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UNITED STATES DIGEST

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OF

DECISIONS IN CRIMINAL CASES

Contained in the Reports

OF THE

COURTS OF THE UNITED STATES AND THE SEVERAL STATE COURTS:

TO WHICH IS APPENDED

A TABLE OF THE CASES CITED.

BY

JOHN L. HANES,

COUNSELLOR AT LAW.

NEW YORK:

DIOSSY AND COCKCROFT,

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Rec. Nov. 17, 1899

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TO

CHARLES O'CONOR, Esq.,

WHO ILLUSTRATES EVERY WALK IN THE

LEGAL PROFESSION,

By Comprehensive Learning:

By Unswerving Integrity:

By Classical Eloquence:

And by Unvarying Courtesy:

AND

WHOSE FIDELITY ALIKE TO HONOR AND DUTY, IN

CRIMINAL JURISPRUDENCE,

HAS BEEN MANY TIMES REMARKABLE,

THIS VOLUME IS RESPECTFULLY

DEDICATED

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New York City, Nov. 1st, 1856. PUBLISHERS.

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PREFACE.

THIS volume embraces all the questions in Criminal Law that have arisen in the several State Courts and the Courts of the United States, including all the Decisions to the close of the year 1855, and those made during the commencement of the year 1856.

In preparing Digests, compilers have embraced in the same work both Civil and Criminal matter; and the result to the profession is, that a series of general Digests must be examined in order to arrive at a knowledge of all the Decisions in the Criminal Cases which have occurred in this country. At the present time these decisions have become so numerous that it is quite as difficult and laborious to examine them in general Digests as in the Reports themselves; and, therefore, it has been deemed advantageous to the profession to collate them into one volume, and so arrange the subject matter into titles and divisions, that a ready reference can be obtained to all the important cases, and the various points decided in them, without incurring the labor of searching through a number of Digests into which criminal matter has been placed without order or systematic arrangement. In cases where the same principle has been decided in different States, all the decisions have been grouped into one section, retaining only the title of the Case, the reference to the Report, and the number of the page—thus avoiding unnecessary repetition of the same matter. A Table has been carefully prepared and appended to this volume, in which all the important Cases can be readily found, and also the pages where they are cited under the several titles and divisions. No pains have been spared to make this work as free from clerical errors as the multiplicity of references to volumes and pages of Reports would allow; and the Compiler, in offering this volume to the profession, indulges the hope that, should any such errors be discovered, they will be overlooked in view of the labor and care necessarily bestowed upon a work of this kind.

J. L. H.

NEW YORK, OCT. 21ST, 1856.

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ERRATA.

Page 254, § 72, read "*Stoltz* v. *People*, instead of "*State* v. *People*."
" 442, § 123, read "Ricker," instead of "Riker."
" 430, Subdivision III., read "information," instead of "indictment."
" 431, Subdivision III., read "information," instead of "indictment."
" 549, § 6, read "it is not indictable," instead of "it is indictable."
See Table of Cases for correction of errors in the references.

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CRIMINAL DIGEST.

ABATEMENT.

I. Matter to be pleaded in Abatement.
II. Time when the plea must be made.
III. Judgment on the plea, when final.

I. Matter to be Pleaded in Abatement.

1. In a criminal prosecution, an objection was raised that seventeen instead of sixteen grand jurors were impanelled and passed upon the indictment under which the defendant was arraigned and tried. It was held that the objection, if true, should have been reached by plea in abatement. *Shropshire* v. *State*, 7 Eng. 190.

2. The question as to whether a grand jury has been drawn, summoned, and impanelled according to law, can only be considered under a plea in abatement. *The State* v. *Greenwood*, 5 Porter 474.

3. A misnomer of the surname or Christian name, if it be substantial, is good cause for a plea in abatement. *Lines* v. *State*, 5 Porter 236.

4. When a person is described in an indictment as A., the wife of B., held that the allegation that the prisoner is the wife of B., is a mere description or addition, and if erroneous, as such the only remedy is by a plea in abatement. *Commonwealth* v. *Lewis*, 1 Metcalf 151.

5. A plea of misnomer in an indictment, being pleaded, it is no answer to such plea that it is the same identical person, since it is the right of the party to be prosecuted by his true name. *Commonwealth* v. *Dockham*, Thacher's Criminal Cases 238.

6. On a motion to quash an indictment against one as William Gabe, *alias* Santa Anna, on the ground that the indictment set forth a second Christian name, under an *alias dictus*; It was held that this was matter to be pleaded in abatement, and could not be reached by a mere motion. *Gabe* v. *State*, 1 Eng. 519.

7. By reason of the statute which requires that grand jurors should be freeholders, a plea in abatement to an indictment, setting forth that some of the jurors who served on the grand jury were not freeholders, was held good. *State* v. *Rockafellow*, 1 Halst. 332; *State* v. *Duncan*, 7 Yerger 271. But not so in New York. *People* v. *Jewett*, 6 Wend. 386; 3 Wend. 314.

8. In an indictment for assault and battery, if the person die before trial, who is named at the foot of the indictment as complainant, still the indictment does not abate. *Commonwealth* v. *Cunningham*, 5 Litt. 292.

9. In North Carolina, a plea in abatement to an indictment is bad, if made because of want of the defendant's addition. *State* v. *Newman*, 2 Ca. Law Repos. 74. Contra in Virginia. *Haught* v. *Commonwealth*, 2 Virg. Cas. 3. False addition is also good cause of abatement. *Commonwealth* v. *Clark*, Ib. 401

10. The incompetency of the grand jurors, who find a bill, is a matter which may be pleaded in abatement. *Rawls* v. *State*, 8 Smedes & Marshall's Rep. 599, and *McQuillen* v. *State*, Ib. 587.

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11. In all pleas of abatement in criminal proceedings, it is essential that facts should be stated out of which the defence arises, or a negative of that state of facts, which is to be presumed from the existence of a record. *State* v. *Brooks*, 9 Alabama 10.

12. In pleas of abatements to the constitution of the grand jury, the greatest accuracy and precision are necessary, as two modes are provided by which a jury may be constituted, and therefore the plea must negative that either mode was pursued. *Ib.*

13. When the matter of a plea in abatement is the disqualification of a juror, laying out of view the direction to summon freeholders and householders, as to which no opinion is given—it must present the constitutional disqualification of conviction for bribery, &c. Matters, which exempt individuals from jury service, are not disqualifications which will abate an indictment. *Ib.*

14. The general allegation, in a plea in abatement, that the commissioners had no authority to make the selection of the grand jurors on the 6th day of May, 1841, is too vague, and the plea not showing that the 6th of May, the day on which the grand jurors were selected, was not included in the May term of the board of commissioners, is bad. *State* v. *Newer*, 7 Blackf. 307.

15. When a plea in abatement to an indictment alleged several distinct matters, which had no connection with each other. It was held that the plea was not tenable, because of duplicity. *Findley* v. *The People*, 1 Manning 234.

16. And it was held that such plea must be verified by affidavit, and must be definite and certain, and pray judgment that the indictment be quashed. *Ib.*

17. Where one has been bound over for a secret assault, and the justice has failed to insert in his certificate that the complainant has sworn to the fact of his being wounded, and shown his wounds, this should be pleaded in abatement. *Northrup* v. *Brush*, Kirby 108.

18. Where two pleas in abatement were pleaded to the same presentment, it was held to be good. *Commonwealth* v. *Long*, 2 Virg. Cas. 318.

19. It was held that a plea in abatement could be pleaded in case the presentment was made by a grand jury, one of whom was a mill owner. By the statute of Virginia an owner of a mill is exempted from serving as a grand juror. *Ib.*

20. A plea in abatement alleging that certain persons (naming them) have been sworn and charged as members of the grand jury, without alleging that they served on the grand jury, is sufficiently certain to designate who were the actual members of the grand jury. *State* v. *Rickey*, 5 Halst. 83.

21. And a plea in abatement, alleging that two of the persons so sworn and charged as members of the grand jury, had before they were sworn, formed and publicly expressed opinions, that were unfavorable and prejudicial to the defendant, was held bad on general demurrer. *Ib.*

22. The pendency of one indictment is no good plea in abatement to another indictment for the same cause. Whenever either of them—it is immaterial which—is tried and a judgment rendered on it, such judgment will afford a good plea in bar to the other—either as a former acquittal or conviction. *Commonwealth* v. *Drew*, 3 Cush. 279.

23. When a plea in abatement was interposed, in a case where two indictments are found for the same offence, on the ground that one indictment was proper matter for a plea in abatement to the other, both being for the same offence. The plea was overruled on the ground that it omitted to state that it was made to the indictment found first, and that it did not state that the indictment pleaded to was for the same crime. *Austin* v. *State*, 12 Missouri 393.

24. Where there is a variance between the Christian name of the juror as signed to the presentment and as given in the entry upon the record setting forth and showing the impaneling of the grand jury. And the defendant pleads in abatement that one of the persons who signed the presentment was not a "lawfully constituted grand juror." It was held that this allegation imported nothing more than

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that he did not possess the qualifications required by law—and that if such variance could be made available as the subject-matter of a plea in abatement, the plea offered was not such as to present the question. *State* v. *Wills*, 11 Humphrey 222.

25. An objection to the grand jury by which an indictment is found, can only be taken by plea in abatement. *Nugent* v. *State*, 19 Alabama 540.

26. In Alabama, it was held essential to the competency of a grand juror that he should be a freeholder or householder when his name is returned by the sheriff to the clerk; and it is a good plea in abatement to an indictment if one of the jurors does not come within this rule, and such plea may call for judgment that the indictment be quashed. *State* v. *Middleton*, 5 Porter 483.

27. In a criminal case, after plea of not guilty, and verdict, defendant cannot interpose the objection that the grand jury, by whom the indictment was found, was composed of a greater number than that prescribed by law. The objection should be reached by plea in abatement. Such objection however does not exist in point of fact in this case. *Shropshire* v. *the State*, 7 English's R. 190.

28. Where a venire had been drawn, returnable to the term of the Circuit Court, at which an indictment was found, by the clerk and sheriff, in the presence of the probate judge, a sufficient number of this venire were proved to be in attendance on the Court to constitute a grand jury. For some reason, not distinctly set out in the record, the Court set aside the whole panel, and ordered a special venire, returnable forthwith. Held that a plea in abatement was a proper plea in such case for the defendant. *Baker* v. *the State*, 23 Mississppi R. 243.

II. Time when the Plea must be made.

29. Pleas in abatement in criminal as well as in civil cases, must be pleaded at the proper time. By denying the charge, the accused waives matter in abatement. *McQuillen* v. *State*, 8 Smedes & Marsh. R. 587.

30. The statute, providing in terms, that if the proper minute of the day, month, and year be not made on the indictment, the proceedings shall, on motion, be dismissed; not that it shall be void, but shall, on motion, be dismissed, thus making it matter of abatement, and unless pleaded before the plea of the general issue, must be considered as waived. *State* v. *Butler*, 17 Vermont 145.

31. It seems there must be some time allowed for the making of this minute, and if made by the clerk under the direction of the Court, during the term when the indictment is found, it will be sufficient. *Ib.*

32. When a complaint was prefered by one as a grand juror to a justice of the peace, against G. S., for selling spirituous liquor contrary to the statute, and the defendant put in a demurrer to the complaint, upon which a judgment was rendered against the defendant; and upon an appeal to the County Court from the judgment, the defendant then moved to strike the cause from the calendar, on the ground that the complainant was not a grand juror. It was held to be too late, and altogether irregular to raise the objection, that the grand juror who had signed the complaint had not been legally appointed. Such defect should have been plead in abatement at first. *Smith* v. *State*, 19 Conn. 493.

33. And the same is true of a plea in abatement to an indictment for embezzling the money of a bank, stating that one of the jurors serving on the grand jury was a stockholder in such bank, and possessing large claims against the bank, was greatly interested in procuring such indictment. *State* v. *Rickey* 5 Halst. 83.

III. Judgment on the Plea, when Final.

34. When a defendant is indicted for an assault and battery, and files a plea in abatement, upon which the State takes issue, and the Court sitting as a

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jury finds for the State, and gives judgment against the defendant for the costs of suit to that time, without assessing and including the fine. It was held, on appeal by defendant from such judgment, that the judgment not being final no appeal would lie; and that the appeal must be dismissed, to be proceeded in to final judgment, according to law. *Guess* v. *State*, 1 Eng. 147.

35. In cases of misdemeanor, the judgment of the Court upon a plea in abatement is final, and if the plea is found against the defendant, the jury, or the Court, if the case is submitted to the Court without a jury, should fix the penalty, and the judgment of the Court should be in accordance with the verdict. *Ib.*

ABDUCTION.

1. The offence made punishable under the Massachusetts statute of 1845, c. 216, sec. 1, is something beyond that of merely procuring a female to leave her father's house for the sole purpose of illicit sexual intercourse with the individual thus soliciting her to accompany him. She must be enticed away with the view and for the purpose of placing her in a house of ill-fame, place of assignation, or elsewhere, to become a prostitute in the more full and exact sense of that term. She must be placed there for common and indiscriminate sexual intercourse with men. *Commonwealth* v. *Cook*, 12 Metcalf 93.

2. Where two defendants were indicted for abducting a girl under the age of sixteen years, and the indictment contained several counts, some being framed under the 3d sec. of the stat. 4 & 5, Phil. & M. ch. 8, which punishes such abduction with two years absolute confinement, or fine at discretion, and under the 4th sec. of the same act, which enacts a higher degree of punishment for the same offence, to wit, five years absolute confinement, or fine at discretion. It was held that the joinder of the Counts was good and was not made otherwise by a verdict of guilty generally, and the different penalties under the sections; that the count under the 4th sec., for abducting and marrying, included the less offence of abducting; that the verdict fixed the greater degree of guilt as well upon him who contracted marriage with the girl as upon him who aided in abducting her; that it was not necessary that the indictment should have negatived the exceptions contained in the statute in regard to the taking being by the guardian in socage or chivalry; that no such tenure as that by Knight service ever did exist in South Carolina; that the statute under which the defendants were indicted was still in force in South Carolina. *State* v. *Tidwell*, 5 Strobh. 1.

3. The terms "previous chaste character," as employed in the act of March 20, 1848, to punish abduction as a crime, mean actual personal virtue in the female, and in order to sustain an indictment for abducting a female, it is necessary that she should have been chaste and pure in conduct and principle up to the time of the commission of the offence, or the commencement of the acts on the part of the defendant, which resulted in the abduction of the female. *Carpenter* v. *People*, 8 Bar. Rep. 603.

4. The word "previous" which is used in this connection, must be understood to mean immediately previous, or to refer to a period terminating immediately previous to the commencement of the guilty conduct of the accused. *Ib.*

5. Although the female has previously lost her virtue, yet if she has subsequently reformed and become chaste, she may be the subject of the offence created by the statute. *Ib.*

6. The prostitution contemplated by the act was that of the female to the lustful appetites of men *at any place* where prostitution of the character usual at houses of ill fame or assignation is practised. *Ib.*

7. In order to constitute the offence intended by the act of March 20, 1848, the abduction of the female must be for the purpose of her indiscriminate meretricious intercourse with men. *Ib.*

8. Such must be the case to render

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her a prostitute, or her conduct prostitution, within the meaning of the act. *Ib.*

9. Accordingly, where it was shown that the female when she left her home went voluntarily, and not at the request of the accused, and that she had since lived and cohabited with him, and with no one else, it was *held* that an indictment could not be sustained for her abduction. *Ib.*

10. On the trial of an indictment for abduction it is error in the Court to charge the jury that they are to judge in regard to the meaning of the word "prostitution," as used in the act of March 20, 1848. *Ib.*

ABORTION.

I. Description of the offence.
II. Of the indictment.

I. Description of the Offence.

1. The offence of abortion being only a misdemeanor, there is no occasion for the presence of the defendant at the time the verdict is given. *Halliday* v. *The People*, 4 Gilman 111.

2. To cause abortion when the child is quick, is not murder or manslaughter at Common Law, but a great misdemeanor. *State* v. *Cooper*, 2 Zabriskie 52.

3. To cause abortion on a woman not yet quick with child, if done with her consent, is not an assault; it is only in cases of high crimes that the person assaulted is incapable of assenting. *Ib.*

4. When in an attempt to procure an abortion there is an evident intent to produce death, and death does actually occur, in such attempt it is murder, but when nothing more is intended than to commit a misdemeanor, it is only manslaughter if death is produced. *Smith* v. *State*, 33 Maine (3 Red.) 48.

II. Of the Indictment.

5. Under an indictment for producing an abortion of a quick child, which by the Revised Statutes is a felony, the prisoner may be convicted, though it turn out that the child was not quick, and the offence therefore a misdemeanor. *The People* v. *Jackson*, 3 Hill 92.

6. In an indictment for administering medicine to produce miscarriage, &c., it is not necessary that the medicine administered should be named, nor is it necessary to state that it was noxious. *State* v. *Vawter*, 7 Blackf. 592.

7. When an indictment charges the prisoner with having feloniously, wilfully, knowingly, maliciously, and inhumanly forced and thrust a wire up into the womb and body of one B. C., she being then pregnant and quick with child, with a wicked and malicious and felonious intent to cause and procure her to miscarry and bring forth the child of which she was then pregnant and quick; and further charges that by the means of forcing and thrusting the said wire into her womb and body she did bring forth the said child of which she was pregnant and quick, dead; and that by the forcing and thrusting of the said wire by the defendant into her womb, she afterwards became sickened and distempered in her body, and by the same means so used she suffered and languished, and afterwards by reason thereof died. It was held that the jury under such an indictment could only find for manslaughter, and in order to find for murder it was necessary that the indictment should charge an intent to kill the child. *Smith* v. *The State*. 33 Maine (3 Red.) 48.

8. By statute in Maine, the use and employment of any instrument with intent to destroy the child of which a woman may be pregnant, whether such child be quick or not, is an indictable offence. *Ib.*

9. Where an indictment charges one with causing the death of a pregnant female in attempting to procure an abortion, in order to fix upon the defendant the guilt of the offence charged upon him, it is not requisite to be either alleged or proved that the deceased was quick with child. *State* v. *Smith*. 32 Maine (2 Red.) 369.

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10. At Common Law no indictment will lie for attempts to procure abortion with the consent of the mother, until she is quick with child. *Commonwealth* v. *Parker*, 9 Metcalf 263.

11. Where a defendant is charged with an attempt to procure an abortion, it is only necessary that the indictment should allege an intention to procure and cause an abortion or miscarriage, and that it was the intention of the defendant to cause the death or premature birth of the child with which the mother was pregnant. *Mills* v. *Commonwealth*, 13 Penn. State R. 631.

12. In such case there is no need of alleging that the mother was quick with child. *Ib.*

13. The procuring of an abortion, either by means of potions or an operation used by the mother herself, or by another with her consent, is not an indictable offence at the Common Law, unless the mother be quick with child, and the mere attempt to commit the act is not indictable. *State* v. *Cooper*, 2 Zabriskie 52.

ACCESSORY.

I. Who are Accessories.
II. In cases of misdemeanors, &c.
III. Accessories in cases of slaves.
IV. Accessories before and after the fact.
V. Of the indictment of an accessory.
VI. Trial of an accessory.
VII. What evidence admissible on the trial of an accessory.
VIII. The verdict.

I. Who are Accessories.

1. If one be present, aid, and assist another to commit a murder, the former may be indicted as an accessory, and convicted of manslaughter. *State* v. *Colman*, 5 Porter 32.

And the same is true of one who assists and abets another in committing manslaughter; he may be convicted as an accessory and punished. *Ib.*

2. When a number of persons are occupied in doing what may be lawful, and some of them without the co-operation of the others, though in their presence, commit a felony, the latter cannot be regarded either as principals or accessories. *U. States* v. *Jones*, 3 Wash. C. C. 223.

3. One who is present and sees that a felony is about to be committed, and does in no manner interfere, does not thereby participate in the felony committed. Every one may, upon such an occasion, interfere to prevent, if he can, the perpetration of the felony, but he is not bound to do so at the peril, otherwise, of partaking of the guilt. It is necessary, in order to make him an aider or abettor, that he should do or say something showing his consent to the felonious purpose, and contributing to its execution. *State* v. *Hildreth*, 9 Iredell 440.

4. If goods be feloniously taken and removed by one's servant, under his instructions, though absent, and afterwards he takes part in secreting such goods, still he cannot be held otherwise than as an accessory. *Norton* v. *People*, 8 Cowen 137.

5. Where a number of persons are present at the time an offence is committed, and the act is done by only one of them; still, if it appears they were all combined in carrying out some purpose of which the act committed constituted a part, then they are all principals. *Green* v. *State*, 13 Missouri 382.

6. In order to constitute an abettor in the commission of an offence, his immediate presence is not necessary. It is enough if one stands designedly in such a position that he is at hand and ready to lend aid to his associates if it be required by them. *Ib.*

7. In case of murder there is no distinction between principal and accessory at the fact; all are regarded as principals. *State* v. *Arden*, 1 Bay 488.

8. All are considered as principals in treason and trespass. *Whitaker* v. *English*, 1 Bay 15; *Chanet* v. *Parker*, 1 Rep. Con. Ct. 333.

9. In Mass., by statute of 1784, c. 65 § 1, the distinction between principals in the second degree, and accessories, has not been abolished. *Commonwealth* v. *Knapp*, 9. Pickering's Rep. 496.

10. The acts of piracy referred to by

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statute of April 30, 1790, § 8, have reference to such as are perpetrated by citizens or on vessels belonging to the United States. And sec. 10 and 11, which relate to accessories, contemplate the acts referred to in § 8. *U. S.* v. *Howard*, 3 Wash. C. C. 340.

11. There are no accessories in cases of petit larceny, but all concerned in the commission of the offence are principals. *Ward* v. *People*, 3 Hill 395.

II. In Cases of Misdemeanors, &c.

12. In case of a misdemeanor, all who take part in it are principals, and there can be no accessories, each one engaged being liable to pay the entire penalty. *Commonwealth* v. *McAtee*, 8 Dana 28.

13. In felonies there may be accessories, but in cases of misdemeanors all aiders and abettors, present or absent at the time of the offence, are principals, and should be indicted as such. Accordingly, the owner of a house which he lets to another to be occupied as a bawdy house, should be indicted as the keeper of the house; and *Brockway* v. *the People*, 2 Hill 558, where the accused was indicted for letting his house, is not authority so far as it conflicts with this rule. *The People* v. *Erwin*, 4 Denio 129.

14. By the statute of the United States of 1818, c. 86 § 3, in misdemeanors, whoever is concerned in aiding and abetting, as well as in committing the act is regarded as principal. *U. S.* v. *Gooding*, 12 Wheaton 460.

15. In all offences below the degree of felony there can be no accessories, either before or after the fact, and therefore those who in felonies would be accessories before the fact, are, in respect to offences below that degree, principals, and must be proceeded against as such. *Williams* v. *State*, 12 Smedes & Marshall 58.

16. In cases of murder the judgment of the law upon this grade of homicide is death, both as to the principal and the accessory before the fact. But by statute of 1838, ch. 29, in Tennessee, where any person is convicted of murder in the first degree, and the jury shall be of opinion and find that there were mitigating circumstances in the case, the punishment shall be commuted to imprisonment for life; and hence, under this law, when the principal was sentenced to imprisonment for life, there being mitigating circumstances in the commission of the offence, and upon the conviction of the accessory, and subsequent sentence to imprisonment for life, there being no mitigating circumstances in the finding of the jury as to the accessory, it was held that the sentence of the Court was correct. *Nuthill* v. *the State*, 11 Huph., 247.

17. Acts, that would make one liable as accessory to a capital felony, make him answer as principal in case of misdemeanor. *State* v. *Westfield*, 1 Bailey 132.

18. Where an assault with an intent to commit murder is made a felony by the penal code of Alabama, it is an offence to which there may be accessories. *Hughes* v. *State*, 12 Ala. 458.

III. Accessories in cases of Slaves.

19. In the State of Missouri, a white man who stands indicted as an accessory to a crime committed by a negro or slave, is punishable the same as if the slave were a freeman. *Loughridge* v. *State*, 6 Missouri 594.

20. Where upon the trial of an accessory the principal in a felony is said to have been the slave of the prisoner, and in setting forth the murder by the slave it is charged to have been committed against the peace and dignity of the State. Held that it is not necessary to charge it to have been committed against the form of the statute in such case made and provided. Since murder by a slave is a felony in him at the Common Law as it exists in South Carolina. *State* v. *Posey*, 4 Strobh. 103.

21. Proof that a slave, charged as principal in a murder, stood mute, or exceeded his right of challenge, are matters inapplicable, for they do not pertain to the trial of a slave. *Ib.*

22. When a slave is amenable as for a felony, then he may have an ac-

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cessory, whether he be his master or any other person. *Ib.* And the verdict of the jury finding the murder of the same person to have been committed both by drowning and beating, as charged in two separate counts of the indictments. Held not to be absurd or inconsistent. *Ib.*

23. After the conviction of a slave as principal in a felony, the record of such conviction can be put in evidence against a free man charged as accessory before the fact, and the same is true if the slave confesses his guilt as principal. *State* v. *Sims*, 2 Bailey 29, *State* v. *Crank*, Ib. 66.

24. When an indictment is found against a free white person under the statute of Georgia of 1840, as an accessory after the fact, by reason of his receiving goods, which had been stolen by a slave named Bob, who was charged in the indictment as the principal felon, it was held that the government must establish the stealing by the slave, that such stealing was known to the receiver of the goods, in order to convict the accessory; and in all cases of accessories after the fact the principal's guilt must be proved. *Simmons* v. *State*, 4 Georgia 465.

IV. Accessories before and after the Fact.

25. In Iowa, by the Rev. Stat. 153, accessories before the fact shall be deemed principals, and may be charged in the indictment with having committed the principal offence. *Bousell* v. *United States*, 1 Iowa 111.

26. In Alabama it was held that a defendant who was indicted as principal could not be convicted by proving him to be only an accessory before the fact. *Hughes* v. *State*, 12 Alabama 458.

27. By statute the offence of an accessory to a murder before the fact comes under the denomination of murder. *People* v. *Mather*, 4 Wend. 229.

28. In inferior offences of a grade less than felony, the law makes no distinction between accessories before the fact and principals, as in cases of forgery at Common Law, assault and battery, and other misdemeanors. And all persons who participate in the commission of such offences as aiders and abettors, are principals, and may be so charged in the indictment for those offences. *State* v. *Cheek*, 13 Iredell 114.

29. In the State of Tennessee, by the act of 1829, ch. 23, sec. 64, an accessory after the fact, on a criminal charge of obtaining goods by false pretences, is punishable as principal. *Long* v. *State*, 1 Swan 287.

30. If there be an accessory after the fact to one who was an accessory before the fact, such accessory before the fact is principal to the party who thus conceals and secretes him, and under the 64th sec. of the act of 1829, ch. 23, both are liable to the same punishment. *State* v. *Payne*, 1 Swan 383.

31. By the law of Illinois, the acts of the principal are made the acts of the accessory before the fact, and the accessory thereby becomes the principal, and may be charged as having done the acts himself, and he shall be deemed and considered as principal and be punished accordingly. *Baxter* v. *The People*, 3 Gilman 368.

32. There can only be accessories after the fact in cases of felonies. *Commonwealth* v. *Macomber*, 3 Mass. 256. *Commonwealth* v. *Barlow*, 4 Mass. 440

V. Of the Indictment of an Accessory.

33. An indictment charging one with entering a dwelling-house in a burglarious manner for the purpose of stealing, and charging with then and there stealing, contemplates only the offence of burglary; and such indictment, though charging another as accessory to "the offence aforesaid," is good. *Stoops* v. *Commonwealth*, 7 S. & R. 491.

34. When, in a felony, an indictment charges one as accessory before the fact, the conviction or execution of the principal need not be alleged in the indictment. *State* v. *Crank*, 2 Bailey 66. *State* v. *Sims*, Ib. 29.

35. If one stands indicted as accessory to a murder perpetrated by a slave,

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it is not necessary to state the name of the slave's master; a description of the slave by his own name was held sufficient. *Ib.*

36. It is not necessary to allege in the indictment the conviction and sentence of the principal; for, by Common Law they may be tried together, and in that case the conviction of the principal cannot be alleged. *The Commonwealth* v. *Williamson*, 2 Vir. Cas. 211.

37. An indictment charging one as principal and another as accessory, is sustained if the jury find the former guilty as accessory and the latter guilty as principal. *State* v. *Mairs*, Coxe 453.

38. When an indictment is found in pursuance of the revised statutes of Vermont (sec. 11, ch. 102), it is necessary to allege, in such indictment against an accessory, that he does not stand in the relation contemplated by the excepting clause of the statute. *State* v. *Butler*, 17 Ver. 145.

39. But where the exception is in a separate section of the statute, or in a proviso, or exception distinct from the enacting clause, it has always been esteemed matter of defence, and that it need not be alleged in the indictment; but, if the exception was contained in the body of the enacting clause, it was in the nature of a condition precedent, and must be alleged. *Ib.*

40. It was held that the principals and accessory could be charged all together, but was questioned whether the precedents would justify charging the principal and accessory both before and after the fact in the same count. *Ib.*

41. But as the attempt to charge the respondent as accessory after the fact, was defective, as appeared for another reason, it might be rejected as surplusage, and the indictment then stood good against the principals and respondent as accessory before the fact. *Ib.*

42. There is no necessity, by the general rules of law, that the conviction of the principal should be recited in the indictment against an accessory; for the conviction makes no part of the crime. *State* v. *Simmons*, 1 Brevard 6.

43. By the provisions of the revised statutes of Maine (ch. 167), the accessory may be indicted and convicted without regard to the conviction of the principal, either in the indictment or on the trial, although the guilt of the principal is an indispensable fact to be shown upon the trial. The guilt of the accessory must be averred in the indictment in the same manner as if he alone had been concerned, followed by the allegation of the acts done by him which constitute him an accessory before the fact. *State* v. *Ricker*, 29 Maine 84.

VI. Trial of an Accessory.

44. An accessory can not be tried before the principal offender has been tried and convicted. *Baron* v. *People*, 1 Parker Crim. Rep. 246.

45. An accessory may be arraigned and tried in the county where he committed his part of the offence, notwithstanding the principal offence was committed in another county; but the accessory cannot be indicted and tried in the county where the principal offence was committed, unless his offence as accessory was committed in that county. *Ib.*

46. By statute a receiver of stolen goods brought from another State, knowing them to be stolen goods, is liable to indictment, and may be tried before the principal is convicted. *Commonwealth* v. *Andrews*, 2 Mass. 14. *Commonwealth* v. *Frye*, 1 Vir. Cas. 18. *Butler* v. *State*, 3 McCord 384.

47. In the State of North Carolina the Common Law prevails, and the accessory cannot be tried before the conviction of the principal, except when the latter is beyond the reach of the law. *State* v. *Goode*, 1 Hawks 463. *State* v. *Groff*, 1 Murph. 270.

48. At Common Law, the principal must be first convicted of the offence charged, before an accessory to such offence can be put on trial against his consent. And when the principal dies before conviction, the accessory must be acquitted. *Commonwealth* v. *Phillips*, 16 Mass. 423. *Vide Whitehead*, v. *State*, 4 Humph. 278.

49. An accessory shall not, *without his own* consent, be brought to trial

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till the guilt of the principal is legally ascertained, by the conviction or outlawry of him, unless they are tried together, and then the jury shall be charged, to inquire first of the principal, and if they are satisfied of his guilt, then of the accessory. *Stoops and another* v. *The Commonwealth*, 7 S. & R. 491. *Vide* Foster's Cr. L. 561.

50. When several persons are charged as principals with the commission of a felony, the Court in its discretion may arraign one as accessory to such of the principals as are convicted, and if he be found guilty as accessory to them, or any of them, judgment shall pass upon him. But on the other hand, if he be acquitted, that acquittal will not discharge him as accessory to the others. And when they come in and are convicted and attainted, or judgment of outlawry passes against them, he may be arraigned de novo, as accessory to them. And he may be considered as accessory to him who has been convicted, though the evidence prove him to have stood in that relation of guilt to several. But when several are charged as principals, and are not all convicted, it is error to arraign one as accessory to all so charged as principals against his own consent. *Stoops and another* v. *The Commonwealth*, 491. *Vide* 1 Hale 624.

51. It is a principle of the Common Law, that an accessory cannot be arraigned before the conviction of the principal, unless both are tried together, or he consent to be tried first, and the same rule applies to offences created by the act of 1829, ch. 21, sec. 12, in Tennessee. *State* v. *Pybass*, 4 Humph. 442.

52. It is necessary to produce the record of the conviction of the principal when an accessory is on trial, unless the principal die or be pardoned before trial, or the accessory consent to be arraigned without the production of such record, or in case both are tried jointly. *State* v. *Crank*, 2 Bailey 66.

53. If, however, the accessory is charged as being present, rendering assistance and abetting, then the guilt of the principal may be shown by other evidence than the record; though such record of conviction may exist at the time of the trial. *Ib.*

54. When two persons are jointly indicted, the one as principal and the other as accessory, and tried separately, on the trial of the accessory the conviction of the principal must be taken as prima facie evidence of his guilt; it may be rebutted by showing that there was no offence committed by the principal, and the burden of proof in such case is on the accessory, and he must show clearly that such conviction was wrong. *Commonwealth* v. *Knapp*, 10, Pick. 478.

55. And the accessory is at liberty to produce any evidence which goes to show that the principal is innocent. The Court will not fix any limit to such proof. *Ib.*

56. When a defendant in Ohio is indicted under the 36th sec. of the act for the punishment of crimes, and charged with aiding, abetting and procuring another person to commit any of the offences enumerated in that sec.; It was held that the Legislature made the crime specified in that Act a substantive, independent offence, not in any way dependent for its punishment on the conviction of the principal offender. *Noland* v. *State*. 19 Ohio 131.

57. In Ohio, the general rule, that the principal must be first tried and convicted before the accessory can be put on trial, is so far changed by statute, that the accessory may be first tried and convicted, if the principal cannot be found. And if the principal be acquitted, the accessory must be discharged. *United States* v. *Crane*. 4 McLane 317.

58. If an accessory aid and abet a principal who is not liable under our laws, he cannot be arraigned except his acts are such as to render him liable as principal. *U. States* v. *Libby*, 1 W. & M. 221.

59. Under the statute of Illinois, an accessory to a murder may be indicted and punished as principal, and in such a case it would be necessary for the prosecution to make out the guilt of the principal before the jury could find the defendant guilty of the murder, by being accessory to it. In such a case, according to the Common Law

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rule, it would be competent for the prosecution to establish that fact prima facie, by the production of the record of the conviction of the principal. *Baxter* v. *the People.* 2 Gilman 578.

60. When a felony is charged to have been committed by two persons as principals, and one has been tried and acquitted, and the other not yet tried, held, on a motion to discharge an accessory, that he was not entitled to his discharge, if he refused to be tried before the trial of the other principal. *Com.* v. *Woodward,* Thacher's Criminal Cases 63.

61. On the trial of a white man as an accessory to a murder committed by a negro, it was held that the white man could be legally indicted and convicted as an accessory, notwithstanding that the principal was a slave. *State* v. *Simmons,* 1 Brevard 6; *State* v. *Sims,* 2 Bailey 29; *State* v. *Crank,* Ib. 66.

62. If the Court thinks proper, and the accessory and principal do not object, they may be tried together. *Samson* v. *Com.,* 5 Watts & Sergeant 385.

63. It is in the discretion of the Court to allow an accessory a separate trial from the principal. *State,* v. *Yancy* 1 Const. Rep. 241.

64. A prisoner charged as accessory before the fact to the crime of murder, is not entitled to his discharge without trial because the principal felon has escaped, and two terms have elapsed since the indictment. *Com.* v. *Sheriff,* 16 S. & R. 304.

65. If proceedings to outlawry are commenced without delay against the principal, sufficient time must be allowed to complete such proceedings before the accessory can be discharged. *Ib.*

66. Where, upon the trial of one as accessory to the crime of murder, the Court charged that it was immaterial whether the principal conceived the design to kill the deceased before his interview with the accessory or not, that if the accessory encouraged him in that design, by falsely stating to him threats made by the deceased, or by persuading him to kill deceased, he was guilty as an accessory. It was held that this charge was proper. *Keithler* v. *The State,* 10 Smedes & Marshall 192.

67. An abettor may be convicted, though the actor of the crime should not be convicted, or attainted. *State* v. *Rochelle,* 2 Brevard 338.

VII. What Evidence Admissible on the Trial of an Accessory.

68. The confession of a principal is not evidence against an accessory. *State* v. *Newport,* 4 Harrington 567.

69. In a felony the principal is a competent witness against the accessory. *People* v. *Whipple,* 9 Cowen 707.

70. Where a principal and accessory are tried separately, though on the same indictment, evidence of the conviction of the principal is not admissible on the trial of the accessory, unless judgment has been first rendered against the principal. *State* v. *Duncan,* 6 Iredell 98.

71. A witness for the State, on the trial of an accessory before the fact, in a capital case, being asked by the defendant whether he had stated, before the examining magistrate, certain facts he was then narrating, replied that he had not, having been deterred by the threats of the principal, and was proceeding to state the conversation between himself and the principal, when the defendant objected to this evidence. Held that the evidence was admissible. *Ib.*

72. When the Court perceives evidence abundantly sufficient to sustain the conclusion of the jury, although they may have interpreted favorably so much of the evidence as applied to the accessories, and acquitted them, still the Court will not for this reason grant a new trial. *State* v. *Posey,* 4 Strobh. 142.

73. An accessory cannot take advantage of an error in the record against the principal, and the attainder of the principal, while unreversed, is *prima facie* evidence against the accessory of the principal's guilt. *State* v. *Duncan,* 6 Iredell 236.

74. In case of an indictment against a white man, as an accessory to a crime committed by a negro, the testimony of negroes may be offered against the principal, but cannot be

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received on the trial of the accessory. *State* v. *Chittem*, 2 Dev. 49.

75. Where a husband is indicted for the murder of his wife through the instrumentality of his slave, and two other persons as accessories, and is also indicted for the murder of his slave; It was held, upon the trial of the latter indictment, that evidence that the defendant was guilty of the murder of his wife, and that the other defendants were accessories, before and after the fact, to the murder of his wife, and accessories after the fact to the murder of the slave, was admissible, in order to show the prisoner's motive. *State* v. *Posey*, 4 Strobh. 142.

76. Where one is on trial as an accessory to a felony, and the principal has been convicted, the record of his conviction is conclusive as to his conviction, and will be received as *prima facie* evidence of the principal's guilt. *State* v. *Chittem*, 2 Dev. 49.

77. And if the record of conviction shows the principal in the felony to be a negro, and the witnesses produced against him negroes, this will not change the rule, though the accessory be a white man, against whom a negro would be an incompetent witness. *Ib.*

78. The Court permitted the State to prove that it was the popular opinion that ergot would produce abortion, and it appeared from the evidence that ergot was administered. The Court held that the fact proved might show a motive for administering it, and the intention with which it was done, and hence was admissible. *Carter* v. *The State*, 2 Carter 617.

79. On the trial of one indicted as accessory in the crime of murder, a transcript of the record of the conviction of the principal was received in evidence; it appearing in the transcript that after the conviction of the principal he appealed to the Supreme Court, from which the case was sent back to the Superior Court, but the decision of the Supreme Court not appearing in the transcript; Held that notwithstanding the omission, and though the decision should properly have been entered on the record, yet the transcript was good evidence against the accessory, for at most the judgment against the principal was only erroneous. *State* v. *Duncan*, 6 Iredell 236.

80. On trial of an indictment of a party as accessory before the fact, the original minutes of trial in Oyer and Terminer, are not at Common Law proper proof of the conviction of the principal; the record of conviction must be produced. But the statute (3 R. S. 1851) provides a substitute. The copy certified by the clerk corresponds to the sworn copy of the record of conviction, and the revised minutes to the original record; either are competent, provided no record has been made; if it has, that is the best evidence. *People* v. *Gray*, 25 Wen. 465.

VIII. Verdict.

81. No verdict can pass against the accessory till the felony charged on the principal has been established by a legal conviction, unless the accessory will waive the benefit of the law, and submit to a trial. *Commonwealth* v. *Woodward*, Thacher's Criminal Cases 63.

82. A general verdict, stating that the prisoner is found guilty as accessory to murder, and omitting to state whether in the first, second, or third degree, is error, and may be set aside. *Commonwealth* v. *Williamson*, 2 Virg. Cas. 211.

ACCOMPLICE.

I. Privilege of an Accomplice on giving testimony.
II. Competency of an Accomplice to testify.
III. When conviction may be had on the testimony of an Accomplice.

I. Privilege of an Accomplice on giving Testimony.

1. In New York an accomplice testifying and making an impartial disclosure, is entitled to a recommendation for pardon. *People* v. *Whipple*, 9

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Cow. 707. But such is not the case in Virginia. *Byrd* v. *Com.*, 2 Virg. Cas. 493.

2. A prisoner who, being charged as an accomplice in the crime of murder, testifies on behalf of the State, on the trial of the other defendants, is not, before conviction and trial, in a condition to avail himself of the rights and privileges of one entitled to the recommendation of the proper Court to executive clemency. Neither having admitted his guilt nor having been convicted, he has no occasion to apply for pardon. *Ex. parte Birch*, Gilman 1334.

3. Where an accomplice is called as a witness by the government, there is an implied obligation by the government, if not expressed, that he shall not be prosecuted if he makes a full and honest disclosure of the facts. *U.S.* v. *Lee*, 4 McLean 103.

4. If one who has participated in the commission of a crime, being called as a witness, volunteers his testimony on the trial of his accomplice, and makes a complete disclosure of his own as well as of the guilt of his accomplice, and details all the transactions connected with the crime, he will not on this account be entitled to a pardon for his own guilt, nor will he be allowed to postpone his own trial in order to get time to apply to the governor for pardon. *Dabney's case*, 1 Robinson 696.

5. A *particeps criminis* cannot be allowed, after having deposed to the guilt of the prisoner, to state that the prisoner had proposed to him to join with him to commit other crimes, or to state that the prisoner in the same conversation had said that he was going to commit other crimes. *Kinchelow* v. *State*, 5 Humph. 9.

6. If an accomplice, under a promise from the prosecution that he shall not be prosecuted, makes a confession, and then refuses to give testimony, such confession will be received as evidence against himself. *Commonwealth* v. *Knapp*, 10 Pickering 478.

7. And such confession being given in evidence, the jury are not at liberty to reject it as being incompetent, after the Court has allowed it; but if they think it unworthy of credit, they may disregard it. *Ib.*

II. Competency of an Accomplice to Testify.

8. An accomplice, after conviction, and before judgment has been pronounced, or after plea of guilty, if he has no objection, may be a witness for his co-defendant in the same indictment, when their trial is separate. *Garrett* v. *State*, 6 Missouri 1.

9. If several persons are charged with the commission of a crime, and some die before trial, and make dying declarations of the charge, such declarations cannot be received on behalf of the others. *Respublica* v. *Langcake*, 1 Yates 415.

10. An accomplice giving testimony is not to be discredited from the mere fact of his being such accomplice. If corroborated in some respect by satisfactory evidence, the Court will charge the jury to give it their consideration. *U. States* v. *Kepler*, 1 Bald. 22.

11. Where L., an accomplice of the prisoner, is called as a witness and gives his testimony, and another witness is called to testify to L's declarations made to him about the time when the occurrence took place, which L. had been introduced to prove; it is said that such evidence is merely hearsay, and if admissible in confirmation of L's evidence, could only be so in reply, after the credibility of the latter had been attacked, and that under no circumstances could it be evidence in chief. *State* v. *Twitty*, 2 Hawks 449.

12. A particeps criminis, notwithstanding the turpitude of his conduct, is not on that account an incompetent witness; but unless the accomplice is corroborated it is the duty of the Court to advise the jury that his testimony is not entitled to credit or belief. And such confirmation must be in relation to some material fact about which he has testified, involving the prisoner's guilt. *Ray* v. *State*, 1 Iowa (Green) 316.

13. It is proper not to permit an accomplice to be brought into Court as a witness without an order from the Court for that purpose; and the application ought to show that there is no witness by whom the offence can be proved; that the witness is not more

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guilty than the person on trial, and that the testimony can be substantially corroborated. *Ib.*

14. A conviction upon the uncorroborated testimony of an accomplice is good ground for a new trial. *Ib.*

15. Although an accomplice may be a witness against one for one offence, still he may be tried for another crime himself. *State* v. *Whipple*, 9 Cowen 707.

16. And if an accomplice is charged with a distinct felony, it is good cause to reject him as a witness on the trial of another case. *Ib.*

17. Where a jury have found by their verdict that one was guilty of murder, and it appeared that he was the leader in the commission of the murder, he was rejected as a witness on the trial of an accessory before the fact. *Ib.*

18. It is not a matter of course to admit an offender to testify on the trial of his accomplices, but a motion for this purpose must be made by the prosecution, and the Court under the circumstances of the case will either allow or reject the evidence as the purposes of justice most require. *State* v. *Whipple*, Duer J., 9 Cowen 707.

19. It is a matter of discretion with the Court whether an accomplice, separately indicted, can be received as a witness on the trial of a co-partner in crime. *People* v. *Whipple*, 9 Cowen 707. *Byrd* v. *Commonwealth*, 2 Virg. Cas. 493. *U. States* v. *Henry*, 4 Wash. C. C. 428.

20. Where all are joined in the same indictment and one has been tried and acquitted, he can be a witness for the others. But, without trial and acquittal or conviction he cannot be so received. *People* v. *Bill*, 10 Johnson 94. *State* v. *Weir*, 1 Dev. 363. *State* v. *Carr*, Coxe 1. *State* v. *Mooney*, 1 Yerg. 431.

21. The competency of an accomplice as a witness does not rest on the doctrine of approvement, and an accomplice, not convicted, is a competent witness. *Byrd* v. *Commonwealth*, 2 Virg. Cas. 493.

22. Where several are joint-defendants, and the proof against some fails or is slight, the Court in such case will not permit the latter to testify, nor will it interfere for their acquittal, so as to make them competent witnesses on the trial of the others. *Pennsylvania* v. *Leach*, Addis. 353. *State* v. *Carr*, Coxe 1. *State* v. *Alexander*, 2 Rep. Con. Ct. 171. *Contra State* v. *Shaw*, 1 Root 134.

23. One charged as an accomplice was proved to have been concerned in the commission of the felony; after this proof in corroboration of his testimony as an accomplice, it was held competent to prove any act or declaration of his which went to show that he and his associate did commit the felony. *State* v. *Ford*, 3 Strobh. 517, note.

III. When Conviction may be had on the Testimony of an Accomplice.

24. The jury may convict on the testimony of the accomplice alone, provided they give full credit to it; but it is rarely safe to do so; and it is most proper to acquit the party where the testimony of the accomplice is not corroborated in material circumstances. *Commonwealth* v. *Grant*, Thacher's Criminal Cases 438.

25. It is competent for a jury to convict on the testimony of an accomplice alone; but the source of this kind of evidence being so corrupt, the Court consider it their duty to advise a jury to acquit where there is no evidence other than the uncorroborated testimony of an accomplice. *Commonwealth* v. *Bosworth*, 22 Pick. 397.

26. The testimony of an accomplice is altogether for the jury, and they may, if they please, act upon the evidence of the accomplice without any confirmation of his statement. *State* v. *Brown*, 3 Strobh. 508.

ADULTERY.

I. Adultery at Common Law and under the statutes.
II. Indictment for Adultery; what the Indictment should contain.
III. Evidence admissible on the trial and proof necessary to establish the offence.
IV. Miscellaneous.

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I. Adultery at Common Law and under the Statutes.

1. At Common Law adultery is not a crime in Virginia, except when connected with other matters which of themselves constitute a misdemeanor, and the same is true of fornication. *Anderson* v. *Commonwealth*, 5 Rand 627. *Commonwealth* v. *Isaaks*, 5 Rand 634.

2. Adultery was not a felony at Common Law, nor a crime to be punished in the Common Law courts; nor does the statute of Vermont make it a felony. *Sate* v. *Cooper*, 16 Verm. 551.

3. The crime of adultery consists in the illicit commerce of two persons of different sexes, one of whom, at least, is married, and includes the crime of fornication. The term itself imports the offence without the allegation of any other fact. *State* v. *Hinton*, 6 Ala. 864.

4. One, at least, of the guilty parties must be married in order to constitute the offence of adultery. *Hull* v. *Hull*, 2 Strobh. Eq. 174.

5. But in the State of Pennsylvania, by the act of 1705, no indictment against a single man can be sustained on a charge of adultery. *Respublica* v. *Roberts*, 2 Dall. 124, 1 Yeates 6.

6. But a conviction may be had for fornication in case of an indictment for adultery. *Ib.*

7. In New Hampshire, adultery is committed whenever there is an intercourse between an unmarried man and a married woman, from which spurious issue may arise; and by the law of New Hampshire both parties to such intercourse are guilty of adultery. *State* v. *Wallace*, 9 N. Hamp. 515.

8. In Alabama, the third section of the sixth chapter of the penal code, enacts that if any man and woman shall live together in adultery or fornication, each of them shall be guilty, &c. Clay's Digest 431. Under this enactment it has been strongly intimated, that if the adulterous connection existed but for a single day, the parties might be convicted of the offence of thus living together; and in a case where the supposed paramour of the defendant lived but a half a mile from his family residence, visited and remained with her all of one night every week for seven months, this was held quite sufficient to make out a living together within the meaning of the statute. *Collins* v. *State*, 14 Ala. 608.

9. By statute, in Indiana, an unmarried man having illicit intercourse with a married woman, is liable to conviction of adultery. *State* v. *Pearce*, 2 Blackf. 318.

10. In Massachusetts, the offence committed when a married man has sexual intercourse with an unmarried woman, is denominated adultery. *Commonwealth* v. *Call*, 21 Pick. 509. Contra, *State* v. *Lash*, 1 Har. 380.

11. When an indictment charges the defendant, a single man, with illicit intercourse with a married woman, the offence so charged was held to be fornication in the man. *Commonwealth* v. *Lafferty*, 6 Gratt. 672.

12. In North Carolina, the Act of Assembly of 1838 (chap. 24), declares that all marriage between free persons of color and white persons shall be null and void; and therefore persons answering such description, living and cohabiting together, are guilty of adultery. *State* vs. *Fore*, 1 Iredell 378.

13. A person who is not a slave, having illicit intercourse with a slave, is within the operation of the statute. 1 Rev. Code 555, of Virginia. *Commonwealth* v. *Jones*, 2 Grattan 555.

14. A married man having criminal intercourse with his own daughter, she being a single woman, is guilty of incestuous adultery, and she is guilty of incestuous fornication. *Cook* v. *The State*, 11 Geo. 53.

15. A married man proved to have been in bed with a single woman, cannot be convicted under the twenty-second section of the statute for the punishment of high crimes. *State* v. *Way*, 6 Verm't. 311.

16. The Act of 1838, ch. 24 (declaring void all marriages between white persons and free negroes and persons of color) includes only cases where such persons of color are within the third degree. *State* v. *Melton and Byrd Busbe*, N. Car. Rep. 49.

17. Hence, where in an indictment for fornication against A. & B. (who

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had been married) it appeared that one of the defendants was of Indian blood, but of what degree was not proved; Held that there could be no conviction. *Ib.*

18. In the construction of a statute, all other statutes made *in pari materia*, whether referred to or not in that under consideration, will be taken as one system, and so construed. *Ib.*

19. Where two defendants were indicted for fornication and adultery, and the jury found them guilty of the former but not guilty of the latter, the Court held that the State was entitled to judgment against the defendants; and adultery was held to be an aggravated species of fornication—both involving an illicit cohabitation between the sexes. *State* v. *Cowell*, 4 Iredell 231.

II. Indictment for Adultery—What the Indictment should Contain.

20. An indictment for incestuous adultery is not defective because it omits to charge common knowledge of relationship between both of the guilty parties. It is sufficient if it charges the living in such adultery, with the knowledge of such consanguinity in the party indicted. *Morgan* v. *State*, 11 Alabama 289.

21. In Alabama, an indictment for adultery is good although the offence is not laid with a continuendo. *State* v. *Glaze*, 9 Alabama 283.

If one of the persons charged with such offence is known by the name charged in the indictment, the other is not entitled to an acquittal by showing that it is not the true name. *Ib.*

22. In an indictment against a man for adultery, it is necessary to allege that the woman with whom the illicit connection is alleged to have taken place was not the wife of the accused. *Moore* v. *Commonwealth*, 6 Metcalf 243.

23. A separate indictment may be found against a man for the offence of fornication. *State* v. *Cox*, 2 Taylor 165.

24. And when the indictment charges fornication and adultery, the offence is sufficiently described by charging an unlawful "bedding and cohabiting together;" And this charge is sufficiently made out by showing such an habitual surrender of the person of the one to the gratification of the other as usually takes place in the marriage state. *State* v. *Jolly*, 3 Dev. & Bat. 110.

25. When an indictment for adultery alleges that the female with whom the defendant is alleged to have committed adultery is the lawful wife of P. J. S., a person other than the defendant, it was held that such allegation was equivalent to an allegation that she was not the lawful wife of the defendant, and that the indictment was good. *Commonwealth* v. *Reardon*, 6 Cush. 78.

26. It is an indictable offence to solicit one to commit adultery. *State* v. *Avery*, 7 Conn. 267.

27. By the law of South Carolina no indictment lies for adultery, not even if living in adultery is claimed to be against public decency. *State* v. *Brunson*, 2 Bailey 149.

28. After a husband has been divorced from his wife on the ground of adultery charged against him, he cannot be indicted for adultery if he marry and cohabit with a second wife. In such case he should be indicted under the second section of the act of 1784, c. 40, of Mass. And the second marriage, together with all the facts constituting the crime of polygamy, should be alleged in the indictment. *Commonwealth* v. *Putnam*, 1 Pickering 136.

29. If, however, the second marriage takes place in another State under such circumstances, and it is lawfully contracted in such State, then the husband is not liable to be indicted for adultery, though he cohabits with his second wife in Mass. *Putnam* v. *Putnam*, 8 Pickering 433.

30. As adultery may be committed by a married man with a single woman, it is not necessary to state the name of the woman, with any view to show that she was a married woman, and it is not necessary that the woman should be described by a certain name; if it is charged and shown that she is a person other than the defendant's lawful wife, this is sufficient to fix the offence on the defendant. *Commonwealth* v. *Thompson*, 2 Cush. 551.

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31. In cases of adultery it is not necessary that the defendant's township should be set forth in the indictment, because the Court may ascertain the place of the defendant's residence otherwise than by the verdict of the jury. *Duncan* v. *the Commonwealth*, 4 S. & R. 449.

32. If the crime of adultery be pardoned, the Court cannot give judgment for costs, but may make an order for the support of the bastard which is the fruit of such adultery. *Duncan* v. *Commonwealth*, 4 S. &. R. 449.

33. Every material fact which serves to constitute the offence alleged should be stated in an indictment, with precision and certainty as to time and place; therefore, an indictment, found October, 1852, alleging that the defendant, "at Avon, on the 25th March, 1851, did commit the crime of adultery with one E. W., the wife of one S. H. W., she, the said E. W., being a married woman, and the lawful wife of said S. H. W.," was held defective. *The State* v. *Thurstin*, 35 Maine (5 Red.) 205.

34. All that is necessary under the statute of Massachusetts to constitute the crime of adultery, is that one of the parties should be a married person, and this must be distinctly alleged in the indictment; and if the defendant is shown to have had illicit intercourse with the lawful wife of another man, he is guilty of the crime of adultery, and equally so whether he is a married man or single. *Commonwealth* v. *Reardon*, 6 Cush. 78.

III. Evidence admissible on the Trial and Proof necessary to establish the Offence.

35. In prosecutions for bigamy, adultery, or incestuous adultery, it was held that the accused's admissions as to the fact of his marriage, are competent to put in evidence, and that the marriage need not be proved in fact. *Cook* v. *State*, 11 Geo. 53.

36. In case of an indictment for adultery, it is not proper to show acts of adultery which were committed eighteen months subsequent to the time when the indictment was found, and in no way connected with the acts that occurred before the indictment was found. *State* v. *Crowley*, 13 Alabama 172.

37. He or she with whom the offence is charged to have been committed is a competent witness for the defence. *Ib.*

38. Upon an indictment for adultery against a married man, the wife's suspicions and jealousy cannot be introduced as evidence against the husband. *Ib.*

39. Proving adultery by proof of the rumor and talk in the neighborhood, that it openly and notoriously existed, is an error. *Belcher* v. *State*, 8 Humph. 63.

40. When a man's wife goes into another's family to live, and the former tells the latter that his wife has ruined him and will also ruin the latter, upon which the latter remarks that she must live somewhere, and that he will not turn her away; it was held that such conversation had no tendency to prove illicit intercourse between the wife and the latter party. *State* v. *Crowley*, 13 Alabama 172.

41. In case the indictment for adultery be against a man and a woman, who at the time of the act charged was a married woman, the evidence of the husband as to the act committed, cannot be received, though at the time of the trial he is divorced from his wife for and on account of such adultery; nor would such evidence, objected to on the trial, be competent against the man; nor would it sustain a conviction obtained upon it against the man, though the female might suffer judgment to pass upon her under such conviction; it would be set aside on appeal. *State* v. *Jolly*, 3 Dev. & Bat. 110.

42. Testimony respecting improper familiarities prior to the act of adultery proved, is admissible, being in support and confirmation of the direct evidence. *State* v. *Wallace*, 9 New Hamp. 515.

43. The defendant's admission of the marriage may be given in evidence against him in proof of the marriage. *Cameron* v. *State*, 14 Alabama 546.

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44. Upon an indictment for adultery, where it appeared that the defendant, some four or five years previous to the commission of the alleged offence, was living with a man as his lawful wife, that she held herself out to the world as his wife, and so declared her relation to him; it was held that the proof of his death was incumbent on her, and that until the contrary was shown he was still alive. *Commonwealth* v. *Reardon*, 6 Cush. 78.

45. On the trial of an indictment for adultery, witnesses must testify to facts, and the jury must consider them, and pronounce such a verdict as their opinion convinces them is proper; but the witness cannot be permitted to express his opinion and impression as to the guilt of the defendant. *Cameron* v. *State*, 14 Alabama 546.

46. When but one act is charged, and that in a single count, acts committed at different times and places cannot be shown. *State* v. *Bates*, 10 Conn. 372.

47. If a witness, who swears to one act of adultery, is sought to be impeached by the defendant, other acts between the defendant and the same woman, committed not long before the act proved, may be shown, to corroborate the witness. *Commonwealth* v. *Merriam*, 14 Pick. 518.

48. Upon the trial of an indictment for adultery, the prosecution offered to prove that the defendant was guilty of other acts of familiarity with the female, with whom the adultery was alleged to have been committed, at or about the time the indictment charged the offence. After the witness had testified as to the time of the other acts, his testimony on the cross-examination left it doubtful whether or not the acts occurred about the time or a year previous. It was objected that his testimony was incompetent; but the Court held that it was not incompetent, as it was offered to prove acts about the time, and the nearness of the time went only to its effect, and if brought into doubt on the cross-examination, it was for the jury to pass upon. *Commonwealth* v. *Morris*, 1 Cushing 391.

49. A certificate appearing to be a marriage certificate made by a clergyman of another State, being offered by the government to establish the marriage of the defendant, wholly unauthenticated, is not competent evidence, and should not be admitted, and it would receive no additional weight by coming from the possession of the person alleged to be the defendant's wife. *Ib.*

50. Where a party is indicted for adultery, proof of the marriage of such party by those present is deemed sufficient. The production of a copy of the record of such marriage is not necessary. *Commonwealth* v. *Norcross*, 9 Mass. 492.

51. Marriage cannot be proved by a copy of the record; it may be put in evidence, but it must be shown that the persons are identical as well as the names. 8 Greenleaf 75.

52. If a party admits his marriage, and such marriage has taken place in some other State or country, that will be sufficient evidence of the fact. 7 Greenleaf 57.

53. In Maine, in a case where a defendant charged with adultery said, twenty years before the time such offence was committed, that he had a wife, and at the time of saying so, hired a house and moved into it with a person whom he called "Miss H——," and lived with her as his wife, it was held that the marriage could not be established by such confession. 2 Fairfield 391.

54. In Virginia, the section of 1 Rev. Code, page 555, which makes the oath of two credible witnesses necessary to a conviction in cases of adultery and fornication, is repealed by the 2d section of the 27th ch. of the Criminal Code, Sess. Acts, 1847–'48, page 164, and therefore but one credible witness is necessary to a conviction in such cases under the new act. *Commonwealth* v. *Cregor*, 7 Gratt. 591.

55. An indictment charging one with committing adultery with B., at a certain town, and using no addition or further designation to B.'s name, and it appearing that there were two persons at such town bearing the same name, father and son, the latter having the addition of junior to his name, by

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which he was known and distinguished from his father. The evidence offered by the prosecution showed the offence to have been committed with the son. It was held that the accused under the indictment could only be convicted by evidence showing the offence to have been committed with the father, and that the indictment, in order to allege any offence as committed with the son, should connect with his name the ordinary addition of junior. *State* v. *Vittum*, 9 N. Hamp. 519.

56. When one is charged with being found in bed with another man's wife, and is indicted therefor, it is necessary to prove a marriage, in fact, and that reputation and cohabitation alone are not sufficient. *State* v. *Rood*, 12 Vermont 396.

57. When an indictment for adultery charges the act to have been committed by living openly and notoriously together, proof of unlawful intercourse occasionally will not be sufficient to sustain such indictment. *Wright* v. *State*, 5 Blackf. 358.

58. A record showing a conviction of one on a charge of bigamy in another State does not prove the commission of the offence of adultery. *Wilson* v. *Wilson*, Wright Rep. 128.

59. On a charge of incestuous adultery the admission of the guilty party is sufficient proof of the relationship. *Morgan* v. *State*, 11 Ala. 289.

IV. Miscellaneous.

60. Indictment in the St. Louis Circuit Court for adultery—venue changed to Jefferson county, on application of defendant, and on his affidavit that the judge was prejudiced against him. Held, that although the statute did not allow a change of venue for that cause, and that it was error to allow it on the affidavit; still, as the change was procured by defendant for his own ease and convenience, and to a Court having competent jurisdiction of that species of offence, this Court will not reverse the judgment of the Circuit Court on the application of defendant, on account of such illegal change of venue. *Porter* v. *State*, 5 Missouri S. C. Rep. 538.

61. Napton, Judge, dissented, holding that the case, when sent to Jefferson county, was *coram non judice;* that the Circuit Court of that county, not having jurisdiction of that cause, the consent of defendant could not confer jurisdiction. *Ib.*

62. Where a defendant is indicted for adultery, and two counts are laid in the indictment, one charging the offence to have been committed with a woman whose name is given in the indictment, and the other charging the offence to have been committed with a woman whose name was unknown; if the evidence was insufficient to establish the fact affirmatively to the satisfaction of the jury that the woman's name was as laid, it was held that the jury could not so find the fact; and, in the absence of evidence tending to prove what her name was, the jury would be warranted in finding that, if the act was done at all, it was with a woman whose name not being proved, was not known to them by a legal and sufficient evidence, and was therefore unknown. *Commonwealth* v. *Thompson*, 2 Cush. 551.

63. Where two defendants are prosecuted by the State, on a charge of adultery, and are severally fined for such offence, it was held that the costs were several also, and not joint. *State* v. *Jolly & Whitby*, 3 Dev. & Bat. 110.

AFFRAY.

I. What constitutes an Affray,
II. Indictment: Trial and Verdict.

I. What Constitutes an Affray.

1. In order to constitute an affray, it is necessary that the fighting should be by two or more persons in some public place, and hence an indictment for such offence must charge it to have been in a public place, and it must be proved accordingly; and it is pre-

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sumed the inference of law will be strong enough to import whatever of terror may be a necessary ingredient. *State* v. *Sumner*, 5 Strobh. 53.

2. If one of the parties to an affray was willing to fight, and merely prepared to go out of the corporate limits for that purpose, and provoked the other to strike him, he was guilty of an affray, although first stricken. *Ib.*

3. To constitute an affray, a necessary and indispensable ingredient is that the fighting must be in some public place; and an allegation in the indictment that the fighting was in the town of Clarksville would not be sufficient. *State* v. *Heflin*, 8 Humph. 84.

4. Mere words do not constitute an affray; nor is a party guilty of that offence who offers no resistance to an attack made upon him, although the attack is induced by insulting language used by him to the assailant. *O'Neil* v. *the State*, 16 Alabama 65.

5. Where a field is surrounded by a forest, situated one mile from any highway or other public place, it does not lose its private character by the casual presence of three persons, so as to make two of them, who fight together willingly, guilty of an affray. *Taylor* v. *the State*, 22 Ala. 15.

6. An affray is a disturbance of the public peace by a fighting with the mutual consent of the combatants. *Duncan* v. *Commonwealth*, 6 Dana 295.

7. One aiding, assisting and abetting an affray is guilty as principal. *Hawkins* v. *the State*, 13 Geo. 322.

8. Mere words will not constitute an affray; but when accompanied by acts, such as drawing knives and attempting to use them in a public street of a city, they will constitute such offence. *Hawkins* v. *the State*, 13 Geo. 322.

9. Three things are necessary to constitute an affray: 1st. There must be a fighting. 2d. This fighting must be by or between two or more persons. 3d. It must take place in some public place, to cause terror to the people. *Simpson* v. *State*, 5 Yer. 356.

10. An affray does not depend upon the fact that those engaged in it acted by consent. *Cash* v. *State*, 2 Overt. 198. Aliter in the case of *Klum* v. *State*, 1 Blackf. 377.

II. Indictment, Trial and Verdict.

11. In the State of Missouri an affray is not an indictable offence, and by statute it is within the jurisdiction of a justice of the peace to punish such an offence. *State* v. *Ledford*, 3 Missouri 102.

12. Where an indictment alleges that two persons with force and arms, &c., did make an affray by fighting; it was held that the words "making an affray," were sufficient in the indictment, and must be understood as meaning that they fought together, being sufficiently definite to sustain an indictment for an affray. *State* v. *Benthal*, 5 Humph. 519.

13. An allegation in an indictment setting forth that the defendants did make an affray, necessarily includes a charge that they fought together in a public place. *State* v. *Vridely*, 4 Humph. 429.

14. Proof that two defendants, lying upon the ground, were seen in close combat, will not sustain an indictment for an affray against them. *Klum* v. *State*, 1 Blackf. 377.

15. In case of an affray if several persons are indicted and one or more are acquitted, the others may still be convicted. *Cash* v. *State*, 2 Overt. 198.

16. Where two persons are indicted for an affray, they should be tried together, and in making their defence are to be regarded as having one common interest. The successful defence of one will have the effect of acquitting both. *Hawkins* v. *the State*, 13 Geo. 322.

17. When two are indicted for an affray at Common Law, it is erroneous for the Court, by its instructions to the jury, to take away or limit their discretion with regard to the amount of the fine to be assessed in the event of a conviction. *Skains* v. *State*, 21 Alabama Rep. 218.

18. When there is a conflict in the testimony on the trial of an indictment for an affray, a charge upon the facts of the case, which assumes the con-

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tested fact as proved, invades the province of the jury, and is properly refused. *Ib.*

19. In Virginia it was held, upon an indictment against two defendants for an affray, that, in case both were acquitted of the affray, and there being no count in the indictment for assault and battery, no verdict of assault and battery by the one on the other could be given. *Commonwealth* v. *Perdue and Dillon*, 2 Virg. Cas. 227. Contra, *State* v. *Allen*, 4 Hawks 356.

20. A verdict, to wit: "We find that an affray was committed by C. and S., in the fighting of C. in W. county, as charged in the indictment, and that the defendant C. aided and assisted in the commission of the affray," was held to be a conviction of the defendant of an affray. *Curlin* v. *State*, 4 Yerg. 143.

APPEAL.

1. There cannot be an appeal to the Supreme Court from the judgment of the Superior Court, granting a new trial for matter of law. *State* v. *Robinson* 1 Hawks 188.

2. Nor from a judgment of respondeas ouster given on demurrer to a plea in abatement. *Ib.*

3. Nor from a decree disallowing a plea to a petition for distribution, and ordering the defendant to answer; because they are not final judgments, sentences, or decrees. *Ib.*

4. The State is not entitled to an appeal in a criminal prosecution. *State* v. *Jones*, 1 Murphy 257.

5. Where the defendant put in a demurrer to an indictment for a misdemeanor in the Court below, and judgment was there rendered against the people, which was here reversed on error, Held that this Court must give a final judgment for the people on the demurrer, and pass sentence on the defendant; and that he could not be permitted to withdraw the demurrer and plead. *People* v. *Taylor*, 111 Denio's 91.

6. No appeal lies to this Court from the Common Pleas, in a criminal proceeding brought into that Court by appeal from a justice of the peace. *Commonwealth* v. *Messenger*, 4 Mass. Rep. 462.

7. If an appeal has been given in all cases within the appellate jurisdiction of the sessions, and afterwards its appellate jurisdiction is extended to new cases, an appeal will lie in those new cases, because it would be a reasonable presumption that the legislature did not intend that its jurisdiction should in any case be final. *Ib.*

8. The Circuit Court in Tennessee has jurisdiction of an appeal prayed by the attorney general, from the judgment of the County Court quashing a presentment for gaming. *State* v. *Tolles* 5 Yerger's Rep. 363.

9. The State, by the intervention of its public prosecutor, the attorney general, is entitled to an appeal in nature of writ of error in cases of misdemeanor. *State* v. *Fields*, Mart. and Yerger 137.

10. Whenever the matter in controversy—in a civil or penal case—before a justice of the peace, exceeds five pounds, an appeal lies to the Circuit Court. *Robinson* v. *Commonwealth*, 6 Dana Rep. 288.

11. In Massachusetts, by Rev. Sts., c. 86, s. 10, allowing an appeal to the supreme judicial court in case of a conviction in the municipal court for an offence, punishable with confinement at hard labor for a term exceeding five years, where one is convicted of three distinct larcenies at the same term of the court last named, and, therefore, liable as "a common and notorious thief," to a sentence exceeding five years' confinement at hard labor, Held that he might appeal, notwithstanding he was not liable, for either of his offences separately, to a sentence of the length above indicated. *The Com.* v. *Tuck*, 20 Pick. 356.

12. Where, however, one is convicted on three or more indictments, containing each in one count a join charge of breaking and entering a dwelling-house in the day time, with intent to steal, and actually stealing therefrom, not being liable to a sentence as a common and notorious thief; it was held that he could not, though erroneously sentenced as such by the

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municipal court, sustain an appeal to the higher court. *Commonwealth* v. *Hope*, 22 Pick. 1.

13. A party was convicted under the act of 1817, ch. 227, which prohibits licensed retailers, &c., in certain counties, from permitting free negroes and slaves to be in their stores at night. A motion in arrest of judgment, upon the ground that the indictment did not sufficiently describe the offence, was overruled by the Court, and the fine prescribed by the act imposed upon the traversee, who appealed from the judgment. On motion to dismiss this appeal, because the record was not brought up by writ of error, it was held that an appeal will lie, such a case being within the provisions of act of 1785, ch. 87, sec. 6. *Rawlings* v. *State*, 2 Mard. R. 201.

14. An inferior court, within the meaning of the first section of the fifth article of the constitution, is a court whose judgment or decrees can be reviewed on appeal or writ of error, by a higher tribunal, whether that tribunal be the Circuit or Supreme Court. *Nugent* v. *the State*, 18 Ala. Rep. 521.

15. The judgments of the City Court of Mobile, being subject to the revision of the Supreme Court, in the same manner that those of the Circuit Courts are, the act creating it does not violate any provision of the constitution. *Ib.*

16. No appeal or writ of error will lie on a judgment, upon an indictment for a riot. *Commonwealth* v. *Bybee*, 5 Dana 219.

17. An appeal from the decision of a circuit judge, refusing a writ of *habeas corpus*, will not be heard, if, before the application for the hearing of the appeal, the petitioner has been enlarged, and has gone beyond the jurisdiction of the court. *Ex parte Pereira*, 6 Richardson's Rep. 149.

ARREST.

I. What process is necessary to authorize an arrest, and the validity of the process.
II. Who may lawfully make an arrest.
III. When an arrest is lawful.
IV. Proof necessary to authorize a criminal process.
V. What constitutes an arrest; duty of officer on making an arrest.

I. What Process is Necessary to Authorize an Arrest, and the Validity of the Process.

1. Where a warrant was dated April 2, and the certificate of the oath was dated May 2, both being on the same piece of paper, and the complaint alleged that the offence was committed on the 30th of April, and the warrant referring to the complaint; upon this state of facts, it was held to be sufficiently evident that the complaint preceded the warrant, and that the date of the warrant was a mere clerical error, and that such error did not render the subsequent proceedings void. *Donahoe* v. *Shed*, 8 Metcalf 326.

2. But an action of trespass could not be maintained against the officer executing the warrant in such case, even if the above decision were incorrect. The Court issuing it had jurisdiction of the offence charged, and the warrant was in due legal form, and was directed to the officer; and it was not for him to inquire into the regularity of the proceedings of the Court that issued the warrant. *Ib.* Vide *Wilmarth* v. *Burt*, 7 Metcalf 257.

3. A warrant issued before indictment must specify the offence charged, the authority under which it issues, the person who is to execute it, and the person to be arrested. And that the offence, and time and place of committing it, shall be plainly and clearly set forth in the warrant of commitment. *Brady* v. *Davis*, 9 Georgia 73.

4. But when a bench warrant and warrant of commitment are issued after indictment, they need only recite the presentment, and the crime generally. *Ib.*

5. A seal is essential to every warrant issued by a magistrate to arrest any person upon a criminal charge, and if there be no seal, the precept is void,

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and affords no protection to the officer attempting to execute it. *State* v. *Worley*, 11 Iredell 242.

6. A warrant must contain the names of the persons to be arrested, and a description thus: A. and his *associate*, is void as to the latter. *Wells* v. *Jackson*, 3 Munf. 458.

7. When a warrant purports to be for a matter within the jurisdiction of the justice issuing it, the ministerial officer is obliged to execute it, without the evidence upon which it issued being endorsed upon it, and he is justified in making the arrest under it. *Welch* v. *Scott*, 5 Iredell 72.

8. The Constitution of New York, which requires that all writs and other proceedings shall run in the name of the People of the State of New York, only has reference to the Court of Chancery and Courts of Record, and does not apply to a justice of peace acting as a conservator of the peace. *Dickenson* v. *Rogers*, 19 John. 279.

9. It is necessary that a warrant to arrest on a criminal charge should have a seal on it. *Welch* v. *Scott*, 5 Iredell 72.

10. A warrant from a magistrate in a civil case, upon which bail has not been required, is in law but a summons, and gives no authority to arrest. *State* v. *Kirby*, 2 Iredell 201.

11. If two justices of the peace sign a mittimus, and add the initials J. P., the process will authorize an officer to hold the defendant. *State* v. *Manly*, 1 Overt. 428.

II. Who may Lawfully make an Arrest.

12. A police officer receiving his appointment under the statute of 1838, c. 123, and having all the power of a constable of the city of Boston, except the serving and executing any civil process, having arrested a person for being disorderly while intoxicated, let him go on his promise to go home peaceably. It was held that the officer had power to re-arrest such person upon his going into a drinking saloon before he had left the officer's sight. *Commonwealth* v. *Hastings*, 9 Metcalf 259.

13. If a statute makes it imperative that a criminal process should be executed by a specified person, the execution of such process by any other person is illegal and void. *Reynolds* v. *Orvis*, 7 Cow. 269; *Wood* v. *Ross*, 11 Mass. 271; *Commonwealth* v. *Foster*, 1 Mass. 488.

14. Where an officer verbally authorizes another to assist him in the execution of process, the acts of such person are valid if he take the prisoner, and, like the officer, the law will protect him. But it seems necessary that both should be in pursuit, though the officer be not in sight when the arrest is made. *Commonwealth* v. *Field*, 13 Mass. 321.

15. By statute in N. Hampshire, of Dec. 1799, certain persons therein described are authorized to arrest for travelling unnecessarily on the Lord's day. *Mayo* v. *Wilson, et al.*, 1 N. Hamp. 53.

16. A constable is justified in arresting one for committing an affray in his presence, and may convey his prisoner to the sheriff or jailer, who is bound to receive him. *Commonwealth* v. *Deacon*, 8 Sergeant & Rawle 47.

17. A private person, who may have apprehended another for treason or felony, may convey him to the jail of the county, or may bring him before a justice of the peace. And this it seems may be done without authority from any magistrate, if a felony has actually been committed, and suspicion rests on such prisoner. *Commonwealth* v. *Deacon*, 8 Sergeant & Rawle Rep. 47.

18. A private person would be justified in arresting another while in the act of committing an affray, without any authority or process from a magistrate. *Knot* v. *Gay*, 1 Root 66.

19. Where a warrant was issued to arrest a defendant, and bring him before the Court to give sureties for his good behavior, and the magistrate had designated an officer to execute it, it was held that, if such officer's name was erased and some other person's name who was not a sworn officer, was inserted by the prosecutor, an arrest made by the person thus substituted

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was void and illegal, and was not a justification in case he was sued for assault and battery and false imprisonment, but was matter to offer in mitigation of damages. *Wells* v. *Jackson*, 3 Munf. 458.

20. Arrests for affrays and breaches of the peace can be made without process by the City Guards of Charleston. *City Council* v. *Payne*, 2 Nott and McCord 475.

21. An officer cannot legally arrest one by a wrong name, though he was the person intended to be arrested, unless it was shown that he was known as well by one name as the other; and if the officer makes an arrest under such circumstances, he will be liable to an action for false imprisonment. *Griswold* v. *Sedgwick*, 1 Wend. 126. *Griswold* v. *Sedgwick*, 6 Cow. 456. *Mead* v. *Hawes*, 7 Cow. 332. *Gurnsey* v. *Lovell*, 9 Wend. 319.

22. An officer may arrest a supposed felon without warrant, but he must act in good faith and upon grounds of probable suspicion, that the person to be arrested is the actual felon. *Eanes* v. *State*, 6 Humph. 53.

23. Where a constable has reasonable ground to suspect another of the crime of receiving or aiding in the concealment of any stolen goods or property, knowing them to be stolen, and acting on such belief as a constable or other peace officer, arrests and detains such party for the purpose of securing him to answer to a complaint for such offence, such arrest and detention would be lawful without a warrant. *Rohan* v. *Sawin*, 5 Cush. 281.

24. It was held, in Connecticut, in a case where the United States Marshal arrested a man by virtue of an attachment for debt, without a mittimus, that the marshal was justified in so doing. *Palmer* v. *Allen*, 7 Cranch 551. This decision overrules the one in 5 Day 193.

25. If two persons bear the same name, an arrest of the wrong one would subject the officer to an action for false imprisonment. *Hallowell and Augusta Bank* v. *Howard*, 14 Mass. 181.

26. Where an indictment contains two counts, the first charging that one B. was arrested by W., a deputy sheriff, *by lawful authority*, and that B. resisting the officer, the defendant was summoned by the officer to assist, but he refused to obey; the second count charging disobedience to the magistrate, who requested the defendant to assist the officer; it was held that the first count was insufficient, and that the authority to arrest ought to have been set forth in the indictment. *State* v. *Shaw*, 3 Iredell 20.

III. When an Arrest is Lawful.

27. To constitute a legal arrest the officer must lay his hand on the defendant, or otherwise take possession of his person; but the officer has no authority to go beyond his limits in order to make an arrest. *Lawson* v. *Buzines*, 3 Harrington 416.

28. In Massachusetts the statute of 1791, c. 58, does not authorize a justice of the peace to receive a complaint and issue his warrant on the Lord's day for a violation of that law, merely by travelling; and that an arrest made on that day, pursuant to a warrant so issued, is illegal, and the officer making it a trespasser. *Pearce* v. *Atwood*, 13 Mass. 324.

29. The law of the State in which an arrest is made will govern as to its legality; and it will be *prima facie* justifiable if made under legal process in another State. *Stouffer* v. *Latshaw*, 2 Watts 165.

30. If the process is void for want of jurisdiction of the Court issuing it, or for other cause, an arrest made under it is illegal. *Tracy* v. *Williams*, 4 Conn. 107; *State* v. *Leach*, 7 Conn. 456; *State* v. *Curtis*, 1 Hayw. 471.

31. If a criminal process is defective on the face of it, and such defect is apparent, the officer will not be justified in acting under it, and he will be liable as a trespasser. *Sandford* v. *Nichols*, 13 Mass. 286; *Lampson* v. *Landon*, 5 Day 508; *Griswold* v. *Sedgwick*, 6 Cow. 456; *Reynolds* v. *Carp.*, 3 Caines 269; *Grumond* v. *Raymond*, 1 Conn. 40.

32. While a defendant was under an indictment for forgery, he escaped to another State, where he was arrested

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and brought back, without process, and imprisoned. It was held on an application to release him from prison by a writ of *habeas corpus*, that though the arrest was illegal, it afforded no ground for the prisoner's discharge. *Dow's case*, 18 Penn. State R. 37.

33. If a known officer, who has two warrants in his hands, the one legal and the other illegal, declare at the time of arrest that he makes the arrest by virtue of the illegal warrant, that is not a false imprisonment, for the lawfulness of the arrest does not depend upon what he declares, but upon the sufficiency of the authority which he then has. *State* v. *Kirby*, 2 Iredell 201.

34. If after making an arrest on suspicion one be sued for false imprisonment, he can show in mitigation of damages the grounds of his suspicion. *Rogers* v. *Wilson*, Minor 407.

IV. Proof necessary to Authorize a Criminal Process.

35. A magistrate may grant a warrant, *super visum;* but except in that case, it is his duty before issuing a warrant to arrest, to require evidence on oath, amounting to a direct charge, or creating a strong suspicion of guilt. *Welch* v. *Scott*, 5 Iredell 72.

36. It is no ground to issue a warrant against one if his guilt appears to the Court only from hearsay and mere rumor; and even if it be alleged that the prisoner will escape before the necessary affidavit showing his guilt can be obtained, this will not be sufficient to justify the magistrate in issuing a warrant. *Connor* v. *Commonwealth*, 3 Binn. 38.

37. A complaint having been made by an informer against one for a criminal offence, and not having been sworn to, it was held that a warrant could not legally be issued: and if the warrant contain a statement that the complaint was sworn to, still without the certificate of the magistrate it is no evidence that the oath was administered. 1 Tyler 444.

V. What Constitutes an Arrest; Duty of Officer on Making an Arrest.

38. No manual touching of the body or actual force is necessary to constitute an arrest. It is sufficient if the party be within the power of the officer, and submit to the arrest. *Gold* v. *Bissel*, 1 Wend. 215. Contra, 2 N. Hamp. 318. *Huntington* v. *Schultz*, 453. *United States* v. *Benner*, 1 Bald. 239.

39. If a prisoner has been once arrested and then escapes from the officer, but is retaken on fresh pursuit, this only makes the first arrest complete. *Cooper* v. *Adams*, 2 Blackf. 294.

40. An officer having authority to arrest another must do it peaceably, and with as little violence as the case will admit of. He must touch the person, and ought to do it without violence, unless the circumstances require roughness, and, if resisted, he may use force sufficient to effect his purpose; but, if no resistance be offered or attempt at escape, he has no right rudely and with violence to seize and collar his prisoner. *State* v. *Mahon*, 3 Harrington 568.

41. When an arrest is made by one not a known officer, he is bound at the time to make known the warrant under which he arrests. *State* v. *Kirby*, 2 Iredell 201.

42. An officer by virtue of a criminal process is justified in breaking open outer doors of a dwelling-house either in the day or night-time, in order to execute such process, having first demanded admittance and being refused. *Bell* v. *Clap*, 10 Johns. 263. *State* v. *Smith*, 1 N. Hamp. 346. *State* v. *Shaw*, 1 Root 134. *Kellsy* v. *Wright*, 1 Root 83.

43. The case in which one arrested may demand of one not generally known as an officer, to produce his warrant or authority, is when the party arrested submits himself to the arrest; not where he immediately resists and by his own wrongful acts prevents the officer from doing his duty. *Commonwealth* v. *Field*, 13 Mass. 321. *State* v. *Curtis*, 1 Hayw. 471. *Arnold* v. *Steeves*, 10 Wend. 514. Not so if a regular officer. *Ib.*

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ARSON.

I. What constitutes Arson in the 1st, 2d, and 3d degree, &c.
II. Definition of the term dwelling-house, and of other structures.
III. Indictment for Arson, &c.
IV. What evidence admissible, and what evidence will support an indictment for Arson.
V. Trial and verdict.
VI. Miscellaneous, benefit of clergy, &c.

I. What Constitutes Arson in the 1st, 2d and 3d degree.

1. Arson consists in an offence against the property of another; and a person cannot become guilty of arson in the first degree by setting fire to his own dwelling-house. *The People* v. *Henderson*, 1 Parker's Crim. Rep. 560.

2. A design to produce death is not an ingredient necessary to constitute the offence of arson in the first degree, either at Common Law or under the statute. *People* v. *Orcutt*, 1 Parker's Crim. R. 252.

3. To convict one of arson in the third degree under § 5, 2 R. S. 667, it must be alleged that the house was insured against loss or damage by fire, and that the offence was committed with intent to defraud the insurance company; under that section one may be convicted of burning his own dwelling-house, but the offence is still against the property of another, the object of the crime being to defraud the insurer, who is interested in the preservation of the property. *People* v. *Henderson*, 1 Park. Crim. R. 560.

4. In the State of North Carolina, the act of 1846, ch. 70, entitled an act to protect houses and enclosures from wilful injury, alters the act of 1836, 1 Rev. Stat. ch. 347, so as to reduce the offence of burning a mill, house, &c., from a felony to a misdemeanor, and substitutes the punishment of fine and imprisonment for that of death. *State* v. *Upchurch*, 9 Iredell 454.

5. To constitute the offence of arson in burning an office, store, or shop, &c., under the statute of Connecticut, the building must be the property of another. It is not necessary that the absolute title or entire interest should be in the person named in the information as the party injured; for such a possession as gives a special property while it exists is enough. It is essential to the crime of arson at Common Law, that the burning should be of the house or outhouse of another, and in indictments or informations for that offence it is necessary to aver ownership in another, and to prove the averment as laid. *State* v. *Lyon*, 12 Conn. 487.

6. Where an indictment founded on the 7th sec. of the 4th ch. of the Criminal Code, in the Session Acts of 1847–'48, page 99, was for the malicious burning of a house, and the house appeared to have been situated upon the farm of the prisoner, but it was at the time of being burnt in the occupancy and possession of another man who had a qualified ownership therein, and therefore the burning of that house maliciously by the prisoner was a violation of that 7th sec., and rendered him liable to prosecution and punishment under that law. *Erskine's case*, 8 Gratt. 624.

7. And where the wheat and hay charged to have been burned were not in stacks, the burning was not a felony under the 6th sec. of said statute. *Ib.*

8. To constitute the crime of arson, there must be a burning of the house, and not merely something that is in it, yet the least burning of the building is sufficient. *State* v. *Sandy*, 3 Iredell 570.

9. The offence of arson cannot be maintained in Indiana against one who is in possession of a house as a tenant for a year, and wilfully burns the house. *McNeal* v. *Woods*, 3 Blackf. 485.

10. According to the statute of 1804, c. 131, s. 5, in Mass., it was held that the burning of hay-stacks did not constitute a felony, but that such an offence might be indicted as a misdemeanor. *Commonwealth* v. *Macomber*, 3 Mass. 254.

11. Setting fire to a dwelling-house, inhabited at the time, by which a part only of the house is burned, is arson within the meaning of the first section of the act, (sess. 36, c. 29,) and punishable with death. *People* v. *Butler*, 16 John. R. 203.

12. To intend maliciously to set fire

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to the building of another, and in pursuance of that malicious and unlawful intent to apply fire to a boat in the same, or to other combustible matter, which would be a clear manifestation of such unlawful intent, is a misdemeanor at Common Law. *Commonwealth* v. *Francis*, Thacher's Crim. Cases 240.

13. In Massachusetts, it was held that if any part of a dwelling-house, however small, be wilfully and maliciously set on fire in the night-time, and consumed by the fire, the offence of arson was complete. *Commonwealth* v. *Van Schaack*, 16 Mass. 105.

14. By the statutes of Maryland and Connecticut, it was held to be arson in case of a school-house being burnt. *Jones* v. *Hungerford*, 4 Gill & Johnson 402. *State* v. *O'Brien*, 2 Root 516. And in Kentucky the statute makes it a punishable offence, although at Common Law such an act would not be considered the offence of arson. *Wallace* v. *Young*, 5 Monr. 156.

15. To burn a barn containing hay and grain is arson at Common Law. *Sampson* v. *Commonwealth*, 5 Watts & Sergeant 385.

16. Where a person took a lease of a house on public land for the term of one year, and went into possession, but it appeared afterward that the same premises had been previously let by parol without his knowledge to another person, who during the absence of the first tenant had taken possession; held that the first tenant was not guilty of arson by reason of his dispossessing the second tenant, throwing down the house and burning the same. *Sullivan* v. *State*, 5 Stewart & Porter 175.

17. Under the Revised Statutes of North Carolina, ch. 34, relative to punishment for burning jails, &c., it was held that the burning must be both wilful and malicious, though the word "or" is inserted between the words "wilfully and maliciously;" and it was held that the word "or," to effectuate the intention of the legislature, and in favor of life, must be construed as if it were *and*. *State* v. *Mitchell*, 5 Iredell 350.

18. If a prisoner put fire to the jail, not with an intention of destroying it, he is not guilty under the act of Assembly. But if he put fire to the jail and burn it with an intent to burn it down and destroy it, he is guilty, notwithstanding the fire goes out, or is put out by others, before the intention of the prisoner is completed, by burning down the jail; and this is the law, although his main intention be to escape; and in cases under the statute, as well as in arson at Common Law, the setting fire to the building constitutes the offence, no matter how little may be burned, provided there was an intention to destroy the building. *Ib.*

19. When a county jail and prison of the county A. was burnt, and the indictment for burning the same described such prison and jail as the house of B., sheriff and jailer of such county; the burning of such jail was held to be a felony by statute (see Rev. Code, c. 160, sec. 4 of Virginia), and the description of the house as being the sheriff's was held to be mere surplusage, and might have been rejected. *Steven's case*, 4 Leigh 683.

20. Setting fire to a jail by a prisoner, merely for the purpose of effecting his escape, does not constitute arson. *People* v. *Cotteral*, 18 John. R. 115.

21. Nor is it a wilful burning of an inhabited dwelling-house within the first section of the statute, declaring the punishment of crimes (sess. 36, ch. 20), though the jail is to be considered an inhabited dwelling-house within the meaning of the statute. *Ib.*

22. Neither at Common Law, nor by any statute of Mass., is it a crime for a man to destroy his own property by fire, unless it be accompanied by an injury to or by a design to injure some other person. *Bloss* v. *Tobey*, 2 Pick. 325.

23. A man's setting fire to his own house, which is inhabited by himself and other tenants, in a populous city, is a great misdemeanor. *John Ball's case*, N. Y. Gen. Sess., June, 1817, 5 City Hall Rec. 851.

24. An attempt within the Virginia statute of 1848, chap. 11, sec. 12, can only be made by an actual ineffectual deed done in pursuance of and in furtherance of the design. But where all the prisoners combined on the night on

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which it is charged the attempt was made to burn the barn, and they all assented to it, and a part of them only went to the barn, those who were absent, knowing with what intent the others went there, were held guilty as principals. *Uhl's case*, 6 Grattan's R. 706.

25. It is not necessary that an overt act should be the last proximate act prior to the consummation of the felony attempted to be perpetrated. *Ib.*

II. Definition of the Term Dwelling-house, and of other Structures.

26. Under the statute of Maine, which relates to the punishment for burning any building within the curtilage of a dwelling-house, it was held that a dwelling-house, within the meaning of the statute, must be a house either actually occupied by some person, or temporarily left with the furniture remaining in, and with the intention of returning, at the time the offence was committed; and the fact of the house being intended for occupation, or capable of being so occupied, is not sufficient to come within the statute. *State* v. *Warren*, 33 Maine (3 Red.) 30.

27. Where an indictment was found against the prisoner for burning a dwelling-house, and the building was described as one built and designed for a dwelling-house, and constructed in the usual manner, and was designed to be painted, but was not yet finished in that respect, and not quite all the glass were set in one of the outer doors, and the building had never been occupied, and was not parcel nor appurtenant of any other; it was held that this was not a dwelling-house in such a sense as that to burn it constituted the crime of arson. *State* v. *McGowan*, 20 Conn. 245. But such is not the case when a dwelling-house has once been inhabited as such, and from which the occupant is but temporarily absent. *Commonwealth* v. *Flynn*, 3 Cush. 529.

28. And in such case it is the duty of the Court to instruct the jury as to the law of the matter, and leave it to them to say, from the proof, whether the building is a house within the meaning of the law thus explained. *Ib.*

29. If a building set on fire is one appropriated to ordinary domestic uses, and is situated so near to the dwelling-house as probably to endanger it, then it is arson to burn it, and not otherwise. *Gage* v. *Shelton*, 3 Richardson 242.

30. Any building is a "dwelling-house" within the meaning of the act defining arson in the first degree, which is wholly or in part usually occupied by persons lodging therein at night, although other parts, or the greater part, may be used for an entirely different purpose. *People* v. *Orcutt*, 1 Park. Crim. R. 252.

31. In Massachusetts, by the act of 1804, c. 131, the legislature by the term vessel did not mean a small boat in an unfinished state, which was still in the hands of the builder, and wholly unfit to carry men, or goods, or water. *Commonwealth* v. *Francis*, Thacher's Criminal Cases 240.

Under the same statute, the expression "lying within the body of any county," meant "that the vessel should be lying in the water which flows within the body of a county, in distinction from one upon the high seas, and out of the body of the county." *Ib.*

32. The act of 1836, Rev. Stat., c. 34, s. 1, having introduced the term "storehouse," it was held that a part of a building thus occupied by a merchant to keep goods in, was what the act contemplated by such term. *State* v. *Sandy*, 3 Iredell 570.

33. Upon an indictment, founded on the R. S., c. 155, s. 3, for setting fire to and burning a barn, within the curtilage of the dwelling-house, &c., it was held that the curtilage of a dwelling-house is a space necessary and convenient, and habitually used for the family purposes, the carrying on of domestic employments. It includes the garden, if there be one. It need not be separated from other lands by fence. *State* v. *Shaw*, 31 Maine (Red.) 523.

34. In this case it was contended that the Court ought to have defined the term curtilage to the jury; but it was held that without being requested

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to do so, the Court was not bound to do it. *Ib.*

35. A barn standing eighty feet from a dwelling-house, in a yard or lane with which there was a communication from the house by a pair of bars, was held to be within the curtilage. *The People* v. *Taylor*, 2 Michigan R. 250.

III. Indictment for Arson, &c.

36. The word house signifying a dwelling-house, it is not necessary, in order to support an indictment at Common Law, to set forth in the indictment that the house alleged to have been burned was a dwelling-house. *Commonwealth* v. *Posey*, 4 Call. 109.

37. An indictment alleging that S., "with force and arms, in said county, unlawfully, wickedly, maliciously, and mischievously, did set fire to, burn, and consume one hundred barrels of tar, of the goods and chattels," &c., was held to be good. *State* v. *Simpson*, 2 Hawks. 460.

38. In Vermont, where a public building is burned, it is unnecessary, in an indictment for arson in burning such building, to allege that it was of or belonged to any one. *State* v. *Roe*, 12 Vermont 93.

39. An indictment under § 5, c. 126, of the R. S., charging as a crime the burning of a building, which building is described as one not then completed, was held to be sufficient. The question whether the state of the structure, and its progress towards completion, be such as to constitute it a building, is a question of fact, to be submitted to the jury, under proper instructions from the Court. *Commonwealth* v. *Squire*, 1 Metcalf 258.

40. And in such case the indictment is not objectionable on the ground that no criminal offence is charged, distinct from those contemplated in the 3d sec. of the same act, which section has reference to a higher grade of offences of the same nature. There would be but one criminal act in the malicious burning of a building, whether that building alone was consumed, or it occasioned the burning of any building described in the 3d section. And if the Government proceed by an indictment for the smaller offence, and on the trial thereof there be a judgment of conviction or acquittal, such judgment would be a legal bar to a second indictment charging the same offence with aggravation. *Ib.*

41. Where a part of a building is let to one for a year, which part has no communication with other parts of the building, it was held that the part so occupied might be properly laid in the indictment for arson, as the property of the lessee. *State* v. *Sandy*, 3 Iredell 570.

42. When the offence of arson depends on more than one statute, the conclusion, contra formam statuti, in the indictment is bad, and in like manner that a conclusion, contra formam statutorum, is bad, when there is but one statute. *State* v. *Sandy*, 3 Iredell 570.

43. Where the indictment for arson alleges that the act was done feloniously, unlawfully, and maliciously, without alleging that it was done wilfully, the indictment was held to be sufficient. *Chapman* v. *Commonwealth*, 5 Wharton 427.

44. In the State of Pennsylvania, under the act of the 21st of March 1806, an indictment for arson, alleging that the defendant had set fire to "a certain barrack," was held insufficient, for the reason that it ought to be alleged that the barrack contained hay, grain, or bark. *Ib.*

45. It is necessary that an indictment for arson, in burning a stable, should conclude, against the form of the statute in such case made and provided, or it will be error. *Ib.*

46. In case of an indictment for arson, which alleges the "setting fire to, and the same house then and there by the spreading of such fire, feloniously burning;" it was held to be a sufficient indictment. *Palsten* v. *State*, 14 Missouri 463.

47. In an indictment for arson it is necessary to allege the value of the property destroyed, and the indictment should aver the property burned, or set on fire, to belong to the person or per-

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sons in the actual possession, in his or their own right. *Ritchey* v. *State*, 7 Blackf. 168. *Clarke* v. *People*, 1 Scammon 117.

48. Where an indictment charged the felonious, wilful and malicious burning down of a dwelling-house, contrary to the form of the statute, &c., and the jury found the defendant guilty of arson in the day-time of the 11th of February, 1850, this finding of the jury being objected to because the indictment did not allege the burning to have been in the night or day-time; but it was held not indispensably necessary to charge expressly a burning by day, because the burning of a dwelling-house feloniously, wilfully and maliciously, is a crime both at Common Law and under the statute.—*Curran's case*, 7 Gratt. 619.

49. An indictment need not describe the combustible materials alleged to have been used and set fire to by the defendant, in an attempt to commit arson. *Commonwealth* v. *Flynn*, 3 Cush. 529.

50. Where upon the face of an indictment for arson, the facts charged show that there was an attempt to commit a crime punishable by law, which is of such a character as to come within the Rev. St., ch. 133, sec. 12, the offence is well charged. *Ib.*

51. If an indictment for arson charges that the defendant did maliciously, &c., set fire to and burn a house used as a dwelling-house, in the night-time, the property of M. H., this is a sufficient allegation that the house burned is a dwelling-house, and charges the offence sufficiently plain. *McLane* v. *State*, 4 Georgia 335.

52. In Massachusetts, an indictment under Rev. St., c. 133, sec. 12, containing two counts, one setting forth a breaking and entering the building in the night-time, and the other setting forth an attempt to burn the building after breach and entry, is not bad for duplicity. *Commonwealth* v. *Harney*, 10 Metcalf 422.

53. The offence of arson being defined by the 4th sec. of the Rev. Code, ch. 160, to be a burning and not setting fire to, an indictment under this section, not containing the expression "burn," is defective, for the reason that the offence of arson is defined by that term in that section, and the offence must be of the description there given. *Howell* v. *Commonwealth*, 5 Grattan 664.

54. Where an indictment for arson alleged that the prisoner in the night-time, feloniously set fire to his own dwelling-house, in which there were at the time divers human beings, with intent to burn the said dwelling-house, and with intent thereby to defraud a certain Fire Insurance Company; on demurrer, it was held that the indictment was not sufficient to bring the offence within arson in the first degree, because it was not the dwelling-house of another, and that it was not sufficient under the third degree, because it was not charged in the indictment that the property was insured, and the indictment was held to be bad. *People* v. *Henderson*, 1 Park. Crim. R. 560.

55. It is sufficient when an indictment is found for arson in the first degree, to describe a building which has been usually occupied by persons lodging therein at night, as a "dwelling-house," although it may not be a dwelling-house according to the ordinary and popular acceptation of that term (2 R. S. 657, § 9). *People* v. *Orcott*, 1 Parker Crim. R. 252.

IV. What Evidence Admissible, and what Evidence will support an Indictment for Arson.

56. If separate indictments for the same charge of arson are found against two persons, the production of the record of conviction of one of them is not evidence against the other. *Kazer* v. *State*, 5 Hammond 280.

57. Upon the trial of an indictment for arson, the defendant offered to prove that one J. H. had threatened to burn the mill, and that he was in the neighborhood the night it was burned. It was held that the testimony offered was legitimate proof to submit to the jury. *Hensley* v. *State*, 9 Humph. 243.

58. An indictment for burning stacks

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of wheat is not supported by evidence of burning shocks of wheat. *Denbow* v. *State*, 18 Ohio 11.

59. In an indictment for arson, charging that the defendant set fire to the building of another, by which a dwelling-house was consumed, it was held that the evidence must show the building to have belonged to the person so alleged in the indictment, or the indictment could not be sustained. *Commonwealth* v. *Wade*, 17 Pick. 395.

60. In an indictment for arson it is necessary that the house or building set fire to or burned should be described as the house or building of the person in possession; and it was accordingly held in this case, where the building was charged in the indictment as the building of the owner, and the proof was that at the time of the committing of the offence it was in the possession of a tenant, that the prisoner could not be convicted. *The People* v. *Gates*, 15 Wendell 159.

61. At the trial of an indictment for the malicious burning of an out-house, the prosecution produced a piece of the side of the building alleged to have been burned, which had been taken from its place and brought into court, and which was offered as exhibiting the whole of the part burned. It was held that it was a question of fact for the jury to decide whether the building was actually burned. *Commonwealth* v. *Betton*, 5 Cush. 427.

V. Trial and Verdict.

62. Where a person is indicted for burning the dwelling-house of another, and if in fact it be the dwelling-house of such person, the Court will not inquire into the tenure of interest of the occupant. *The People* v. *Van Blarcum*, 2 John. R. 105.

63. Where an indictment charges one with attempting to set fire to a dwelling-house, by attempting to burn another building, the question whether the acts so done by the defendant are such as to authorize the jury to find an attempt to set fire to any other building than the particular one in which the materials for fire are placed, and which is the first to be exposed to be consumed, is wholly a matter for the jury, and should be properly left to them. *Commonwealth* v. *Harney*, 10 Metcalf 422.

64. The act of burning a stack of hay is not a felony, either at Common Law or by the acts of 1809, c. 138, and 1845, c. 181. *Black* v. *State*, 2 Maryland 376.

65. The indictment in this case charged that the traverser feloniously, unlawfully, wilfully, and maliciously did burn a certain stack of hay, against the form of the Act of Assembly, &c.

The jury rendered a verdict that he did feloniously, unlawfully, wilfully, and maliciously burn said stack of hay. Held, that as the offence charged is not a felony, no valid judgment could be pronounced on such an indictment and verdict. *Ib.*

VI. Miscellaneous: Benefit of Clergy, &c.

66. In Virginia and North Carolina a conviction of arson will oust one of his clergy. *Commonwealth* v. *Posey*, 4 Call, 109; *State* v. *Seaborn*, 4 Devereux 305.

67. Where a person has been found guilty of burning a house, the word house being used alone without the addition of "dwelling," it was held that the prisoner was entiled to benefit of clergy, as the statute only refers to cases of burning dwelling-houses. *State* v. *Sutcliff*, 4 Strobh. 372.

68. It is immaterial whether the person charged with the crime of arson has knowledge that the building burned has usually or at any time been occupied by persons lodging therein. *People* v. *Orcutt*, 1 Parker Crim. R. 252.

69. Where an indictment was for setting fire wilfully, maliciously, and unlawfully to the woods of a certain person, whereby the woods and the fence of another whose plantation adjoined such woods was burnt, a description of such indictment was made in the record of the finding as an indictment "for setting fire to the woods

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and burning the same;" it was held that the record of the finding was sufficient. *Earhart's case*, 9 Leigh 671.

70. Upon the trial of an indictment for arson it appeared that the prisoner was a servant girl between the age of twelve and thirteen years, and a shrewd, sensible, and artful girl; held, that if she had such mental capacity as rendered her amenable to the law for the commission of crime, she had sufficient mental capacity to make a confession of her guilt. *State* v. *Bostick* 4 Harrington 563.

ASSAULT AND BATTERY.

I. What constitutes an Assault and Battery.
II. Assault and Battery, how prosecuted.
III. Court having jurisdiction of the offence of Assault and Battery.
IV. Evidence admissible on the trial for Assault and Battery.
V. Indictment for Assault and Battery; its form and contents.
VI. Indictment for Assault and Battery with intent to kill.
VII. Evidence necessary to support the indictment.
VIII. Of the Trial. Verdict, conviction, and judgment.
IX. Justification.
X. Arrest of Judgment.
XI. Miscellaneous.

I. What Constitutes an Assault and Battery.

1. If at the time a defendant raises his whip to strike another he makes use of the words, "were you not an old man I would knock you down," and has no present intention to strike, it is not an assault in law. *State* v. *Crow*, 1 Iredell 375.

2. If a person present a pistol purporting to be loaded, at another, so near as to have been dangerous to life, if the pistol, being loaded, had gone off, this is an assault in law, though the pistol were not in fact loaded. *State* v. *Smith*, 2 Humph. 457.

3. An offer to strike, by one person rushing upon another, will be an assault, although the assailant be not near enough to reach his adversary, if the distance be such as to induce a man of ordinary firmness, under the accompanying circumstances, to believe that he will instantly receive a blow unless he strikes in self-defence. *State* v. *Davis*, 1 Iredell 125.

4. An actual and personal assault must be made upon the party, coupled with a felonious intent, in order to complete the offences created by the 52, 53, and 54 sections of the Act of 1829. *State* v. *Freels*, 3 Humph. 228.

5. The besetting the house of another is an assault in contradistinction to an actual assault, and when done with a felonious purpose, merits severe punishment; but it is not the character of assault intended by the 52 section of the Act of 1829. *Evans* v. *State*, 1 Humph. 394.

6. A husband will not be justified in beating his wife or inflicting corporal punishment upon her; but he may defend himself against her, and may restrain her from acts of violence towards himself or towards others. *People* v. *Winters*, 2 Parker Crim. 10.

7. A person who stands by and directs another to commit an assault and battery, without participating in it himself, is guilty as principal, upon the principle that whatsoever will make a man an accessory before the fact in felony, will make him a principal in high treason and trespass, as battery, riot, rout, forcible entry, &c. *State* v. *Lymburn*, 1 Brevard 397.

8. Where a tenant at sufferance placed windows in a dwelling-house occupied by such tenant during the tenancy, and after the expiration of the tenancy, and after the house so occupied was sold to another party, who had taken possession by his tenant, returned to remove the windows from the house, and was proceeding to carry off the windows, when the latter occupant forcibly seized and took away the windows, causing some injury to the former tenant; it was held that no assault and battery was committed by thus retaking the windows under the existing circumstances. *State* v. *Elliot*, 11 N. Hamp. 540.

9. If a person unlawfully takes and detains another without his consent,

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he is liable to an indictment for assault and battery. *Long* v. *Rogers*, 17 Ala. 540.

10. If an officer, about to serve an attachment against the property of another, takes property in which the defendant has no attachable interest, he cannot be lawfully resisted by the real owner of the property, and if the owner assaults and beats the officer in endeavoring to retake his property, he will be liable to an indictment for assault and battery. *State* v. *Buchanan*, 17 Vermt. 573.

11. A stranger has no right to chastise the slave of another in North Carolina, and if he do so he is guilty of an assault and battery. Aliter in South Carolina. *Nelson* v. *State*, 10 Humph. 518.

12. A threat of great bodily harm, put forth in a desperate and reckless manner, accompanied by acts showing a formed intent to execute them, and intended to put the person threatened in fear of bodily harm, and producing that effect, and being of a character calculated to produce that effect upon a person of ordinary firmness, constitutes the offence created by the statute in Vermont. *State* v. *Benedict*, 11 Vermont 236.

13. Where a father commences an assault upon another person in his own wrong, and the son coming up also joins in the assault with intent to murder, it was held that, if the father wantonly made the first assault, and that fact appeared from the proof, then the son could not avail himself of his relation in his defence, if it appeared from the proof that he came into the conflict for the purpose of aiding his father in an unlawful assault. *Sharp* v. *State*, 19 Ohio 379.

14. In the State of Ohio, the discharging a gun loaded with powder and wadding only, at a person so far distant that no injury would probably result from the act, is not a violation of the 24th section of the Act respecting the punishment of crimes. *Henry* v. *State*, 18 Ohio, 32.

15. A defendant, as tenant in common of a barn-floor occupied by the complainant and himself, has no right to use force and violence to prevent his co-tenant from entering the door, though it was for the declared purpose of removing the defendant's wagon. *Commonwealth* v. *Lakeman*, 4 Cush. 597.

16. An assault is some act amounting to an attempt or offer to commit personal violence, as "the striking at one with or without a weapon, or presenting a gun at him within a distance which the gun will carry, or pointing a pitchfork at him standing within the reach of it, or by holding up one's fist at him in an angry, threatening manner. *State* v. *Morgan*, 3 Iredell 186.

17. When a defendant commences an attack and raises a deadly weapon against another, and stands in an attitude to strike such person, but suspends the blow to afford the object of his vengeance an opportunity to buy his safety, by compliance with the defendant's terms, this is an assault, though no blow is struck. *Ib.*

18. An assault is an offer or attempt by force to do a corporal injury to another; as if one person strike at another with his hands, or with a stick, and misses him; for if the other be stricken it is a battery, which is an offence of a higher grade. Or if he shake his fist at another, or present a gun or other weapon within such distance as that injury might be given; or drawing a sword, and brandishing it in a menacing manner. *U. States* v. *Hand*, 2 Wash. C. C. Rep. 435.

19. If one is charged with assaulting another, and with great violence and force pushing him down and throwing him into a pond, and endeavoring to strangle him by holding his head under water, this charge was held to be an assault and battery with intent to kill; and if not strictly such a charge, still the offence was considered a high crime, not within the cognizance of the County Court. *Southworth* v. *State*, 5 Conn. 325.

20. Upon an indictment for an assault and false imprisonment, in order to make out the offence charged, no actual force is necessary, but that a man may be assaulted by being beset by another; and if the opposition is such as a prudent man would not risk, then the defendant would, in contemplation of law,

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be guilty of false imprisonment. *Smith* v. *State*, 7 Humph. 43.

21. If a defendant in raising his arm for the purpose of committing an assault, at the same time accompany his action with words which show that he was determined not to strike, he is not liable to an indictment for an assault. *Commonwealth* v. *Eyre*, 1 Sergeant & Rawle's Rep. 347.

22. If one raise his fist, or a stick, or a gun in a posture to shoot, it may well be concluded that he intends what his acts seem to indicate, and the law permits one who is thus endangered to defend himself against the threatened aggression. But if the act be accompanied by declarations or other unquestionable evidences of an absence of intention to do any violence, then the party thus apparently put in jeopardy, is notified of the absence of any intention to commit a battery, and need not resort to violence in order to prevent it. Hence, if a defendant rides his horse so near to the prosecutor as to endanger his person and create a belief in his mind that it is his intention to ride upon him, it is an assault; and so, too, if he shakes his hickory over his head, indicating an intention to strike, and within striking distance, it is also an assault. *State* v. *Sims*, 3 Strobh. 137.

23. The mere fact of a person going to a place with the intention to assault another, will not subject him to the penalty of such an offence, unless he carry his intention into effect. *Yoes* v. *the State*, 4 Eng. Rep. 42.

24. Upon the trial of an indictment for assaulting and shooting another, if it appear that the defendant was in search of the prosecutor with a loaded gun, with a deliberate purpose to take his life, and, attracted by the prosecutor's breaking the glass, he saw the prosecutor's gun presented toward him and instantly fired his own gun, in pursuance of his original preconceived purpose to kill, then he is guilty of the offence charged in the indictment, and may be punished under the act of Tennessee of 1829, ch. 23, sec. 52. *Davidson* v. *State*, 9 Humph. 455.

25. When the evidence disclosed that the defendant presented a gun within shooting distance of and against the prosecutor, who was then armed with a knife and about to attack the defendant, this is no assault, if there was no attempt to use the gun, or intention to use it unless first assailed with the knife. *State* v. *Blackwell*, 9 Alabama 79.

26. Under the 38th sec., 2d art., of the Missouri act relating to crimes and punishments, when the indictment charges a felonious assault, if an injury be inflicted of such a dangerous character as to be likely to produce death, it matters not whether the instrument used to inflict the injury be a deadly weapon or not; nor is it material that the wound inflicted should be of a dangerous nature, even if made with a deadly weapon. *Cameo* v. *State*, 11 Missouri 579.

27. In every case of a prosecution for an assault with intent to murder, when the proof shows that it would have been murder had death ensued, that itself will be a sufficient ground for the jury to infer the existence of the actual intention to murder, as every one must be taken to intend the necessary consequence of his own acts, and hence it is not necessary to show that the defendant, at the time of the assault, had the intention to murder. *Cole* v. *State*, 5 Eng. 318.

28. It was formerly considered a felony to assault one with the intent of committing murder, but is now only a misdemeanor, and like other misdemeanors, may be punished in the discretion of the court; and though being a high misdemeanor, yet the punishment to be inflicted is at the discretion of the court, and must not of necessity be more excessive than in other cases of misdemeanor. *State* v. *Boyden*, 13 Iredell 505.

29. In order to subject a party to the punishment consequent upon an indictment for an assault with intent to commit a rape, it is necessary that the facts and circumstances accompanying the transaction should be such as to constitute the crime of rape in case he had succeeded and carried his intention into full effect; and the indictment must charge the offence to have been feloniously committed, and must con-

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tain the technical word, "ravished," and state that it was attempted to be done forcibly and against the will of the female. *Sullivant* v. *State*, 3 Eng. 400.

30. When a person goes to the house of another after having been told by the owner that he should not come, and at the request of some of the inmates of the house, enters, and after having entered the house is ordered out by the owner, whom he requests to go with him, and the owner refusing, he stops at the door and draws a pistol upon the owner; this was held to be an assault with intent to commit murder, and it was held that he might be convicted even under the old authorities, for such offence, since if death had been effected under such circumstances, it would have been murder. *State* v. *Boyden*, 13 Iredell 505.

31. It being lawful for any person to arrest a runaway slave, therefore it is the duty of the slave to submit to the arrest, and if he resist it with an attempt to kill the person arresting him, he is guilty of an assault with intent to commit murder in the first degree. *Tom* v. *State*, 8 Humph. 86.

32. It is a capital offence for a slave to assault a white person with intent to kill, although if the intention had been consummated, the killing would have been manslaughter only. *Nancy* v. *State*, 6 Ala. 483.

33. In Tennessee, the acts of 1820, ch. 9, sec. 1, and 1831, ch. 82, do not apply to an assault and battery with intent to kill; the intent to kill being the gist of the crime. *Sate* v. *Sharp*, 5 Yerg. 245.

34. Where an officer has a *fi. fa.* and attempts to levy it on articles exempt by law from levy and sale by execution, after being warned of the fact; held that the owner may employ as much force as is necessary to prevent the levy; but if he employs more force than is necessary, he becomes a trespasser. *State* v. *Johnson*, 12 Ala. 840.

35. In crimes requiring force as an element in their commission, there is no essential difference between an assault with intent, and an assault with attempt to commit the crime. *Johnson* v. *the State*, 14 Geo. 55.

II. Assault and Battery, how Prosecuted.

36. In the State of Georgia the black act of 9 George I. does not operate, and the proper course is an indictment for an assault with an intent to commit murder. *State* v. *Campbell*, Charlt. 166.

37. An assault committed in the presence of the Court is indictable, even after the party has been fined for the contempt of the Court. *State* v. *Yancy*, 1 Car. Law Rep. 519.

38. In Tennessee, a presentment for an assault may be made by the grand jury, though not committed in term-time, and they may do this by virtue of the provision of the act of 1842, ch. 141, sec. 4. *State* v. *Hunter*, 5 Humph. 597.

39. In Arkansas, an assault and battery is, according to the 14th section of 2d article of the constitution, a criminal offence, and therefore can only be prosecuted by indictment or presentment. *Rector* v. *State*, 1 Eng. 187. *Ib.* 461.

III. The Court having Jurisdiction of the offence of Assault and Battery.

40. In the State of Indiana, an ordinary assault is not an indictable offence, and by statute is within the jurisdiction of a justice of the peace to punish. *State* v. *Hailstock*, 2 Blackf. 257. And the same is true by statute in Missouri. *State* v. *Ledford*, 3 Missouri 102.

41. It was held in Tennessee, where the statute of 1797 confers the entire jurisdiction over indictments for assaults and batteries to the County Courts, that if the indictment be for an assault and battery with intent to kill, the Superior Court had jurisdiction. *State* v. *Anderson*, 2 Overt. 6.

42. An assault and battery upon an officer, being of a high and aggravated nature, does not fall within the jurisdiction of the police court in the city of Boston to punish, and therefore a judgment rendered by such court for such offence would not be a bar to a prosecution by an indictment for the same offence.

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Commonwealth v. *Hyde*, Thacher's Criminal Cases 112.

43. The act of 1846 has no reference to cases pending in the Circuit Courts at the time of its passage, but declares that the offences therein specified shall not thereafter be indictable, and transfers the jurisdiction of those offences from Circuit Courts to justices of the peace. *Gooch* v. *State*, 3 Eng. 448.

44. In Arkansas, under the amendment of 1846, of the constitution, an indictment or presentment in cases of simple assault, affrays, and common assaults and batteries, by a grand jury, is not necessary to the jurisdiction of justices of the peace, conferred upon them by the act of December 16th, 1846, and under this act justices of the peace possess jurisdiction of such offences, although committed before the passage of the act. *State* v. *Cox*, 3 Eng. 436.

45. In Indiana the act of 1849, p. 78, providing that justices of the peace in certain counties shall have exclusive jurisdiction of simple assaults and batteries; upon an indictment for an assault and battery with intent to commit a rape, where the jury found the prisoner guilty of the assault and battery, but not guilty of the intent to commit rape, and after verdict by agreement of the parties a new trial was granted, and a nolle prosequi entered to that part of the indictment which related to the intent to commit a rape, and the cause was then submitted to the Court, who found the prisoner guilty of assault and battery. Held, that the Court had no jurisdiction over the offence of which the prisoner was found guilty, and that the offence was exclusively within the jurisdiction of the justice of the peace, after the entering of the nolle prosequi, by virtue of the act of 1849. *Nelson* v. *the State*, 2 Carter, 249. Vide *Smith* v. *State*, *Ib.* 251.

46. The act of 1840, conferring jurisdiction upon the city court of Little Rock, in assaults and batteries, so far from conforming to the 14th section of the 2d article of the constitution of Arkansas, is clearly repugnant to it. *Rector* v. *State*, 1 Eng. 187.

47. A defendant having been arrested for an assault and battery, and having been taken before a justice of the peace, who bound the defendant over to appear at court; the prosecutor afterwards agreeing to settle, went with defendant before another justice, who allowed them to compromise on payment of costs. Held that the latter justice could not settle. *State* v. *Mousely*, 4 Harring. 553.

48. Where a defendant was prosecuted before a justice of the peace for an assault, and tried by a jury who returned a verdict of guilty of a breach of the peace, and assessed the fine at five dollars; it was held that the proceedings before the justice of the peace were conducted substantially in accordance with the statute regulating them. *State* v. *Douglass*, 1 Iowa, (Green) 550.

49. In Connecticut, by the Common Law, a battery with intent to maim and kill, is decided to be a high crime and misdemeanor and cognizable by the Superior Court. *State* v. *Danforth*, 3 Conn. 112.

IV. Evidence admissible on the Trial for Assault and Battery.

50. Where A. was indicted for an assault upon B., with intent to kill, and had previously written a very obscure letter concerning his own wife, B.'s mother-in-law, which provoked B. to make the first assault; held, 1. That the letter was incompetent as evidence against A. 2. That in such case a charge to the jury that they must find A. guilty if they believe he assaulted B. with intent to take his life, is error, because it takes from the jury all considerations of provocation or self-defence. *The State* v. *Williamson*, 16 Mis. (Bennett) 394.

51. The complaint or affidavit, made before a magistrate, upon which a criminal prosecution for assault and battery is founded, may be used on the trial, either to contradict or sustain the complainant's testimony. *State* v. *Lazarus*, 1 Rep. Con. Ct. 34.

52. Upon the trial of one indicted for an assault and battery, where the plea is not guilty, no evidence of

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mitigating circumstances can be offered; such evidence must be presented to the Court at the time of sentence. *State* v. *Smith & Cameron*, 2 Bay 62.

53. Upon the trial of an indictment for assault and battery in resisting an officer who has an attachment, valid upon the face of it, but serves it against property in which the defendant in the attachment has no attachable interest, no evidence can be allowed on the part of the person so resisting, which goes to show that the attachment was obtained by connivance between the plaintiff and defendant therein, with intent to get possession of his goods and defraud him out of the same. *State* v. *Buchanan*, 17 Vermt. 573.

54. In case of an indictment for an assault and battery committed by a husband on his wife, it is admissible on the part of the husband to prove in mitigation of the fine, that when he committed the assault and battery, he was provoked to do so by the misbehavior and misconduct of his wife. *Robbins* v. *the State*, 20 Alabama 36.

55. On the trial of an indictment for an assault and battery, with intent to murder, the Court permitted the State to prove that the defendant had said a short time before he committed the assault, that he expected to kill some one before he left town. It was held that this evidence was admissible to prove the intention of the defendant, and therefore proper. *Read* v. *State*, 2 Carter 438.

56. Where a defendant is upon the trial of an indictment for an assault, and offers evidence to prove his general good character and usual peaceable deportment as a citizen; it was held to be not admissible. *Drake* v. *Commonwealth*, 10 B. Munroe 225.

57. Where the defendant is indicted for an assault and battery, and pleads a former conviction for the same offence, and in order to sustain this plea, he offers the record of conviction, and to show that the offence is the same he produces a witness to prove what a witness on the former trial swore to; the latter witness being still living and within the State; it was held that the production of such witness was proper, and that his testimony was admissible for the purpose intended. *State* v. *Smith*, 11 Iredell 33.

58. On an indictment for an assault and battery the defendant may give evidence to show that he owned the premises on which the assault and battery were committed, and that he did the acts complained of in defence of the possession of his said premises; and if the assault and battery were committed in resisting persons entering upon the premises to open and work a highway, the defendant may prove that the alleged highway was laid through his orchard of four years growth, without his consent, *Harrington* v. *the People*, 6 Barb. S. C. R. 608.

59. Upon the trial of an indictment for an assault, with intent to commit rape, proof of previous acts of the defendant may be properly admitted as evidence of a guilty intent in committing the act charged in the indictment. *Williams* v. *State*, 8 Humph. 585.

60. Upon the trial of an indictment for an assault, with intent to murder, the defendant having proposed to ask the witness G. as to threats made by D. (who was assaulted), to drive the defendant from the place or take his life; it was held that this was legal evidence, and ought to have been answered by the witness; and whether the words and threats on the part of the party assaulted, were such as to excite the fears of a reasonable man, and to induce the defendant to apprehend violence to his person, so as to justify an attack upon the party making them, was a question for the jury under the law; and if not a justification, it might, in their judgment, rebut the presumption of malice on the part of the defendant. *Howell* v. *State*, 5 Georgia 48.

61. If the assault be made, the preconceived intention of committing it may be proved in aggravation. *Yoes* v. *State*, 4 Eng. 42.

62. Where upon the trial of an indictment for an assault, with intent to commit a rape, the female assaulted testified that about the 11th hour of the night of June 12, 1847, she awoke, and upon extending her hand she felt some person over her in the act of

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committing a rape, and that when she touched him he sprang from the bed, &c.; it was held that this testimony, loose and unsatisfactory as it was, was also liable to the objection of being a conclusion of law and not a simple statement of the facts of the case, which was the proper matter to submit to the jury; whose duty it was to draw conclusions, and not the witness. *Sullivant* v. *State*, 3 Eng. 400.

63. Where an assault upon the prosecutor followed soon after his declarations, "that no honest man would avail himself of the Bankrupt Law," and such declaration was likely to provoke to resentment the son of one thus publicly branded as dishonest; it was held that the State could show this circumstance as tending to point out the individual who took fire at this remark, and wreaked his vengeance on the person who made it. *State* v. *Griffis*, 3 Iredell 504.

V. Indictment for Assault and Battery; its Form and Contents.

64. It is not an indictable offence for the owner or hirer of a slave to beat him. *State* v. *Mann*, 2 Devereux 263.

65. Where an indictment is laid with an intent to commit murder, it is not necessary that the offence should be laid to have been committed unlawfully. *State* v. *Williams*, 3 Foster 321.

66. An indictment for an assault and battery, concluding with the words "contrary to the *statute* (instead of statutes), in such case made and provided," was held a sufficient compliance. *State* v. *Berry*, 4 Halsted 374.

67. If an indictment be found for an assault, with intent to commit a felony, it will be defective, unless the felony is particularized. *State* v. *Hailstock*, 2 Blackf. 257.

68. The statute of Ohio, in relation to an assault with intent to commit a rape, does not contain any clause which it is necessary to negative in an indictment for such offence. *Williams* v. *State*, Wright 42.

69. Where an indictment charges that the defendant did with force and arms make an assault in and upon W., laborer, on the —— day of ——, 1812, and then and there did with force and arms beat, wound, &c., it does not lay the venue sufficiently definite, even though the name of the county be in the margin. *Kennedy* v. *the Commonwealth*, 3 Bibb 490.

70. In New Hampshire an indictment lies at Common Law for an assault and false imprisonment. *State* v. *Rollins*, 8 N. Hamp. 550.

71. Where an indictment charges that A. in and upon one B. did make an assault, and he the said B. then and there did beat, wound, and ill treat; held that the indictment was good, and that the words he the said B. then and there, &c., was mere surplusage, and might be rejected. *Commonwealth* v. *Hunt*, 4 Pick. 252.

72. It is necessary that the indictment for an assault should show a certain year and day of the material facts alleged in it, or judgment will be arrested for such omission. *State* v. *Beckwith*, 1 Stewart 318.

73. The term "with actual violence," contained in the 14th sec. of the act of 1830, is not indispensable in an indictment under the act, in order to give a description of the offence. Other words of the same meaning may be used. *State* v. *Nichols*, 8 Conn. 406.

74. Where an indictment for an assault alleges that the defendant presented a gun at another within the distance the gun would carry, it is not necessary that the indictment should have charged that the gun was pointed at the party assaulted. *State* v. *Smith*, 2 Humph. 457.

75. It is necessary to allege in an indictment for an assault with an intent to kill, that the act was done feloniously, with malice aforethought; and when such allegation is made in the first part of the indictment where the assault is charged, it will not be sufficient to sustain it. *State* v. *Howell*, Geo. Decis. Part 1, 158.

76. Where an indictment alleges in the first count that the defendant made an assault upon Adnah Smith, then and there, being sheriff of said county of Addison, and in the second count alleges that he hindered and impeded a

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civil officer under the authority of this State, to wit, Adnah Smith, sheriff of the county of Addison aforesaid, and in both counts Smith is alleged to have been in the execution of his said office; it was held that this was a sufficient allegation that Smith was sheriff. *State* v. *Hooker*, 17 Vermt. 658.

77. In case of an indictment for assault and battery, it is not necessary to allege that the person beaten was in the peace of the State. 3 Chitty C. L. 821, n. e. Nor are the words force and arms necessary in the description of the offence. 1 Id. 241. *State* v. *Elliott*, 7 Blackf. 280.

78. In case of an assault upon an officer, who at the time of the assault had an execution against the body of the respondent, which he was about to execute, it was not necessary that the indictment for such assault should contain an allegation that the sum due on the execution had been demanded of the respondent, or that he refused to pay it. *State* v. *Hooker*, 17 Vermt. 658.

79. And in such case if the indictment alleges that the execution was dated the 27th day of September, 1842, and that it was delivered to the sheriff while it was in full life on the 6th day of October, 1842, that it was attempted to be served on the 7th day of November, and that it was made returnable in sixty days from date, it is a sufficient allegation that the execution was delivered to the sheriff within sixty days after its date, and that the sheriff attempted to execute it within its life. *Ib.*

80. And where it is alleged that the sheriff was in the execution of his duty as sheriff, and that, for want of property on which to levy the execution, he attempted to serve and execute the writ of execution, as he was therein commanded, by arresting the body of the said H.; and that the said H., then and there well knowing that said S. was sheriff of the county of Addison, and that he then and there had said writ of execution to serve and execute, and was then and there attempting to serve and execute the same, did then and there impede and hinder the said S. while attempting to serve and execute said writ of execution; all of these allegations taken together, though not in terms, fully amount to the allegation that the sheriff had the execution in his hands at the time the resistance was made. *Ib.*

81. And it is not necessary to allege in the indictment the place at which the execution was delivered to the sheriff. The place where the execution was delivered is immaterial; but the place where it is to be executed is important, and the time when it is delivered is material. *Ib.*

82. In an indictment for an assault with intent to murder, by shooting, it is not necessary to allege that the person assaulted was within the distance to which the gun would carry, for the attempt to shoot must have been coupled with the ability to do the act, or it would not have amounted to an assault; nor is it necessary to allege that the weapon charged to have been used was a deadly weapon. *Shaw* v. *State*, 18 Alabama 547.

83. When two commit a joint assault with intent to murder, the one with a knife and the other with a gun, a count in the indictment, which charges them jointly, is not objectionable for duplicity. *Shaw* v. *State*, 18 Alabama 547.

84. Where an indictment is found against one for impeding an officer in the execution of his official duty, the allegation should show the nature of the official duty, the manner of its execution, and the mode of resistance. *State* v. *Burt*, 25 Vermont R. 373.

85. Where an indictment is laid for an assault of an officer in the execution of his office, as at Common Law, or under the general statute, upon the matter of a breach of the peace, it is good without setting forth the nature of the official duty, manner of execution or mode of resistance, and may be sustained, notwithstanding the higher penalty superadded to the offence by the statute. *Ib.*

86. And if where a count in an indictment for a common assault, would be good, with the addition of the battery, it is held to be equally good for the assault without the battery. *Ib.* And it matters not whether the conclusion of the count is against the statute

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unless the count is claimed as good under the statute, for it may be regarded as surplusage, or the conclusion against the statute may be regarded as applicable to the proper statute. *Ib.*

87. In an indictment under the statute for an assault with intent to murder, it is necessary to specify the acts which constitute the assault. *Beasley* v. *State*, 18 Alabama 535.

88. The statute changing the punishment of an assault when accompanied with the intent to murder, does not create a new offence. The assault should therefore be alleged as at Common Law, with the additional averment of the intent with which it was committed. *Ib.*

89. An indictment for an assault with intent to commit murder, containing the averment that the assault was committed with malice aforethought, would be sustained if the jury found that the assault was made without premeditation and malice aforethought, but wilfully and maliciously with intent to murder. *Sharp* v. *State*, 19 Ohio 379.

90. Where an indictment charges the defendant with an assault and battery with an intent to murder, it was held that the indictment was not bad because it included a battery with the assault with intent to murder. *Cole* v. *State*, 5 Eng. 318.

91. Where an indictment for an assault upon a constable alleges that the officer was in the due execution of the duties of the office of constable, and that the defendant, while the said officer was in the due and lawful execution of his said office, unlawfully, knowingly, and designedly did hinder and oppose; it was held that this allegation sufficiently charged knowledge in the defendant of the fact that the officer assaulted was a constable. *Commonwealth* v. *Kirby*, 2 Cush. 577.

92. It is not necessary to allege in an indictment for an assault and battery that the person assaulted was late of the county, nor is it necessary to aver that the beating and wounding were to the prosecutor's damage. *State* v. *Wimple*, 8 Blackf. 214.

93. Where an assault has been committed on a child under ten years of age, and the indictment charges the assault to have been made "with intent feloniously to ravish and feloniously to carnally know," it was held that the indictment was good, as the words "to ravish" might be regarded as mere surplusage and rejected, and they could be referred to the different kinds of rape under the statute. *McComas* v. *State*, 11 Missouri 116.

94. In a statutory proceeding in which the indictment follows, with substantial accuracy, the language of the acts upon which it is framed, the nature or character of an assault is sufficiently alleged. *State* v. *Seamons*, 1 Iowa (Green) 418.

95. No particular description of the instrument used in the assault becomes necessary under sec. 20, R. S. p. 169. If designated as a deadly weapon or instrument it is sufficient. *State* v. *Seamons*, 1 Iowa (Green) 418.

96. If the indictment states, at least in substance, all the facts which constitute the offence of an assault, under the R. S. p. 169, sec. 20, and discloses clearly an indictable offence, sufficiently specific to advise the accused of its nature, and to enable him to plead a conviction or acquittal upon it in bar of another prosecution for the same offence; this is all that should be required. *State* v. *Seamons*, 1 Iowa (Green) 418.

97. An indictment for an assault with intent to murder must state the facts which constitute the assault. *Trexler* v. *State*, 19 Alabama 21.

98. Where a defendant is charged in an indictment for an assault, with having committed the assault with several weapons, it is immaterial whether the defendant used one or all of the instruments described in the indictment. If he made the assault with the intent and with one of the instruments described, which is a deadly weapon, he is substantially guilty as charged in the indictment. *State* v. *McClintock*, 1 Iowa (Green) 392.

99. An indictment for an assault with intent to commit a rape, charging that the party made the assault with intent feloniously to ravish, does not sufficiently charge the offence, as it

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ought to charge that the assault was made feloniously, using the word feloniously especially with reference to the assault, instead of the intent to ravish. *Williams* v. *State*, 8 Humph. 585.

100. The allegation, in an indictment for an assault with intent to commit murder, that the offence was committed feloniously, unlawfully, and with malice aforethought, most assuredly implies a wilfulness to do the act, and if the term wilfully had been expressly inserted it could have amounted to nothing more or less than mere surplusage. *McCoy* v. *State*, 3 Eng. 451.

101. Where an indictment for assault with intent to kill, was defective, and after conviction the judgment was reversed, for that reason it was held that the accused could not be set at liberty, but that proceedings must be had again under a new indictment, and that the accused must be remanded to jail in default of bail. *Jones* v. *State*, 11 Smedes & Marsh. 315.

102. In an indictment for an assault with an intent to kill, framed under the statute, How. & Hutch. 698, sec. 39, it is necessary to allege, in order to come within the statute, that the accused shot at a certain person, with intent to kill that person; and it is not enough to allege that the intent was to kill generally. *Jones* v. *State*, 11 Smedes & Marshall, 315.

103. Where an assault is made with an axe, it will be considered a deadly weapon without being so alleged in the indictment for such assault. *Dollarhide* v. *U. States*, 1 Morris 233.

104. An indictment under the 35th sec., 2d art. of an act concerning crimes and punishments, R. C. 1835, should state the circumstances attending the commission of the offence; and it is essential to aver the circumstances themselves, which, if death had ensued, would have made the offence manslaughter; and this is sufficiently done in the averment that the assault is made feloniously and with a dangerous weapon. *Jennings* v. *State*, 9 Missouri, 852.

105. An indictment charging the accused with an assault and battery with a deadly weapon upon a certain slave, with the intent to commit manslaughter, can be construed only to be an indictment for an aggravated assault, and it is not an indictment for an assault with an intent to kill, by which is understood and has been held an intent to murder. *Bradley* v. *State*, 10 Smedes & Marshall 618.

106. By statute of limitations, an indictment for an assault with intent to murder, must be found and filed within four years from the commission of the offence, and for an assault and battery within two years; and where the accused was indicted for the former and found guilty of the latter offence, more than two years after it was committed; held that the statute of limitations applied to the offence for which the accused was indicted, and not to the minor offence of which he was found guilty on a traverse of the indictment. *Clark* v. *State*, 12 Geo. 350.

107. A count in an indictment for an assault and battery, "stating that the def. in error maliciously, wickedly, and unlawfully did bite or cut off the ear of C." the Court held that the disjunctive "or" would be a fatal objection, but for the assault and battery which was the offence, and that the mode in which the injury was inflicted was only a circumstance of aggravation. *Scott* v. *Commonwealth*, 6 Sergeant & Rawle Rep. 224.

108. If an indictment contains but one count, and that for an assault and battery, the jury have no right to find a true bill for the assault alone. They must find for the entire charge contained in the indictment, or their finding will be bad. *State* v. *Wilburne*, 2 Brevard 296.

VII. Indictment for Assault and Battery, with Intent to Kill.

109. In an indictment for assault and battery, it is not necessary that the word unlawfully should be used. *State* v. *Bray*, 1 Missouri 180.

110. Where an indictment alleges that "A. Hunt &c., in and upon one P. Harvey, &c., did make an assault, and her the said A. Hunt then and there did beat, wound, and ill-treat, with an in-

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tent her the said P. Harvey, &c., to ravish," it was held that the words "her the said P. Hunt then and there," did not vitiate the indictment, and might be rejected. *Commonwealth* v. *Hunt*, 4 Pick. 252.

111. In cases of assault and battery, with intent to kill, it is necessary that the indictment should allege that the intent was unlawful and felonious. *Curtis* v. *People*, Breese 197.

112. In case of an assault where a party has commenced a civil action and public prosecution therefor at the same time, the attorney general will enter a nolle prosequi upon the indictment, unless the party makes his election. *State* v. *Blythe*, 1 Bay 166.

113. In an indictment under the 31st section of the act concerning crimes and punishments, charging the defendant with assaulting a female, with weapons and other means likely to produce great bodily harm, with intent to commit a rape, &c.; it must be established by proof as charged, that the assault was made with deadly weapons, or other means likely to produce great bodily harm. Where, therefore, the case made out was an assault upon a female child, under ten years old, but without any proof of violence, it would not sustain the indictment. It should have been drawn under the 34th section. *Humphries* v. *the State*, 5 Missouri R. 203.

114. Where an indictment charges a rescue, and also an assault and battery, and the defendant is convicted generally, if the averments as to the rescue are uncertain or bad, these may be rejected as superfluous and immaterial, and the Court may proceed to pass judgment upon the verdict as for an assault and battery. *State* v. *Morrison*, 2 Iredell's R. 9.

115. In an indictment charging that A., feloniously, and of his malice aforethought, assaulted B. with a sword, &c., then and there struck him, &c., the first allegation, of feloniously and of his malice aforethought, applied to the assault, runs also to the stroke, to which it is essential. *The State* v. *Owen*, 1 Murphy's R. 452.

116. An indictment against two which charges one with an assault, with the intent maliciously to kill and murder, and the other with maliciously and feloniously exciting his co-defendant to make an assault with that intent, is good at Common Law. *The State* v. *Pile*, 5 Alabama R. 72.

117. An assault, with intent to commit manslaughter, is indictable, and it is sufficiently described in the indictment as an assault, with intent to kill. 4 Missouri R. 618.

118. An indictment framed under 34th sec. of 2d art. of the act concerning crimes and punishments, the assault was described as being made with a knife, and the wound inflicted was termed a stab; held, that the word stab was not used as a technical term, but must be construed in its ordinary acceptation. *Ruby* v. *the State*, 7 Missouri R. 206.

119. Where the indictment in a case of assault and battery, with intent to kill, under the statute, charges the offence to have been committed "feloniously, wilfully, and of his malice aforethought," it was objected, on behalf of the prisoner, that sentence of death was improperly pronounced upon him, because the indictment does not charge the act to have been done with express malice, and the objection was held good. *Anthony* v. *the State*, 13 Smedes and Marshall's R. 263.

120. An indictment under the Revised Statutes, charging one with the commission of an assault and battery, with a deadly weapon, with the intent to kill, is sustained by proof of having done the act with intent to commit any felonious homicide; it is not necessary to prove an intent to murder. *The People* v. *Shaw*, 1 Parker Cimr. Rep. 327.

121. Indictment for assault with intent to kill, party may be convicted of assault and battery, or assault alone. *Stewart* v. *State*, 5 Ohio 241.

122. A person is liable to indictment, under s. 7, c. 53, Rev. Stats., 1843, for an assault and battery, with intent to commit murder, in the second degree. *The State* v. *Kesler*, 8 Blackf. 575.

123. Indictment for an assault, with intent to commit murder, charging that defendant, upon one D. E., "feloniously, unlawfully, and of his malice aforethought, &c., did make an assault,

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with intent him, the said D. E., feloniously, unlawfully, and of his malice aforethought, to kill and murder;" held that the words sufficiently charge a *wilfulness* without the use of the word *wilfully*. *McCoy* v. *State*, 3 Eng. R. 451.

124. An assault with intent to murder a slave is an indictable offence. *State* v. *Maner*, 2 Hill's S. C. Rep. 453.

VII. Evidence Necessary to Support the Indictment.

125. With regard to the evidence necessary to sustain an information against a justice of the peace, constable and informer, for assaulting and imprisoning a party under pretence of having a warrant to arrest such party, issued by such justice, see *Jones' Case*, 1 Robinson 748.

126. Evidence that the defendant had beaten Catharine Swails, will not support an indictment for an assault and battery on Ratharine Swails. *Swails* v. *State*, 7 Blackf. 324.

127. On the trial of an indictment for impeding an officer, allegations in regard to the character of the person assaulted need not be proved, being mere descriptions of the person, and the impeding and hindering the person are mere consequences of the assault. *State* v. *Burt*, 25 Ver. 373.

128. If a charge is made against one for an assault with intent to kill without malice, evidence which goes to show that it was done with malice, will sustain the charge as laid. *State* v. *Parmelee*, 9 Conn. 259.

129. In Delaware, under the act of assembly which provides, that if any negro or mulatto slave shall, with violence, make an assault upon another with the intent to commit murder, he shall be guilty of a felony, &c. The intent to kill, as well as the assault, must be proved; and all the facts must be considered in proof of the intent. *State* v. *Jefferson*, 3 Harrington 571.

130. If it is necessary to prevent the prosecutor from taking or carrying away from the presence of the defendant, his personal property, he can strike in defence of the same, if the prosecutor is not then a lawful officer; and in order to make the defendant criminally liable, the onus lies on the State to show that the prosecutor was at the time a lawful officer and was armed with a lawful execution. *State* v. *Briggs*, 3 Iredell 357. And if the defendant does not raise the objection to the prosecutor's authority at the time, it makes no difference. *Ib.*

131. Where an indictment was for an assault with a *basket knife*, with intent to kill, and the proof was that the instrument used to commit the assault was a *basket iron*, the indictment was sustained. *State* v. *Dame*, 11 New Hamp. 271.

132. In an indictment for an assault with the intent to commit murder, the testimony to sustain the charge must have been such as to have warranted a conviction for the crime of murder itself in case the defendant had succeeded in carrying out and effectuating it; and malice in such case is an indispensable requisite. *McCoy* v. *State*, 3 Eng. 451.

133. The evidence of a single witness showing that the defendant was seen with a knife in his hand in pursuit of the slave, when he was stopped by the witness, and that he then made threats against the life of the slave, was held to be entirely insufficient to warrant the conviction of the defendant on an indictment for an assault with intent to commit manslaughter. *Bradley* v. *State*, 10 Smedes & Marsh. 618.

134. In cases of assault and battery with intent to commit a rape, the offence may be proved without the testimony of the injured party. *People* v. *Bates*, 2 Parker Crim. 27.

135. Where the defendant is charged in the indictment with an assault and battery on T. A., a deputy sheriff, and on the trial it appears that the person upon whom the assault and battery were committed, was commissioned as a deputy sheriff by the name and addition of T. A., junior, this was held not to be a variance from the allegation in the indictment. *Commonwealth* v. *Beckley*, 3 Metcalf 330.

136. Where the indictment alleged that the defendant assaulted Silas Melville with intent to kill, and the evidence was that the name of the person

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assaulted was Melvin, it was held that this was such a variance that the court should have ordered an acquittal. *The State* v. *Curran*, 18 Miss. (3 Bennett) 320.

137. Where an indictment was framed under the 33d sec., chap. 64, of the act of 1839 (Hutch. Dig., p. 960), and the first clause of that section creates and defines the offence with which the party was charged, and is in the following words, viz.: "Every person who shall be convicted of shooting at another with the intent to kill, maim, &c., such other person, shall be punished by imprisonment in the penitentiary for a term not exceeding ten years;" held, that under such indictment it is necessary for the prosecution to prove that said defendant shot at the person on whom the assault was alleged to have been committed, with the intent to kill, before the defendant can be legally convicted. *Morgan* v. *State* 13 Smedes & Mar. 242.

VIII. Of the Trial, Verdict, Conviction and Judgment.

138. Where an indictment for an assault and battery is pending and a civil action at the same time, the trial upon the indictment cannot be continued till the trial of the civil action, unless the injured party is to be used as a witness on behalf of the government. *Commonwealth* v. *Elliot, et al.*, 2 Mass. Tenn. Rep. 372.

139. Where a prosecutor has commenced a civil action for an assault and battery, at the same time he is instituting criminal proceedings for the same assault and battery, he is not bound to make his election forthwith whether he will proceed in his civil action or not; and if he refuse to elect, the attorney for the prosecution will not be allowed to enter a nolle prosequi to the criminal prosecution. *State* v. *Frost*, 1 Brevard 385.

140. A prosecutor, having a right to proceed both civilly and criminally for an assault and battery, cannot be compelled to make an election as to which course he will pursue; yet, in such cases, the Court will not give a severe judgment upon the criminal conviction, unless the prosecutor will agree to relinquish his civil remedy. *State* v. *Beck*, Dudley 168.

141. Where two assaults are alleged in an indictment, it is the usual course to require the solicitor to elect for which assault he will proceed, after the evidence has been heard, and not before. *State* v. *Sims*, 3 Strobh. 137.

142. Where there are two indictments laid, one for resisting legal process and the other for an assault; held that they cannot be supported for the same offence, and if the same testimony will support both charges, the party cannot be found guilty of both. *State* v. *Johnson*, 12 Ala. 840.

143. Where one is on trial for an assault with intent to murder, the fact that he was intoxicated at the time, so as to be reduced to a state of temporary insanity, should have no influence with the jury. *State* v. *Bullock*, 13 Ala. 413.

144. If a father wantonly make an assault upon a third person, and his son come into the affray afterwards to aid his father in the assault, on the indictment against the son for an assault with intent to murder, the jury cannot consider his relation to his father, nor the circumstances of peril in which his father was placed. *Sharp* v. *State*, 19 Ohio 379.

145. A charge that the accused cannot be convicted of an assault with intent to kill and murder, unless he had at the time a positive intention to commit murder, is well calculated to mislead the jury, and should be refused. It is error to charge the jury on a trial for an assault with intent to kill and murder, that the same facts and circumstances which would make the offence murder if death had ensued, furnish sufficient evidence of the intention, since, by the Common Law, a killing would in many cases amount to murder, though the party committing the offence did not intend to kill. *Moore* v. *State*, 18 Alabama 532.

146. An indictment for an assault with intent to murder contained two counts. The judgment-entry recites that the State movedthat the defendant be tried on the first count in the

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indictment, and that the second count be postponed until the first is disposed of, to which there was no dissent by the defendant. On the trial upon the first count the jury found the defendant guilty as charged in the bill of indictment, and the solicitor afterwards entered a nolle prosequi to the second count. It was held, 1. That the postponing of the second count until the first was disposed of, was an error for which the judgment of conviction must be reversed. 2. That the defendant is not precluded from taking advantage of the error, by the recital in the judgment-entry that he did not dissent from such a course of proceeding. 3. That if the defendant had consented to go to trial on one count only, yet the verdict being general would be erroneous. 4. That the appellate court will not say that the defendant was not injured by the error, because a nolle prosequi was afterwards entered to the second count. *Flanagan* v. *State*, 19 Alabama 546.

147. Where a white person is indicted for an assault with intent to kill and murder, and the jury, by their verdict, find him guilty of an assault with intent to kill, the legal effect of the verdict is, that the party is guilty of an assault or assault and battery, as the case may be. *State* v. *Burns*, 8 Alabama 313.

148. In Ohio, where in an indictment there are counts under the 24th section of the act for the punishment of crimes for shooting with intent to kill, and under the 17th section of the same act, for assaulting with intent to murder, and the jury find the defendant guilty of the first charge, the Court cannot with the consent of the jury enter a verdict of guilty generally on all the counts in the indictment. *Wilson* v. *State*, 18 Ohio 143.

149. Where upon the trial and conviction on an indictment for a common assault, the statement of facts left it doubtful which commenced or made the first assault, and the jury had to determine, by weighing the different statements made by witnesses, as it was their peculiar province to do; it was held that the verdict of the jury under such circumstances could not be disturbed, and that there was no ground for reversing the judgment. *Givens* v. *State*, 6 Texas 344.

150. The finding a common assault, or assault and battery, upon a count in an indictment for an assault with intent to murder, is held to be good and valid. *Ib.* Vide *Gardenheir* v. *State*, 6 Texas 348.

151. Where a slave is indicted for an assault on a white person, with intent to kill and murder, and the verdict is "guilty of an assault with intent to kill" only, this will be considered as a finding of guilty of an assault with intent to kill, but not guilty of an intent to murder. *Nancy* v. *State*, 6 Alabama 483.

152. Where a verdict is, that the defendant is guilty of an assault with intent to kill, without the words "as charged in said indictment," it will be referred to the charge in the indictment. *Ib.*

153. The crime of an assault in Connecticut, under the 13th sec. of the act of 1830, and the 14th sec. of the same, was held to be identical; and therefore in a case where the indictment alleged an assault with intention to murder, and the jury found a verdict of guilty of an assault with intent to kill without malice aforethought, it was held to be a good finding. *State* v. *Nichols*, 8 Conn. 496.

154. Where a count is laid for a riot and assault, a finding by the grand jury that the defendant is guilty of a riot is partial and void. *State* v. *Creighton*, 1 N. and M. 256.

155. In a trial for an assault with intent to murder, a special verdict, which found the defendant guilty of striking with a loaded whip calculated to produce death, without cause or provocation, does not warrant the Court in rendering judgment of guilty in manner and form as charged in the indictment. *Leitz* v. *the State*, 23 Ala. 42.

156. Where on an indictment for assault and battery with intent to commit murder, and for an ordinary assault, the jury return a general or informal verdict, held proper for the Court to send the jury out with instructions to return a verdict in due form. 12 Ala. 465.

157. On an indictment for an assault

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with intent to murder, the defendant may be found guilty of an assault and battery when the indictment alleges a beating. *Clark* v. *the State*, 12 Geo. 350.

158. It is a general rule that where the accusation includes an offence of inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the inferior one; and hence in an indictment for an assault and battery with intent to murder, the defendant may be found guilty of a simple assault and battery, and not guilty of felonious intent to murder. *State* v. *Kennedy*, 7 Blackf. 233.

159. To sustain a verdict of guilty on an indictment for an assault with intent to commit murder, the evidence must show that, if the death had ensued, it would have been murder. *McCoy* v. *State*, 3 Eng. 451.

160. Under an indictment for an assault with intent to commit mayhem, a conviction of a simple assault would be held proper, upon the principle that a party indicted of one offence may be convicted of a lesser, provided it be of the same class with that with which the defendant stands charged. *McBride* v. *State*, 2 Eng. 374.

161. A defendant was indicted for manslaughter, and on trial was convicted, under the charge of the Court, of a common assault and battery. Such conviction was held to be correct, upon the principle that where an indictment includes an offence of an inferior degree, the jury may discharge the defendant of the higher crime, and convict of the lesser. *State* v. *Scott*, 24 Vermont (1 Deane's) 127.

162. An indictment under the Tennessee act of 1832, ch. 22, for an assault with intent to commit murder in the first degree, includes an indictment for an assault and battery; and if upon the trial the proof does not warrant a conviction for felony, the defendant may be found guilty of the misdemeanor; and under such circumstances, if the prosecution be not commenced within twelve months from the commission of the offence, the defendant may avail himself of the limitation prescribed in the act of 1820, ch. 9, sec. 1, as a bar to the prosecution; but he can only do so by proof of the facts upon the trial, and not by plea, demurrer, or motion, in arrest of judgment. *State* v. *Bowling*, 10 Humph. 52.

163. Where a white man is indicted for an assault on a slave with intent to murder him, and without demurring to the indictment or moving to quash it, is tried on a plea of not guilty, he may be convicted of assault and battery only, and he cannot afterwards, by assigning for error the verdict of the jury, raise the question whether an indictment can be found against a white man for an assault on a slave with intent to murder. *Carpenter* v. *the State*, 23 Ala. 846.

164. Where an indictment is found against one for an assault with intent to commit murder, a conviction may be had for the assault only, even though there is no distinct charge in the indictment for the assault alone. *State* v. *Coy*, 2 Aiken, 181.

165. Where an indictment is found for an assault with intent to commit murder, a prisoner, by force of the provisions of the 8th section of chap. 214 Revised Statutes, may be convicted of an assault with intent to commit murder in the second degree. *State* v. *Williams*, 3d Foster's R. 321.

166. The second statute relative to assaults and batteries simply abridges the discretion of the Court with respect to the amount of the fine and the duration of the imprisonment; but in nowise attaches the penalty or punishment to the offence. *State* v. *Berry*, 4 Halsted 374.

167. The jury, under the statute of Alabama of 1807, have no power to inflict imprisonment upon the conviction for an assault with intent to kill and murder. This is the province of the Court. *Hawkins* v. *State*, 3 Stewart & Porter 63.

168. Where a defendant is indicted under the first section of the statute of Virginia, for malicious and unlawful stabbing, and the jury bring in a verdict of guilty of unlawful stabbing, it was held that such a finding presents no case for which the Court can pronounce judgment on the prisoner. *Marshall* v. *Commonwealth*, 5 Gratt. 663.

169. In North Carolina, the Court held that they were not bound to imprison upon a conviction for an assault

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with an intent to kill, but that it was discretionary with the Court to inflict imprisonment, the pillory, and a fine; not that they must inflict all, but some or one of them. *State* v. *Roberts*, 1 Haywood 201.

IX. Justification.

170. An assault cannot be justified on the ground of abusive words and language. *State* v. *Wood*, 1 Bay 351.

171. A violent battery cannot be justified by any assault. The assault must be such as to make the battery a matter of self-defence; and the resistance in all cases must be in proportion to the assault. *State* v. *Quin*, 2 Const. Rep. 694.

172. A man has a right, after ordering another out of his house, and if he refuse to go, to use so much force as may be necessary to put him out, but no violence can be justified under such circumstances. *State* v. *Lazarus*, 1 Rep. Con. Ct. 34.

173. An assault with intent to commit murder cannot be justified by alleging that it was done in defence of one's property. *State* v. *Morgan*, 3 Iredell 186.

174. In criminal as in civil cases, if there be an assault, it cannot be justified other than by showing specially all the circumstances which render the act rightful, and the sufficiency of the alleged justification is a matter of law. *Ib.*

175. Proof that the prosecutor, in a case of assault and battery, was the aggressor, would not justify an enormous battery; nothing beyond the bounds of self-defence. *State* v. *Quin*, 3 Brevard 515.

176. When a man presents a pistol at another, threatening to shoot, he puts him in fear and gives him a legal excuse for a battery, and it may be questioned whether the act can be excused by proving that the pistol was not loaded, without also proving that the other person knew that fact, and in such case the mere presenting the pistol is an assault, and the State is not bound to prove that the pistol was loaded; this rests with the defendant to show that it was not loaded, and that the party assaulted so knew the fact to be. *State* v. *Cherry*, 11 Iredell 475.

177. Upon the trial of an indictment for an assault and battery, upon one M. with a bullet discharged from a revolving pistol, the government offered evidence to show that M. was in the passage-way along the side of the defendant's house, in the evening, and that while there the defendant came from his house and ordered him away. He refused to go, and the defendant took a stick and beat him with it, saying "I will make you go away." The stick broke, and the defendant then went into his house and came out with a pistol, which he aimed and discharged at M. who thereupon declared that he was shot; that the defendant put in evidence, tending to show that M. exposed his person to the defendant at his front door, and committed a nuisance upon his premises, and the defendant contended that he was attracted to the door by a stone or stick thrown against it, and that opening the door he found M. committed the nuisance complained of, and ordered him three times to go away; that M. did not move, and the defendant thereupon seized a broom and struck him and broke the broom, and then took a part of the handle and thrust it at him, standing on his own premises; and that returning into the house he took a pistol in his hand, but did not discharge the same. The jury were instructed that the facts proved were no justification of the assault and battery. This was held to be erroneous, and it was held that the facts should have been submitted to the decision of the jury, with instructions from the Court as to what, and what would not, in law, be a justification. *Commonwealth* v. *Goodwin*, 3 Cush. 154.

178. In North Carolina, it is settled that insolent language from a slave is equivalent to a blow by a white man in its legal effect, as an excuse for a battery, and the same principle applies to free negroes. *State* v. *Jowers*, 11 Iredell 555.

179. Upon indictments for assaults and batteries there can be no justification, unless it appear that the party

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committing the assault acted clearly in self defence, and it appears that a party having been struck, has no right to retaliate, by an assault, when it is in his power to keep aloof from the party striking. *State* v. *Gibson*, 10 Iredell 214.

X. Arrest of Judgment.

180. Where a defendant was convicted before a justice of the peace for an assault and battery on the wife of the complainant, and the case brought into the Court of Common Pleas on appeal; it was held on a motion in arrest of judgment of the Common Pleas, on the ground that the complaint did not give a sufficient description of the party assaulted, that the allegation that the assault and battery was committed in and upon the body of R. wife of the complainant, was a sufficient description. *Commonwealth* v. *Gray*. 2 Cush. 535.

181. Where a husband and wife were jointly indicted for an assault and battery, it was held that the joinder was not sufficient to arrest judgment, but that the fine ought to be assessed against each defendant. *Commonwealth* v. *Ray, et al.*, 1 Virg. Cas. 262; *Jones* v. *Commonwealth*, 1 Call 555.

182. A defendant being indicted for an assault, with attempt to kill and murder, and convicted therefor, moved in arrest of judgment, on the ground that the allegation of an assault, with attempt to kill and murder, was insufficient; that the language of the statute being an assault with intent to murder, the conviction was erroneous. The motion was held to be well founded. *State* v. *Marshall*, 14 Alabama 411.

183. Where a defendant has filed a motion in arrest of judgment upon an indictment for assaulting an officer while in the discharge of his duty as officer, on the ground that it is not alleged in the indictment that the defendant knew the party assaulted was a constable at the time the assault was committed; it was held that this could not be good cause for arrest of the judgment, but might be ground for entering judgment for a simple assault. *Commonwealth* v. *Kirby*, 2 Cush. 577.

XI. Miscellaneous.

184. By statute of 1793, c. 57, of Maryland, an assault, with an intent to commit sodomy, is made punishable. *Davis* v. *State*, 3 Harris & Johnson 154.

185. In South Carolina the Court will not allow a party who has commenced a civil suit for an assault and battery, to commence at the same time a criminal prosecution; and it will direct a nolle prosequi to be entered. *State* v. *Blyth*, 1 Bay 166.

186. Where the statute has the word "attempt" printed instead of *intent*, and the enrolled bill is found to have the word *intent*, it was held that the statute must be construed as if the word *intent* had been used instead of the word "attempt." *State* v. *Marshall*, 14 Ala. 411.

187. An assault and battery cannot be compromised after the accused is convicted. *The People v. Bishop*, 5 Wend. 111.

188. The act of April, 1790, in Pennsylvania, does not contemplate assault and battery with intent to kill as one of the class of offences described in such act, for which punishment by imprisonment in the penitentiary, at hard labor, &c., is provided. *Scott* v. *Commonwealth*, 6 Sargeant & Rawles Rep. 224.

BAIL AND RECOGNIZANCE.

I. Bailable offences.
II. Grounds for admitting to Bail.
III. Recognizance; its requisites and validity.
IV. Courts having power to admit to Bail; Sheriff's power to take Bail. Power of other officers to take Bail.
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VI. Time when Bail is to be entered. Place where it must be taken. Bail on a peace warrant. Excessive Bail. Justification of Sureties. Special Bail.
VII. Bail in cases of Murder, Homicide, Gaming, Treason, Piracy, Counterfeiting and Forgery, Burglary, Mayhem. Slaves.
VIII. Discharging Bail.
IX. Forfeiture of Recognizance.
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I. Bailable Offences.

1. In New Jersey the power of the Court to admit to bail in capital cases will be rarely exercised and with great reserve. *State* v. *Blackafellow*, 1 Halst. 332.

2. In Illinois all persons may be admitted to bail, except such as have committed capital offences, where the proof is evident or the presumption great. *Foley* v. *People*, 1 Breese 32.

3. In South Carolina, after indictment for a capital felony, the prisoner may be admitted to bail at the discretion of the Court of General Sessions, and that court may entertain affidavits tending to show that the prosecution was instituted from malice or mistake. *State* v. *Hill*, 3 Brevard 89.

4. In Georgia it is discretionary with the Superior Court, to bail in all cases whatsoever. *State* v. *Abbot*, R. M. Charlt. 244. But in felonies of high grade, where the affidavits are positive, and there are no extrinsic circumstances in favor of the prisoner, bail will be refused. *State* v. *Howell*, R. M. Charlt. 120. Where, however, upon a charge of murder, there are favorable circumstances in the case, and there is a presumption that the prisoner has only been guilty of manslaughter, the Court will admit to bail. *State* v. *Wicks*, Ib. 139; and see *Com.* v. *Keeper of the Prison*, 2 Ashmead 227.

5. By the constitution of the State of Missouri, every offence is bailable except capital offences, where the proof is evident, or the presumption great. *Shore & Parkinson's case* v. *the State*, 6 Mo. 640.

6. *Quere.* Whether the finding of an indictment by a grand jury renders the presumption so great as to deprive the Circuit Court of Missouri of any power to bail. *Ib.*

II. Grounds for Admitting to Bail.

7. Where the trial of a party charged with a capital offence is continued at one term, on account of the incompetency of the presiding judge to try him, and at the succeeding term by the State without his fault or assent, he is entitled, as a matter of legal right, to be admitted to bail, and this, notwithstanding the cause had been previously continued at his request. *Ex parte Stiff*, 18 Ala. 464.

8. The fact that the jury on a trial for murder could not agree on a verdict, will not in itself entitle the prisoner to bail. *State* v. *Summons*, 19 Ohio 139.

9. If the evidence exhibited on the hearing of the application to admit to bail, be so weak that it would not sustain a verdict of guilty against a motion for a new trial, the Court will feel it their duty to take bail. *State* v. *Summons*, 19 Ohio 139.

10. An indictment in a capital case raises such a presumption against the accused, as to deprive him of the privilege of being admitted to bail as a matter of right; and to entitle him to it, he must establish such facts as will rebut the presumption raised against him by the indictment. A general allegation of his innocence is not sufficient. *White ex parte*, 4 Eng. Arbe. 222.

11. Where the accused was in prison on four indictments for felony, it appearing that continued confinement would endanger his life, he was admitted to bail. *Archer's case*, 6 Gratt. 705.

12. In Alabama a statute provides that if any person be committed for treason or felony, and be not tried before the next stated term of the Court where the offence is properly cognizable, the Court may, on the last day of the term, set at liberty such prisoners on bail, unless it appear on oath or affirmation, that the witnesses for the State (mentioning their names) could not be produced; and if the prisoner be not tried at the second stated term after his commitment, unless the delay happen on the application or with the assent of the prisoner, he must be discharged from imprisonment on bail. *Ex parte Simonton*, 9 Porter 390.

13. In Pennsylvania, in cases of capital felony, where the proof is evident or the presumption great, bail

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cannot be allowed. *Com.* v. *Keeper of the Prison*, 2 Ashmead 227.

14. A presumption of innocence arising from acquittal on one of several indictments, founded on substantially one and the same offence, is sufficient to entitle to bail. *Green's case*, 11 Leigh 677. But acquittal on one of two indictments for passing counterfeit money will not entitle the prisoner to be let to bail in the other. *Summerfield's case*, 2 Robinson 767.

15. A person charged with a felony may make the omission of a public officer to prosecute, a good claim for bail, if the omission is made the means of oppression, or oppression shall be the consequence of it: as when a party is in custody and the prosecuting officer or committing magistrate permits a term of a court in which the prisoner could have been tried, to pass without instituting proceedings against him. Wayne, J. *State* v. *Abbot*, R. M. Charlt. 244.

16. Bail in criminal cases is not founded on the grace or favor of the Court, but wholly on the doubt which may exist as to the prisoner's guilt. If his guilt is past dispute, he ought not to be bailed. *People* v. *Lohman*, 2 Barb. 450.

17. At each step of the proceedings, the grounds upon which defendant can be let to bail diminish in proportion as the evidences of his guilt increase. After conviction and sentence, his claims to be let to bail are further diminished; yet even at that point, where it appears that his conviction was unjust, or there is a serious doubt as to his guilt, his application may be granted. *Ib.*

18. It seems that the statute in the State of New York gives to a defendant, under conviction and sentence, the right to apply to be let to bail, even after his conviction has been adjudged to be legal by the Supreme Court; but at that stage of the proceeding, the legal doubts concerning the guilt of the defendant ought to be considered as so well settled against him that the application for bail, if made to a judge at chambers, should be very cautiously entertained, and only granted in cases of great question and difficulty. *People* v. *Lohman*, 2 Barb. 450.

19. Although the general rule in cases of felony is that an indictment is to be deemed conclusive as to the guilt of the defendant, and that he is not to be allowed bail, there are several circumstances arising after indictment which entitle the party to bail, and which may be regarded as exceptions to the general rule. *People* v. *Van Horne*, 8 Barb. 158.

20. Where two grand juries out of three had adjudged that the crime committed was only manslaughter, and the third that it was murder, it was held that the accused was entitled to the benefit of the presumption of law that his offence did not exceed the grade of manslaughter, and he was accordingly admitted to bail. *Ib.*

21. The fortieth section of the eighth chapter of the Penal Code of Alabama, (Clay's Dig. 444,) by which it is enacted that if the defendant in capital cases is not tried at the first term at which he was properly triable, on account of any of the causes therein specified, he shall not be entitled to bail as a matter of right, but that he may claim to be discharged on bail if he is not tried at the second term, is not repugnant to the article of the constitution which declares that all persons before conviction shall be bailable by sufficient sureties, except for capital offences, where the proof is evident and the presumption great. *Ex parte Croom*, 19 Ala. 561.

22. A prisoner charged with a capital offence, who makes application to be discharged on bail, on account of an unauthorized premature adjournment of the Court, without any disposition having been made of his case, is primâ facie entitled to relief. *Ib.*

23. A prisoner in such case may insist on his right to be discharged on bail, although at the time of adjournment he was confined in the custody of the sheriff, at a place several miles distant from the court-house, and the sheriff was advised by physicians that it was unsafe to remove him on account of his wounds, and although he made no application for a trial, and might

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have continued his trial on account of his condition. *Ib.*

III. Recognizance—Its Requisites and Validity.

24. All the facts necessary to be set out in an indictment need not be stated in the recognizance. It is sufficient to state the name of the offence for which the accused has been arrested. *The State* v. *Hamer*, 2 Carter 371.

25. A recognizance taken by the Court in which the indictment is found, at the same time with an order changing the venue to another county, and which is conditioned for the appearance of the accused at the ensuing Circuit of the county to which the case is transferred, is not objectionable on that account. *Hall* v. *the State*, 15 Ala. 431.

26. The name of the conusor if signed to the recognizance need not be mentioned in the body of it. *Cunningham* v. *the State*, 14 Missouri 402.

27. The accused is entitled to an examination before he can be compelled to enter into a recognizance; but if he waive an examination, a recognizance entered into without it is valid. *Champlain* v. *the People*, 2 Comstock 82.

28. A penalty and condition are indispensable requisites to a recognizance. *Caldwell* v. *Brindell*, 1 Jones 293.

29. In New York, when a recognizance is taken by a justice of the peace for the appearance of the defendant to answer to a criminal charge, it must require his attendance at the next Criminal Court having cognizance of the offence. *The People* v. *Mack*, 1 Parker 567.

30. Where in New York a recognizance was conditioned for the appearance of the accused at the next Court of Oyer and Terminer, to be held in the county in June then next; and it appeared that a Court of Sessions was appointed to be held, and was in fact held, in the same county on the second Monday of May of the same year; such Court of Sessions having jurisdiction of the offence charged, the recognizance was held void. *People* v. *Mack*, 1 Parker 567.

31. Where a recognizance is taken in pursuance of an order of an officer authorized to let to bail, and by an officer having general jurisdiction to let to bail and to take recognizances, though he be not the officer before whom the application to let to bail is pending, it is valid; especially where the officer acquires jurisdiction of the person of the party by his voluntary appearance and acknowledgment, and where the officer before whom the application is pending subsequently adopts the recognizance then taken, and lets the prisoner to bail on the faith of it, and the recognizance itself is filed by him and becomes a record. *The People* v. *Legget*, 5 Barb. 360.

32. Where a recognizance is taken from the prosecutor of a criminal complaint before a police justice, conditioned to appear and testify at the next Court having cognizance of the offence, &c., it will not be vitiated by the addition of the words, "as well to the grand as the petit jury, and not depart the said Court without leave." *The People* v. *Millis*, 5 Barb. 511.

33. A recognizance to appear and answer to a charge of conspiracy need not designate in the terms of the indictment the particular act which the accused conspired to do. *Hall* v. *the State*, 15 Ala. 431.

34. Where the statute requires the recognizance to be made returnable to the term of the Court next to occur by law after the recognizance is taken; a recognizance conditioned for the appearance of the accused at a time when no Court sat by law, was held void. *Butler* v. *the State*, 12 Sm. & Marsh. 470.

35. The statute of Ohio requires that a recognizance taken by a justice of the peace or other officer authorized to take such recognizance, to be of any validity must be of record; and to make it a record, there must be a memorandum of its return entered on the minute book of the Court. *Sargeant* v. *the State*, 16 Ohio 267.

36. A recognizance taken on Sunday to prosecute an appeal in a crimi-

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nal case is void. *State* v. *Suhur*, 33 Maine 539.

37. Where the prisoner was ordered to give bail in the sum of four hundred dollars, with two sureties in the sum of two hundred dollars each, and he gave bail to the amount of four hundred dollars, with ten sureties in the sum of forty dollars each, it was held that the order had not been complied with, and that the sureties were not bound. *State* v. *Buffum*, 2 Fost. 267.

38. A recognizance to appear and answer an indictment to be preferred at a future time against the principal recognizer, need not set out the offence charged with the technical accuracy required in the indictment, but it will be sufficient if the offence be substantially described. *State* v. *Weaver*, 18 Ala. 293.

39. The omission of a party's name in the body of a recognizance will not make it inoperative as to him if he has regularly acknowledged it; and it need not be sealed by him. *Hall* v. *the State*, 9 Ala. 827.

40. *Quere.* Whether, where a seal is necessary to the validity of a recognizance, and the recognizance is signed by several recognizers, and seals set opposite the names of some of them, the seals upon the paper may not be referred to all who subscribe the obligation, and thus make its execution sufficient. *Hall* v. *the State*, 9 Ala. 827.

41. The recognizance will be sufficient although the offence be not decribed in the words of the statute. *Hall* v. *the State*, 9 Ala. 827.

42. A bond to appear and answer to a criminal charge, binds the principal not only to appear at the term to which it is returnable, but to continue to appear until acquitted, or in some legal way discharged; or, if tried and found guilty, until the sentence of the Court is passed upon him, unless he is permitted to depart sooner by leave of the Court had; and the evidence of this leave being had is an order entered on the minutes. *Dennard* v. *the State*, 2 Kelly 137.

43. Recognizances in criminal cases should be made returnable before the Court at a term thereof; and if made returnable before a judge at chambers, the prisoner is not bound to appear there. *Corlies* v. *Waddell*, 1 Barb. 355.

44. A recognizance given in the course of proceedings is not necessarily void because the proceedings are erroneous. *Com.* v. *Huffey*, 6 Barr 348.

45. An undertaking to answer to a charge for "resisting process," is sufficient in a recognizance to indicate the offence intended to be charged, although the statute makes the offence consist in knowingly and wilfully resisting or opposing any officer in the State in serving or attempting to serve or execute any legal writ or process whatsoever. *Browder* v. *the State*, 9 Ala. 58.

46. A recognizance conditioned that the accused will appear and answer at a specified term of the Court, may be extended at any subsequent term, if an indictment be found at that term. *Ellison* v. *the State*, 8 Ala. 273.

47. When the parties acknowledge themselves bound in a given sum, to be levied severally and individually, on their goods, &c., respectively. This is a joint and several recognizance, and not the several recognizance of each of the parties. *Ellison* v. *the State*, 8 Ala. 273.

48. The recognizance may be either to appear and answer the particular offence alleged, or to appear and answer what shall be objected against the accused. *The People* v. *Boeber*, 7 Hill 39.

49. In New York a recognizance taken in a Court of Oyer and Terminer, for the appearance of a defendant at a Court of General Sessions, to answer to a pending indictment, must be entered in the minutes of the Court, or it will be of no effect. *The People* v. *Graham*, 1 Parker 141.

50. Such entry must contain in substance all the parts of the recognizance, such as the acknowledgment of indebtedness, the offence alleged, and the condition, &c. A mere memorandum that a recognizance in a certain sum was taken, is not sufficient. *Ib.*

51. Where the persons approving of the recognizance respectively affixed to their signatures the letters J.P., it was held that as these characters were

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understood to be an abbreviation of the term justice of the peace—one in common use, and clearly indicating that that office is intended—it sufficiently appeared that the bond was entered into before, and approved by, two justices. *Shattuck* v. *the People*, 4 Scam. 477.

52. A recognizance taken by a justice of the peace for the appearance of the prisoner before him at a subsequent day, need not show that it was attested by the justice. *Ross* v. *the State*, 6 Blackf. 315.

53. The statute of Illinois requires every recognizance that has any relation to criminal matters to be taken to the people of the State, and when not entered into before a Court of Record, to be signed by the party acknowledging it; but no particular form is prescribed. R. L. 221; Gale's Stat. 239. *Shattuck* v. *the People*, 4 Scam. 477.

54. A recognizance will not be void because no writ of habeas corpus was issued, if the jailer produces the prisoner voluntarily. *Ready* v. *Com.*, 9 Dana 38.

55. A recognizance taken on a charge of felony, need not state the crime. *Fowler* v. *Com.*, 4 Monr. 128.

56. A recognizance at Common Law was an obligation entered into before some Court of Record or magistrate duly authorized, with a condition underwritten to do some particular act, as to keep the peace, or to appear and answer to a criminal accusation. It was not signed by the party entering into it. By it the cognizer acknowledged that he owed the cognizee a certain sum, to be levied of his goods and chattels, lands and tenements, if he should make default in performing the condition. In other respects it was in form like a penal bond. It was considered an obligation of more solemnity, and of greater legal effect than another bond. It was allowed a priority in point of payment, and the lands of the cognizee were bound from the time of its enrolment on the record. *Shattuck et al.* v. *the People*, 4 Scam. 477, per Treat, J.; and see 2 Blk. Com. 341; 3 Tomlin's Law Dict. 297.

57. A recognizance need not set forth the special facts which gave the officer an authority to act in the particular case in which it was taken; it is sufficient if he had jurisdiction in cases of that general description, and it appear that the condition is to perform something to which a party may legally be bound by recognizance. *The People* v. *Kane*, 4 Denio 530.

58. Where a recognizance which was taken before the recorder of Albany, (who is authorized to take bail in all cases,) conditioned for the appearance of the defendant at the next court of criminal jurisdiction to be held in that city, to answer to a charge of forgery, omitted to state the proceedings by which the application was brought before the recorder, it was held to be a good recognizance. *Ib.*

59. The history, nature and effect of a recognizance discussed. *Ib.*

60. Where the condition of a recognizance is that the principal shall appear at the next court of general sessions of the peace, and then and there answer all such matters and things as shall be objected against him, and abide the order of the court, and not depart the said court without leave, and in the meantime shall keep the peace, &c., it is valid, although it does not state what particular charge the principal shall answer. *Gildersleeve* v. *the People*, 14 Barb. 35.

61. The substance of the bond is, that the principal will appear and answer any charge which may be brought against him. *Ib.*

62. The legal effect of such a condition in an undertaking is, that the principal shall appear at the next court of general sessions, and answer such charge as shall be brought against him, and be forthcoming before the court at all times until discharged; not merely that he shall appear at the term of the court next following the date of the recognizance. *Ib.*

63. If the prisoner be bound to appear on a day when the court does not sit, the recognizance is void. *The State* v. *Sullivant*, 3 Yerg. 281.

64. An instrument which in form is a bond with collateral conditions, is not such an instrument as carries with it any of the evidence which in law distinguishes a recognizance from other

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obligations. *Hickes* v. *the State*, 3 Arkansas 313.

65. Where a recognizance is taken by a sheriff, and his attestation does not show the county of which he is sheriff, the recognizance is void. *State* v. *Austin*, 4 Humph. 213.

66. Superadded words of condition beyond what are authorized by the statute, will not destroy the effect of a recognizance; but it has precisely the same effect as if such superadded words were omitted. *Howie & Morrison* v. *the State*, 1 Ala. 113.

67. In Alabama, a recognizance is properly certified to the Circuit Court when it commences thus: Be it remembered that on, &c., came A. B., &c., before me, J. P., a justice of the peace in and for the county, &c., who acknowledged themselves, &c.; and is signed by the justice. *Ib.*

68. No form of words is required for the validity of a recognizance, provided it contains the essential requisites of such an instrument. *Dean* v. *the State*, 2 Smedes & Marsh. Rep. 200.

69. A recognizance which recites that the offence was committed in a different county from that to the court of which the prisoner was recognized, is not thereby void. *Dean* v. *The State*, 2 Smedes & Marsh. 200.

70. A statement made by a justice of the peace preceding a recognizance, showing the manner of its execution and who are the recognizors, is equivalent to a formal certification of those facts made at the foot of it. *Badger & Clayton* v. *the State*, 5 Ala. 21.

71. The obligation of a recognizance does not depend upon the inquiry whether the court before which the party is required to appear has jurisdiction of the particular crime charged against the party, but upon the duty and power of the magistrate to examine and admit such party to bail. *State* v. *Edney*, 4 Dev. & Bat. 378.

72. Where a recognizance taken before a justice of the peace has been signed and sealed by the principal and his surety, its validity is not affected by the failure to insert the name of the surety in a blank left for that purpose in the body of it. *Badger & Clayton* v. *the State*, 5 Ala. 21.

73. A recognizance for the appearance of witnesses to give testimony on an indictment in a court of general sessions, should contain an acknowledgment of indebtedness to the people, and state the offence charged. *The People* v. *Rudle*, 6 Hill 506.

74. Where the prisoner is an infant, he should not join with his sureties in the recognizance. *Semme's case*, 11 Leigh. 665.

75. A recognizance to appear at a court of general sessions to answer to an indictment to be preferred, is valid where the offence alleged is subtantially, although not technically set forth. *The People* v. *Blankman*, 17 Wend. 252.

76. Where a statute regulating an appeal requires that the person convicted shall recognize to the State for his personal appearance at the court appealed to, the prisoner's remaining in custody is not equivalent to such recognizance. *Com.* v. *Brigham*, 16 Pick. 10.

77. Where a recognizance is several, and is expressly required to be so by the statute, a cognizor cannot object that there is but one surety, although the statute requires two sureties. *Com.* v. *Porter*, 1 A. K. Marsh 44.

78. A recognizance to keep the peace is a criminal proceeding, and if taken to the governor, it is bad. *Adams et als.* v. *Ashby*, 2 Bibb. 96.

79. Although in Kentucky a circuit judge has power to take a recognizance in vacation, yet if taken in term time it must be taken in court. *Com.* v. *Little*, 1 A. K. Marsh, 566.

80. All recognizances in criminal cases should be taken to the State. *Com.* v. *Porter*, 1 A. K. Marsh 44.

81. A seal is not necessary to give validity to a recognizance. *State* v. *Ford*, 2 Mill's Const. Rep. 123.

82. The recognizance may be dated on the day on which the prisoner is recognized to appear. *State* v. *Bradley*, 1 Blackf. 83.

83. A recognizance to appear and answer a charge of "*gaming*," without describing the game to show that it was indictable, is bad. *Com.* v. *West*, 1 Dana 165.

84. Where the condition of a recog-

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nizance was, that the recognizance should be void if the principal should appear in the circuit court, to answer "*the charge herein*," and gave no other description of the charge, it was held that as the recognizance did not contain any thing to show that the prisoner was charged with a felony, it was bad on its face. *Simpson* v. *Com.*, 1 Dana 523.

85. The rule of construction of a recognizance to answer a criminal charge, is, if possible, to make it answer the purpose for which it was intended; where it has words that are absurd and repugnant to the design of the instrument, they are to be rejected as void. Therefore, the expression in a recognizance that it was to be void if default were made in the condition, is an absurdity, as not only contrary to the design of the recognizance, but as also repugnant to the concluding defeasance, which was, that if the condition was performed, then the recognizance to be void, else to remain in full force. *McCarty* v. *the State*, 1 Blackf. 338.

86. A recognizance in general binds to appear to answer, either to a specified charge, or to such matters as may be objected; to stand to, and abide the judgment of the Court; and not to depart without leave of the Court. The prisoner is not to depart until discharged, although no indictment be found against him, or although he be tried and found not guilty by a jury. *State* v. *Stout et als.*, 6 Halst. 124.

87. The material parts of the obligation and of the condition should be set forth in the body of the recognizance; and as close an analogy between the recognizance to appear before the examining magistrate, and the common one to appear at the Court to which it is returned, should be observed, as the nature of the case will admit. *Dillingham* v. *the United States*, 2 Wash. C. C. 422.

88. A recognizance executed by a person as surety in behalf of a party indicted on whom process has not been served, and who does not appear, is not binding. *People* v. *Slayton*, 1 Breese 257.

89. A qualification in a recognizance that it was only to be valid in case the prisoner was legally imprisoned, can have no operative effect, and must be regarded as mere surplusage. Such a qualification cannot either vitiate the recognizance, or enlarge or restrict its obligation. *State* v. *Wellman*, 3 Ohio Rep. 14.

90. A recognizance signed only by the sureties, without the principal conditioned for the appearance of the prisoner to answer to a charge of larceny, is valid. *Minor et al.* v. *the State*, 1 Blackf. 236.

91. Form of a recognizance for the appearance of a party who has removed a criminal cause by certiorari, for error in his conviction, and upon which the Supreme Court ordered that he be tried at the circuit. *The People* v. *Vermilyea*, 7 Cow. 108.

92. A prisoner who has applied for a writ of habeas corpus to be bailed, may upon the refusal of the judge to grant him bail, prosecute a writ of error from such judgment to the Supreme Court. *Lumm* v. *the State*, 3 Ind. 293.

93. The judge who hears such application may, under the R. S., 1843, cause notice to be given to the party interested in resisting it, or his attorney, and witnesses to be summoned to testify in the premises; and may fully investigate the case. *Ib.*

94. In Ohio, a recognizance to let to bail on the allowance of a writ of error, after conviction, is not authorized by the act allowing writs of error in criminal cases, and is therefore void. *The State* v. *Clark et als.*, 15 Ohio 595.

95. When a recognizance is conditioned for the appearance of M. at the next Court of Sessions to be held at the court-house, in the city of H., to be tried by a jury on two indictments for forgery, it is to be construed as requiring the appearance of M. at the next Court of Sessions to be held in the city of H., and not at the next Court of Sessions to be there held, at which a jury shall be summoned. *People* v. *Derby*, 1 Parker 392.

96. It seems unnecessary that the specific charge should be recited; to answer a charge of felony, would be sufficiently certain, because an indictment would lie for every felony. *Cotton* v. *the State*, 7 Texas 547.

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97. Although the conditions of a recognizance does not specify the courthouse of the county as the place at which the prisoner is to appear before the examining court, yet that place is to be intended, because the statute points out that as the only place where the examination shall be had. *Tyler* v. *Greenlaw*, 5 Rand. 711.

98. It is no objection to a recognizance in Indiana that it shows it has been entered into before an associate judge of the county, but does not state him to be a judge of the Circuit Court. *McCarty* v. *the State*, 1 Blackf. 338.

99. As the recognizance, when filed, is a record, and presumes that the charge was regularly made, it need not show that the charge was made on oath. *Ib.*

100. Where a criminal recognizance is taken before one of the special justices of the city of New York, it should so far state the crime charged as to show the case to be one in which the special justice had power to take bail. *The People* v. *Koeber*, 7 Hill 39.

101. If the statement be that the crime alleged before the justice was burglary, without setting forth that it was below the first degree, the recognizance will be void. *Ib.*

102. So if the recognizance only mentions that the prisoner was charged with the offence without stating in some way that there was probable cause for believing him guilty. *Ib.*

103. The recognizance should state the ground on which it is taken, so that it may appear that the magistrate taking it had jurisdiction, and authority to demand and receive it. Meller, C. J. *State* v. *Smith*, 2 Greenlf. 62.

104. A recognizance should recite the cause of taking it. *Com.* v. *Downey*, 9 Mass. 520, S. P.; *Com.* v. *Daggett*, 16 Mass. 447.

105. When a recognizance is taken by a magistrate binding an individual to appear at a court to answer, &c., the authority of the magistrate to take it must plainly appear by a specification of the charge which is made against the party. *Goodwin* v. *the Governor*, 1 Stew. & Port. 465.

106. It is essential to a recognizance that it show the cause of taking it. *Nicholson* v. *the State*, 2 Kelly 363.

107. Oral evidence cannot be received to give effect to a recognizance which is defective in any particular which by law is essential to its validity. *Nicholson* v. *the State*, 2 Kelly 363.

108. A paper purporting to be a recognizance taken by a person not authorized by law to take a recognizance or admit to bail in criminal cases, although not technically a recognizance because not an acknowledgment of a debt of record, nor before a judicial officer, is a contract between the securities and the State, and as such, good. *Dennard et al.* v. *the State*, 2 Kelly 137.

109. In Kentucky, the principal and bail need not sign a recognizance to answer a charge of felony. *Com.* v. *Mason et al.*, 3 A. K. Marsh 456.

110. Where a writ of error has been properly allowed under the 15th section of the article of the New York revised statutes concerning writs of error on judgments, &c., in criminal cases, an application by the accused to be admitted to bail, may be made under the 19th section of that article, although the writ of error is made returnable in the Court of Appeals. *The People* v. *Lohman*, 2 Barb. Sup. Ct. 450.

111. Upon an application by a defendant to be let to bail under the 19th section of the New York statute, the officer is to exercise a discretion. He is to act judicially, and not ministerially. And in the exercise of the power vested in him, he is to be governed by such legal considerations as have hitherto properly controlled courts and officers in the discharge of their duties in similar cases. *Ib.*

112. Where, upon an indictment for receiving stolen goods, the recognizance was to appear at the Supreme Court on a given day, and no such court was or could be held on that day, the recognizance was held void. *Com.* v. *Bolton*, 1 Serg. & Rawle 328; and see *State Treasurer* v. *Danforth*, Brayt. 140.

113. The recognizance, if acknowledged, need not be signed. *Madison* v. *Com.*, 2 A. K. Marsh 131.

114. Where a recognizance was

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signed and sealed by the parties, and attested by the justices, and by them delivered to the clerk with the warrant upon which it was founded, it was held that these allegations made it certain to a common intent that the recognizance was taken before these justices. *The State* v. *Cherry*, Meigs 232.

115. Where several persons of the same name enter into a recognizance, it will not be void for ambiguity if from the whole stress and scope of the instrument they can be sufficiently distinguished. *Ib.*

116. A recognizance must show the court to which the defendant is bound to appear; but it need not contain a recital of the offence to be answered, nor show on its face the court in which it was taken. *State* v. *Rye et al.*, 9 Yerg. 386. But see *Grigsby* v. *State*, 6 Yerg. 354.

117. Where one tried for burglary has been acquitted, the Court may compel him to find sureties for the peace and good behavior. *Bamber* v. *Com.*, 10 Barr. 339.

118. The surety in a recognizance in a criminal case is entitled to the same indemnity which is allowed to bail in civil cases. *Reynolds* v. *Harrol*, 2 Strobh. 87.

119. In Illinois, none of the proceedings before the magistrate, except the recognizance of the accused and of the witnesses on the part of the prosecution, are required to be sent up to the Court. *Shattuck* v. *the People*, 4 Scam. 477.

120. The recognizance, when filed, becomes matter of record, and the presumption from it is, that the charge was regularly preferred and investigated and the proper decision made, before it was entered into and acknowledged. *Ib.*; and see *McCarty* v. *the State*, 1 Blackf. 338; *The People* v. *Blankman*, 17 Wend. 252.

121. Where the recognizance was for the appearance of the defendant at the next term of the Court, to be held on the first Monday in March, it was held that the legal effect of the recognizance being, to appear at the next court, it was not avoided by the change in the time of holding the court. *Walker* v. *the State*, 6 Ala. Rep. 350.

122. A recognizance cannot be respited from one court to another in opposition to the remonstrance and express dissent of the bail, if they have the principal in court when the motion for a respite is about being made. *The People* v. *Clary*, 17 Wend. 374.

123. A recognizance may still be respited without the knowledge, consent or approbation of the bail; and in order to discharge them from liability, there must be an express dissent. *Ib.*

IV. Courts having power to Admit to Bail; Sheriff's power to Take Bail. Power of other Officers to Take Bail.

124. The final commitment of the defendant after the record of conviction has been completed and signed, entirely exhausts the power of the magistrate, and ousts him of jurisdiction to take a recognizance. *People* v. *Duffy*, 5 Barb. 205.

125. The Act of Mississippi of 1842, ch. 3, § 3, constitutes the Vice-Chancellor a conservator of the peace, and, as such, authorizes him to take the recognizance of a person charged with a criminal offence. *State* v. *Wofford*, 10 Smedes & Marsh. 626.

126. In Ohio, the power to bail persons in custody charged with crime is an original inherent power in the Court of Common Pleas; and when the term of the Court ends, the power passes to single Judges. *Powell* v. *State*, 15 Ohio 579.

127. In Alabama, a prisoner charged with a capital offence, after having been refused bail by a Circuit Judge, may petitition the Supreme Court for a revision of the decision of the Circuit Judge. *Ex parte Croom*, 19 Ala. 561.

128. In Indiana, in 1842, a Probate Judge had no authority to take a recognizance returnable to a court out of his county. *State* v. *Montgomery*, 7 Blackf. 221.

129. In Indiana, under the Revised Statutes, 1838, p. 162, no Judge of a Circuit Court could take a recognizance out of court, returnable to a Circuit Court out of the county where

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it was taken. But the law is now different; and under Revised Statutes, 1843, p. 990, the recognizance may be returnable to the court of another county. *Paine* v. *the State*, 7 Blackf. 206.

130. In Indiana, the Revised Statutes of 1838, p. 327, authorizes the Judge who issues a habeas corpus on complaint of illegal imprisonment, to call witnesses before him, inquire into the guilt of the prisoner, and to demand, recognize, or discharge him, as he may deem proper. Nor is it any objection to the validity of the recognizance, that he fixes a greater amount than that required by the committing magistrate. *The State* v. *Best et al.* 7 Blackf. 611.

131. Under the 124th section of the statute of Connecticut, concerning crimes and punishments, the magistrate is authorized to take a recognizance from the defendant, not only to keep the peace and be of good behavior, but also to appear before the next County Court, and abide the judgment and order of that court; and if he do not so appeal, it is a forfeiture of the recognizance. *Sturges* v. *Sherwood*, 15 Conn. 149.

132. In the State of New York, under the statutes concerning disorderly persons, the magistrate before whom the conviction takes place has no power, acting singly, to take a recognizance for good behavior, after the record of conviction is filed. *The People* v. *Brown*, 23 Wend. 47.

133. At common law, a Court of Record has a discretion to require sureties for good behavior from a party who shall have been found guilty of a gross misdemeanor, and there is no change of law in Tennessee in this respect. *Estes* v. *the State*, 2 Humph. Rep. 496.

134. But this power must be exercised with a sound legal discretion. The character of the offence must contain in itself that turpitude that would justify the appellation of *gross* to the offence. *Ib.*

135. In Indiana, where a person has committed a crime during the session of the Circuit Court, he may be recognized to appear at a subsequent day of the term by a Judge at Chambers. *Crandall* v. *the State*, 6 Blackf. 284.

136. The power to take recognizances is incident to every common law court of record. *Young* v. *Shaw*, 1 Chipman 224.

137. In Ohio, where one charged with crime has been committed for trial by a justice of the peace, the Court of Common Pleas has power to recognize him to appear from day to day without inquiring into the circumstances. *State* v. *Dawson*, 6 Ohio 251.

138. The power to admit to bail is incident to the power to hear and determine the offence alleged. *The People* v. *Van Horne*, 8 Barb. 158.

139. The Supreme Court of New York, or a justice thereof, as also Courts of Oyer and Terminer, have power to bail in all cases, whether upon a charge of treason, murder, arson, or any other offence. *People* v. *Van Horne*, 8 Barb. 158.

140. Whether the accused in a case of felony shall be allowed bail, is a question resting in the sound discretion of the Court. *People* v. *Van Horne*, 8 Barb. 158.

141. It is discretionary with the Court to admit the prisoner to bail on a renewed application, after having previously refused so to do. *Campbell ex parte*, 20 Ala. 89.

142. The sufficiency of an affidavit to hold to bail, and the amount of bail to be given by a person arrested on mesne process in the District of Columbia, are, under the Act of Congress of 1842, ch. 108, to be decided by the District Court. *Taylor ex parte*, 14 How. U. S. 3.

143. A magistrate, who has authority to take the recognizance of persons charged with criminal offences, cannot delegate the power to another. *Butler* v. *Foster*, 14 Ala. 323.

144. Where the statute requires a recognizance, a sum of money cannot be received by the Court in lieu of or as a substitute for bail. *Butler* v. *Foster*, 14 Ala. 323.

145. The New York Supreme Court has the same power in relation to bail as the Court of King's Bench in England; and may let parties charged with criminal offences to bail in all

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cases whatsoever. But though the crime appear to be but manslaughter, it is not of course to allow bail. If there be no reasonable doubt of the guilt of a prisoner charged with committing a felony, he ought not to be bailed. *Ex parte Taylor*, 5 Cow. 39; and see *Com.* v. *Rutherford*, 5 Rand. 646.

146. The Court of General Sessions of South Carolina has the same power to bail in all cases whatsoever as the Court of King's Bench in England. *State* v. *Hill*, 1 Rep. Const. Ct. 242.

147. In South Carolina, where two justices, under the Habeas Corpus Act, had admitted a person to bail who was charged in the warrant with murder, it was held that they were guilty of an escape, and might be indicted. *State* v. *Arthur et al.* 1 McMullan 456.

148. The inferior magistrates of the city of Philadelphia cannot admit to bail in felonies of a high grade. *Com.* v. *Keeper of the Prison*, 2 Ashmead 227.

149. By the Act of Kentucky of 1795, the city judge of Louisville has in respect to vagrants in that city the same authority as the Circuit Courts and justices of the peace. *Frishe* v. *Com.*, 6 Dana 318.

150. In Alabama, the sheriff has no authority to take a recognizance from a person arrested under a capias on a charge of felony. *The Governor* v. *Jackson*, 15 Ala. 703.

151. The penal code of Alabama (Digest 601, § 5, 6) directs that when the offence for which the party is arrested is a misdemeanor, it shall be the duty of the sheriff to take his recognizance with sufficient sureties. Such recognizance may be taken by a deputy-sheriff; and it need not be certified by the officer. *Shreeve et al.* v. *the State*, 11 Ala. 676.

152. In North Carolina, where a sheriff arrests a person for a breach of the peace, he has no right to take his recognizance to keep the peace, but must carry the offender before a judge or justice, who may commit or bail him. *State* v. *Hill*, 3 Iredell 398.

153. Under the statute of Arkansas, when an indictment is for a bailable offence, the sheriff is authorized to take a recognizance when the sum for which bail is required, is endorsed on the writ; and he may take bond and security where no such indorsement is made. *Gray* v. *the State*, 5 Arkansas 265.

154. In North Carolina, a sheriff has no authority to take a recognizance; and where he attempted to do so, the instrument was held to be but a simple obligation. *The State* v. *Miles*, 2 Dev. 555.

155. In Mississippi, the sheriff is not allowed to take recognizance when the process is returnable forthwith; but when the prisoner is only required to appear at a distant day, it is competent for him to do so. *Moss* v. *the State*, 6 How. Miss. Rep. 298.

156. In Tennessee, a sheriff has no power to take bail for the appearance of prisoners committed for offences, except such as is given by statute; and he is prohibited from taking bail where the examining magistrate has determined that the offence is not bailable. *State* v. *Horn*, Meigs' Rep. 473.

157. In Connecticut, the sheriff has power to admit to bail one committed by a justice for not finding sureties. *Dickinson* v. *Kingsbury*, 2 Day 1.

158. In Tennessee, a deputy sheriff has no power to take bail. *The State* v. *Edwards*, 4 Humph. 226.

159. By the act of Tennessee of 1809, ch. 6, sec. 2, the sheriff is authorized to take bail in cases where the principal may be surrendered by his sureties. By the act of 1831, ch. 4, sec. 1, the sheriff is authorized to take bail in all criminal cases where the accused has been committed to jail for want of surety. These are the only statutes in Tennessee which authorize the sheriff to take bail in criminal cases. He can only take bail in the given cases mentioned in these statutes. He must, therefore, recite in the recognizance the state of facts, upon the existence of which his authority to take the bail is founded. Otherwise the Court cannot see that the recognizance was entered into before an officer having by law power to take it. Green J. *State* v. *Edwards*, 4 Humph. 226.

160. A jailer has no authority to take recognizances in criminal cases, although he may do so in Kentucky in civil cases, under the statute of 1812.

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Dig. 678, *Com.* v. *Lee*, 3 J. J. Marsh. 618.

161. Under the act of North Carolina of 1794 (Rev. Sts. c. 62, 97), an oral request by a plaintiff in a warrant to an officer to take bail is sufficient to justify him in insisting on bail; but an officer, by virtue of his office, is not an agent of the plaintiff for exacting bail, and it may be doubted whether he can become an agent for that purpose. *State* v. *Kirby*, 4 Iredell 90.

V. Power of a Justice of the Peace to take Bail.

162. In Illinois, justices of the peace have power to take recognizances in all cases where the offence is bailable. *McFarlan* v. *the People*, 13 Ill. 9.

163. In Kentucky, where a free person is arrested on a criminal charge, a justice of the peace may take bail for his appearance at the Circuit Court on the first day of the next succeeding term. *Hostetter* v. *Com.*, 12 B. Mon. 1.

164. In Virginia, after the prisoner has been sent to a court of record for trial, a justice of the peace has no right to admit to bail. *Hamlett* v. *Com.*, 3 Gratt. 82. The justice can, however, take bail after the examining court has decided that the prisoner is bailable, and fixed the amount of bail. *Ib.* But it must appear on the record that the prisoner was bailable. *Ib.*

165. Whether two justices of the peace are authorized under the New-York statutes relative to disorderly persons, to take the recognizance after the filing of the record, and previous to the commitment of the offender, —*quere*. *People* v. *Brown*, 23 Wend. 47.

166. In Ohio, a justice of the peace who has bound over one charged with crime, has no power to cancel the recognizance and discharge the accused. *Benjamin* v. *Garee*, Wright 450.

167. In Vermont, a justice of the peace, upon the complaint of a private individual for a felony or misdemeanor, may arrest, bind over, or commit for trial. But unless the complainant has a pecuniary interest in the conviction of the offender, the bond must be taken to the State. *State Treasurer* v. *Rice, et al.*, 11 Vt. Rep. 339.

168. In Connecticut, a justice of the peace has the power to require sureties of the peace and good behavior of a person charged with keeping a bawdy house; and on failure of compliance with such order, may commit the offender to prison for a term not exceeding thirty days. *Darling* v. *Hubbell*, 9 Conn. 350.

169. But where the offence alleged in the complaint was that of keeping a bawdy house, and the defendant was found guilty of that specific offence alone, and thereupon an order was made not to keep or frequent bawdy houses, it was held that such order was illegal, and a bond taken in conformity thereto, void. *Ib.*

170. Where a justice of the peace had authority to hear a complaint and take a recognizance only in the absence of the police justice, residing in the same town, it was held that the legal presumption in the absence of proof, was that the justice of the peace did not transcend his jurisdiction. *People* v. *Mack*, 1 Parker 567.

171. Under the statute of Vermont, authorizing justices of the peace to commit or bind over for trial, it is sufficient for him to return a copy of the recognizance, the statute not requiring any return of the original recognizance to be made to the court before which the accused is to appear. *Treasurer* v. *Pierce*, 2 Chipman 106.

172. In South Carolina, two justices of the peace have a right to let to bail a prisoner brought before them on a charge of felony; but not after he has been committed. *Barton* v. *Keith*, 2 Hill S. C. 537.

173. A justice of the peace may let a prisoner to bail at an adjourned examination. *Potter* v. *Kingsbury*, 4 Day 98.

174. A justice of the peace in Massachusetts has no right to take bail from one charged with homicide. *Com.* v. *Loveridge*, 11 Ohio Rep. 337. Neither can he let to bail one convicted of felony who escapes before sentence into another State, and is subsequently brought back. *Com.* v. *Otis*, 16 Mass. 198.

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175. A justice of the peace has no authority to let to bail a prisoner committed by another justice. *Com.* v. *Canada*, 13 Pick. 86.

176. In Massachusetts a justice of the peace cannot admit to bail for an offence which may be proceeded against as well by action or information *qui tam*, as by indictment. *Com.* v. *Cheney*, 6 Mass. 347.

VI. Time when Bail is to be Entered—Place where it Must be Taken—Bail on a Peace Warrant—Excessive Bail—Justification of Sureties—Special Bail.

177. Where a prisoner had been convicted of felony in one county and sentenced to the State prison, but escaped and was arrested on a charge of a similar offence subsequently committed in another county, bail in the latter case was refused. *State* v. *Burrows*, Kirby 259.

178. In case an indictment is quashed because it was found by a grand jury summoned by the sheriff without process, the defendant must be held to bail to appear before the next Court of Oyer and Terminer. *Nichols* ads. *the State*, 2 South. 539.

179. In South Carolina, although in minor offences it is customary to admit persons after conviction to bail, where motions for new trial or in arrest of judgment are made ; yet after conviction of an infamous crime, and motion for a new trial or in arrest of judgment, bail will not be allowed. *State* v. *Connor*, 2 Bay 34.

180. The power to bail after conviction, existed at Common Law. *Davis* v. *the State*, 6 How. Miss. Rep. 399, and see *State* v. *Hill*, 3 Brevard 89.

181. In Mississippi, where the punishment is only fine and imprisonment, the Court will allow bail after conviction, when the peculiar circumstances of the case would seem to justify it. But the power of the judges to take bail after conviction, will be exercised with great caution, and only in minor offences. *Davis* v. *the State*, 6 How. Miss. Rep. 399.

182. Where a prisoner is arrested by virtue of a warrant endorsed pursuant to 2 N. Y. Rev. Sts. 707, sec. 5, for an offence punishable by imprisonment in the State prison, he cannot be let to bail in the county where the arrest is made, but must be taken back to the county in which the warrant was issued. *Clarke* v. *Cleveland*, 6 Hill 344.

183. When a party is taken on a peace warrant and bound to appear at court, such court cannot review the judgment of the magistrate below allowing costs. *State* v. *Wilson*, 1 Jones' N. Car. 550.

184. Where the accused was charged with embezzlement to the amount of between seventy and eighty thousand dollars, bail in the sum of twenty-five thousand dollars was held not to be excessive. *Snow ex parte*, 1 Rhode Island Rep. 360.

185. The offence of denying, delaying, or obstructing bail, where it ought to be granted, was not only known at Common Law, but was punishable by action at the suit of the party wrongfully imprisoned, as well as by indictment at the suit of the king. Yet to constitute this offence by requiring excessive bail, it must have been manifest that either the number or the sum required, was unreasonable : for the officer who demanded them was at the same time liable if he accepted insufficient bail. Woodbury, J. *Evans* v. *Foster*, 1 New Hamp. Rep. 374.

186. Bail in the sum of two thousand dollars on a charge of perjury—likewise on a charge of stealing property to the value of five hundred dollars, is not excessive. *Evans* v. *Foster*, 1 New Hamp. Rep. 374.

187. Sureties for the accused's appearance to answer an indictment, &c., must justify, when required by the district attorney. *The People* v. *Vermilyea*, 7 Cow. 108.

188. Special bail has the right to arrest his principal anywhere and at any time, to render him in discharge of the bail. The bail may make the arrest himself or may delegate the power to another, or others in writing, to make the arrest for him. Either the bail or his deputy may call in the aid

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of others in making the arrest; but such aid must be rendered in presence of the person authorized to make the arrest. *State* v. *Mahon*, 3 Harrington 568, per Booth, C. J.

189. The force of a special bail-piece ceases when the party is arrested on a *ca. sa.*, though the prisoner escape and he cannot afterwards be surrendered by his special bail. *Ex parte Badgley*, 7 Cow. 472.

VII. Bail in cases of Murder—Homicide—Gaming—Treason—Piracy—Counterfeiting and Forgery—Burglary—Mayhem—Slaves.

190. Where a prisoner indicted for murder, after the case has been continued by the State, and at the same term, applies for, and obtains a change of venue, the continuance is necessarily set aside and will not authorize him, upon the case being continued by the State in the court to which it is transferred, to claim, as a matter of right, that he be admitted to bail, on the ground that the State has twice continued the cause. *Ex parte Johnson*, 18 Ala. 414.

191. Where upon the trial of one of two several indictments for murder, the accused is acquitted, he will be let to bail on the second indictment, on the ground that the acquittal affords such a presumption of his innocence of the identical charge reiterated in the second indictment, as to warrant the Court in taking his recognizance.—*State* v. *Summons*, 19 Ohio 139; and see *Green's case*, 2 Leigh 677.

192. Bail refused a prisoner against whom a true bill for murder was found at the term during which he surrendered himself and demanded his trial; and the State allowed to continue the case for want of witnesses. *State* v. *Holmes*, 3 Strobh. 272.

193. Under the ordinance of Congress of 1787, relative to the Northwest Territory, one arrested upon an indictment for murder is not entitled to bail. *Hight* v. *United States*, 1 Morris 407.

194. In Kentucky, the accused on a charge of murder is entitled to bail when the proof of his guilt is not evident, nor the presumption great. *Ullery* v. *Com.*, 8 B. Mon. Rep. 3.

195. Where a person who had been indicted for murder, was in extreme ill health, which was so aggravated by his confinement as to endanger his life, it was held to be good cause for admitting him to bail. *Semmes' case*, 11 Leigh 605.

196. A prisoner held under an indictment for murder cannot be bailed on ex parte testimony. *State* v. *Dew*, 1 Taylor 142.

197. By the 17th section of the 1st article of the Constitution of Alabama, it is declared that "all persons shall, before conviction, be bailable by sufficient securities, except for capital offences, where the proof is evident, or the presumption great," &c. Under this constitutional provision, it is clearly competent for the Court, in a case where "the proof is not evident, or the presumption great," to admit to bail a prisoner charged with murder, even though it appears on oath or affirmation that the witnesses for the State could not be produced. Collier, C. J. *Ex parte Simonton*, 9 Porter 390.

198. Where a prisoner is indicted for murder in the first degree, he may sue out a writ of habeas corpus to be let to bail, and upon proof that he is guilty of a bailable homicide, he should be allowed bail. *Lumm* v. *State*, 3 Ind. 293.

199. By the statute of Missouri, homicide in all its grades except the first, is bailable. *Shore* v. *State*, 6 Mo. 640.

200. In North Carolina, when a man is indicted for murder, he cannot be bailed upon affidavits taken ex parte. *The State* v. *Dew*, 1 Tayl. 142.

201. A recognizance to appear and answer to a charge of "playing at a game of cards," is defective, because simply "playing at a game of cards" is not an indictable offence. *Cotten* v. *the State*, 7 Texas, 547; *Towsey* v. *the State*, 8 Texas 173.

202. Where in Tennessee a judge required the defendant to find sureties that he would not gamble for twelve months, it was held that such special bond was not authorized by law, but that a recognizance with sureties for

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good behavior generally, would have been the proper form of the undertaking. *Estes* v. *the State*, 2 Humph. 496.

203. The circumstances must be very strong which will at any time induce the Court to admit a person to bail who stands charged with high treason. *U. S.* v. *Stewart*, 2 Dallas 343; but see *U. S.* v. *Hamilton*, 3 Dallas 17.

204. In the case of an indictment for piracy, it was held that if in the opinion of a skilful physician, the nature of the prisoner's disorder was such that confinement must be injurious, and might be fatal, he ought to be bailed. *U. S.* v. *Jones*, 3 Wash. C. C. 224.

205. If a person accused of forgery be confined in prison, he will be admitted to bail at the second court, if no indictment has been found against him. *State* v. *Buych*, 2 Bay 563.

206. In North Carolina, after conviction for passing counterfeit money, it was held that the prisoner was not entitled to be bailed as a matter of right; but that it rested in the sound discretion of the judge before whom the appeal was taken. *State* v. *Rutherford*, 12 Hawks 453.

207. Where upon an indictment for burglary, the prosecuting attorney was unwilling to go to trial upon the evidence he possessed, the prisoner was bound in his own recognizance to appear for trial at the next term. *Com.* v. *Phillips*, 16 Mass. 423.

208. Upon indictment for mayhem, if the offence be aggravated, and there be no mitigating circumstances, bail will not be taken. *State* v. *Mains*, Coxe 335.

209. A statute of Kentucky, of 1800, (2 Sitt. Sans. 418,) provided that when any slave was imprisoned, under that act, the owner of the slave might bail him, in those cases in which free persons were bailable. *Ready* v. *Com.*, 9 Dana 38.

210. In Kentucky, although voluntary manslaughter by a slave is made punishable by death, yet he will be entitled to the privilege of bail, unless the court is of opinion that the facts conduce to a strong presumption of guilt. *Ready* v. *Com.*, 9 Dana 38.

VIII. Discharging Bail.

211. The surrender by sureties of their principal, on a recognizance to answer a criminal charge, though it releases them from liability on the recognizance, does not discharge the principal. *Lorance* v. *the State*, 1 Carter 359.

212. The arrest by a private person of one under recognizance to appear and answer for a criminal offence, without any deputation or authority in writing, is illegal, and does not therefore discharge the recognizance. *People* v. *Moore*, 2 Douglas 1.

213. Where the recognizance is forfeited by the failure of the defendant to appear, and he appears at the succeeding term, the Court, for good cause shown by the defendant why he failed to comply with the condition of the recognizance, may discharge it. *U. S.* v. *Feely*, 1 Brock. 255.

214. Where upon a charge of bastardy, the defendant appeared by attorney, and induced the Court erroneously to quash the recognizance, it was held that it did not extinguish the recognizance; but the defendant was allowed a reasonable time to appear in discharge of it. *Com.* v. *Thompson*, 3 Litt. 284.

215. In Indiana, where a prisoner is bound over by a justice of the peace to appear and answer at the Circuit Court, his surety cannot discharge himself by surrendering his principal to the justice; but he may do so by making a surrender to the sheriff. *Stegars* v. *the State*, 2 Blackf. 104.

216. The bail will not be exonerated by the surrender of the principal to a deputy sheriff. *State* v. *Le Cerf*, 1 Bailey 410.

217. The Circuit Court of the United States has no power to issue a habeas corpus for the purpose of surrendering a principal in discharge of his bail, when the principal is in confinement under the process of a State court; but it will, in its discretion, respite the recognizance. *U. S.* v. *French*, 1 Gallison 1.

218. Where there is a verdict of acquittal, and the defendant is out on

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bail, his recognizance is, ipso facto, discharged without any further entry. *Mills* v. *M'Coy*, 4 Cow. 406.

219. Where the recognizance is for the personal appearance of the defendant in court, on the first day of the next term, and the surrendering himself in custody to answer a charge of felony, bare appearance before the court on the first day is not a compliance with the condition of the recognizance; nor will anything avail to discharge it, other than the surrender of himself into custody to answer the felony charged. *Starr* v. *Com.*, 7 Dana 243.

220. Where a prisoner who had been bound in recognizance to appear at the Oyer and Terminer, made default, he having shown that he appeared at a subsequent Court of Quarter Sessions, and was tried and acquitted, his bail were discharged on payment of costs. *State* v. *Saunders, et als*, 3 Halst. 177.

221. After the default of the principal has been recorded, his bail may be discharged upon showing to the satisfaction of the Court, by affidavits, that the prisoner could not on account of sickness appear at the proper court. *Com.* v. *Craig*, 6 Rand. 731.

222. Where, upon a complaint for a libel, the grand jury return "no bill," the defendant is not entitled, as a matter of course, to a discharge from his recognizance, but a new bill may be preferred against him, without assigning any cause. *Fitch* v. *the State*, 2 Nott & M'Cord 558.

223. Where the governor of one State, on the demand of a governor of another State, surrendered a person who had been previously arrested for murder in the former State, and bound over, and who was on bail at the time of the demand made, it was held that the delivery of him by the latter State to the constituted authorities of the former, discharged the bail from his recognizance. *State* v. *Allen*, 2 Humph. 258.

224. Bail may surrender their principal, and be discharged from their recognizance in criminal as well as civil cases. *Harp.* v. *Osgood*, 2 Hill 216, *per* Bronson, J.

225. Where a prisoner was recognized to appear at the next term and not at the succeeding sessions, it was held that he was to be discharged at the end of the term. *Keefhaver* v. *Com.*, 2 Pennsylvania 240.

226. A person under recognizance on a criminal charge is not entitled as of course to a discharge, although no indictment be found. *Champlain* v. *the People*, 2 Comstock 82.

227. The discharge of the sureties will not discharge the principal. *Lorance* v. *the State*, 1 Smith 377.

228. Where a party has been bound over to keep the peace, and no indictment is preferred or continuance had, such failure operates as a discontinuance, and discharges the accused. *Goodwin* v. *the Governor*, 1 Stew. and Port. 465.

229. A prisoner bound over to appear on the first day of the next court, must appear at the first court actually held; and a failure to hold the court at the regular time will not discharge him. *Com.* v. *Cayton*, 2 Dana 138.

230. The entry of a nol. pros. does not put an end to the case, nor entitle the party to a discharge from custody, nor his bail to a discharge from his recognizance. *State* v. *Haskett*, 3 Hill's S. C. Rep. 95.

231. Bail may be discharged by the act of God, as the death of the principal; or by the act of the law, as by the conviction and transportation or imprisonment of the principal for felony, which puts it out of the power of the bail to surrender him. *Canby* v. *Griffin*, 3 Harrington 333.

232. Where the accused has failed to comply with his recognizance, and the recognizance has been forfeited of record, the surety cannot, as a matter of right, discharge himself from liability by a surrender of the principal, though the Court may, in its discretion, receive a surrender, and remit the penalty in whole or in part. *Com.* v. *Johnson*, 3 Cush. 454.

233. It is competent for the Court to vacate a void recognizance at any time. *Butler* v. *the State*, 12 Smedes & Marsh. Rep. 470.

IX. Forfeiture of Recognizance.

234. When the clerk through neg-

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lect has omitted to record the forfeiture of a recognizance, it may be entered *nunc pro tunc*. *Rhodes* v. *Com.*, 3 Harris 272. And see *McFdulan* v. *the People*, 13 Ill. 9.

235. A recognizance was conditioned for the appearance of W. H. G., and the indictment was presented against H. G., and a forfeiture of the recognizance entered for his non-appearance. Held that this did not show any breach of the obligation. *Hopkins* v. *Walter*, 11 Ill. 542.

236. Where by the condition of the recognizance the accused is not only to appear, but not to depart without leave of the Court, and to abide the order and judgment thereof, if he do not comply with the judgment against him, the recognizance will be forfeited. *State* v. *Whitson*, 8 Blackf. 178.

237. A recognizance to appear on the first day of the term, is forfeited by the failure of the cognizer to appear on that day; and his appearance on a subsequent day of the term will not save his recognizance. *Shore* v. *the State*, 6 Mo. 640.

238. When two forfeitures of a recognizance are entered at different terms of the same court, the last entry may be treated as mere surplusage. *State* v. *Pepper*, 8 Mo. 249.

239. Where the prisoner who has given bail to appear to answer to an indictment, appears, and is discharged by judgment of court, and the judgment is subsequently reversed and the prosecution proceeded with, his neglecting to appear to answer to the indictment will not forfeit the recognizance. *State* v. *Murphy*, 10 Gill & Johns. 365.

240. Where the performance of the condition contained in a bond or recognizance has been rendered impossible by the act of God, of the law, or of the obligee, the default will be excused. *The People* v. *Bartlett*, 3 Hill 570.

241. Where a recognizance has been taken for the personal appearance of the defendant at court, his neglect to appear will be a forfeiture of the recognizance. *Com.* v. *McNeill*, 19 Pick. 122.

242. Although the recognizance is continued by statute from term to term, a forfeiture cannot be taken at a subsequent term without notice. *Moss* v. *the State*, 6 How. Miss. 298.

243. Where a recognizance was entered in January, 1851, and at a Court of Sessions held in June following, M. was defaulted, and his recognizance declared forfeited and ordered to be prosecuted, and it appeared that a regular term of the Court of Sessions had been held at that place in March of the same year, though no jury had been summoned to attend at said March term, it was held that there had been no breach of the condition of the recognizance. *People* v. *Derby*, 1 Park. Crim. 392.

244. Where a defendant was indicted for perjury and neglected to appear at the circuit because he could not procure certain testimony; on motion to escheat his recognizance, it was ordered that the motion be granted unless within thirty days he should give a new recognizance to appear at the next Circuit. *The People* agt. *Winchell*, 7 Cow. 160.

245. Where a recognizance is not conditioned for the appearance of the prisoner on any particular day, he is not bound to appear, nor his bail to produce him on the first day of the court, but has the whole term to enter his appearance. *Griffin* v. *Com.*, Litt. Sel. Cas. 31.

246. A prisoner was bound over to appear at the "April criminal term." The next term of the criminal court succeeding the date of the recognizance, was in May and not April. In June there was a Common Law court, when he was called and failed to appear. Held that there was no forfeiture of the recognizance. *Thurston, et al.* v. *Com.* 3 Dana 224.

247. Where a person bound over to keep the peace commits an act of violence out of the State, it is no breach of his recognizance. *Key* v. *Com.*, 3 Bibb 495.

248. In Kentucky, where one is bound in a recognizance to the State, it is not necessary to the entering of his default, that he should be called. But it is incumbent on him to appear and have his appearance recorded as a dis-

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charge of the recognizance; and that he did not appear is a negative which the State is not bound to prove. *Leeper* v. *Com.*, Litt. Sel. Cas. 102.

249. Where upon a charge of assault with intent to commit a rape, the prisoner was bound over for trial before the Superior Court in a bond, the conditions of which was that "the prisoner should appear before said court and abide final judgment on said complaint;" it was held that the failure of the prisoner to appear and answer to an information filed against him by the district attorney for the offence charged in the complaint, was no forfeiture of the bond. *Kingsbury* agt. *Clark*, 1 Conn. 406.

250. Where a recognizance is entered into for the prisoner's appearance on the first day of the term, his failure to attend on that day is a forfeiture; and his sureties will be liable even though no indictment be found against him! but if he appear during the term, the sureties may be discharged. *Adair* v. *the State*, 1 Blackf. 202.

251. It is essential to a breach of the recognizance that the party who is recognized to appear should be solemnly called before his default is entered; and it must be clearly proved that the party was called and warned, and neglected to appear. *Dillingham* v. *the United States*, 2 Wash. C. C. Rep. 422.

252. A recognizance conditioned for the appearance of a party at one day, is not forfeited by his failure to appear at another day to which the holding of the court was changed by a law passed after the taking of the recognizances, the law containing no provision that recognizances should be returned and parties appear on that day. Whether such a provision would have made any difference, *quere*. *State* v. *Melton*, Busbe, N. C. Ib. 426.

253. The fact that a defendant is sick, constitutes no reason for his non appearance in obedience to his recognizance; but it will excuse the bail from a surrender of him at the subsequent term. *State* v. *Edwards*, 4 Humph. 226.

254. In order to make bail liable in a criminal case, the record must show that the principal was called and did not appear. *Park* v. *the State*, 4 Geo. Rep. 329.

255. The statute of New York of 1844, which provides that all recognizances given in the city and county of New York, to answer a criminal charge, on being forfeited, shall be filed by the district attorney, together with a certified copy of the order of the Court forfeiting the same, in the office of the county clerk, and docketed as if the same were the transcript of a judgment-record for the penalty, is not inconsistent with the section of the constitution of 1821, which declared that trial by jury in all cases in which it had been theretofore used should remain inviolate forever. *Gildersleeve* v. *the People*, 10 Barb. 35.

256. The statute of N.Y., 1844, so far as it affects recognizances taken previous to its passage, takes away no right, but operates merely in furtherance of the remedy. It furnishes a more speedy method of enforcing an existing obligation. *Ib.*

X. Miscellaneous.

257. What passed between the clerk and the bail on the taking of a recognizance, cannot be shown by the certificate of the clerk. *People* v. *Graham*, 1 Parker 141.

258. In Vermont, by the Revised Statutes (sec. 49, ch. 11), the State's attorneys have authority to bring persons accused of crimes before magistrates and cause them to be held to bail. *Treasurer of Vermont* v. *Brooks, et al.*, 23 Vt. 698.

259. In order to make bail in a criminal case liable, the record must show that the principal was called and did not appear.. *State* v. *Grigsby*, 3 Yerg. 280. *S. P. White, et al.*, v. *the State*, 5 Yerg. 183.

260. The recognizance must be forfeited before it can be quashed on motion. *The State* v. *Holloway*, 5 Ark.

261. In Pennsylvania, the recognizance after forfeiture and judgment, may be remitted by the Governor. *Com.* v. *Denniston*, 9 Watts 142.

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262. Where a party is under a recognizance he may be called on any day during the continuance of the court, and it is not necessary to justify a call on a day subsequent to the first day of the court, that notice should be given to him or his bail. *The People* v. *Blankman*, 17 Wend. 252.

263. A judgment on a recognizance for neglecting to appear, does not bar another prosecution for the same offence. *Com.* v. *Thompson*, 3 Litt. 284.

264. The surety of a prisoner indicted, but not served with process, and who therefore does not appear, is not liable. *People* v. *Slayton*, Breese 257.

265. Both parties should proceed to trial according to the terms of the recognizance, and whether the accused give notice or not, no rule need be taken on the part of the people. *The People* agt. *Winchell*, 17 Cow. 160.

266. The provisions of the statute of Massachusetts of 1810, ch. 80, which authorizes the court to remit the whole or part of the penalty of a recognizance, was intended for cases of unavoidable accident or irresistible necessity, and for the relief of unfortunate persons who are induced by humane feelings to become sureties for persons who afterwards abscond. *Com.* v. *Dana*, 14 Mass. 65.

BARRATRY.

1. Barratry consists in wilful acts or conduct of the master or mariners, done for some unlawful or fraudulent purpose contrary to their duty to the owners of the vessel. The act must be wilful and not accidental or caused by negligence, unless the negligence be so gross as to amount to evidence of fraud. *Patapsco Ins. Co.* v. *Coulter*, 3 Pet. 222, 234.

2. Every wilful act on the part of the master, of known illegality, every gross malversation in his office, or criminal negligence, by whatever motive induced, whereby the owner is damnified, comes within the legal definition of barratry. Shaw, C. J. *Lawton* v. *The Sun Mut. Ins. Co.*, 2 Cush. 500.

3. Dropping anchor and going ashore to find a market for a private adventure, is barratry. *Ross* v. *Hunter*, 4 Term. Rep. 33.

4. Criminal delay of the voyage for an unlawful purpose, is barratry. *Roscow* v. *Corson*, 8 Taunt 684.

5. Intoxication does not excuse or qualify acts of barratry. *Lawton* v. *Sun Mutual Ins. Co.*, 2 Cush. 500.

6. Barratry is an act committed by the master of a vessel, of a criminal nature, without the license or consent of the owner. There must be fraud in the transaction—a selfish and sinister design for the master's own interest; for if the act is done solely to benefit the owner, it does not constitute barratry. *Cronsillat* v. *Ball*, 4 Dallas 294.

7. If the master and mariners of a neutral vessel resist the search of a belligerent, it is barratry. *Brown* v. *Union Ins. Co.*, 5 Day 1.

8. To constitute barratry, a fraudulent act or criminal purpose is essential. *Wiggin* v. *Amory*, 14 Mass. 1.

9. Where the seamen steal from the cargo, it is barratry. *Stone* v. *National Ins. Co.*, 19 Pick. 34.

10. Wilful deviation by the master, in fraud of his owners for purposes of his own, is barratry. *Vallejo* v. *Wheeler*, Cowp. 143.

BARRETRY.

1. As the offence of being a common barretor consists in being a common mover, exciter, or maintainer of suits and quarrels either in courts of justice or the county, and as such character can be proved only by showing a number of distinct acts of misconduct, which need not be set forth or specified in the indictment, the prosecutor must, before the trial, give the defendant a note of the particular acts of barretry which he intends to prove against him, and if he omit to do so, the court will not suffer him to proceed in the trial of the indictment. Shaw, C. J. *Com.* v. *Davis*, 11 Pick. 432.

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2. If an acquittal or conviction would be a bar to another indictment for barretry committed before the finding of the indictment, it would be so without regard to the particular acts given in evidence in support of the former indictment. *Com.* v. *Davis*, 11 Pick. 432.

3. The words "common barrator," are necessary in the indictment, and these are a term of art appropriated by the law to this purpose. *Ib.*

4. The indictment may charge the defendant generally as a "common barrator." *Ib.*

5. Under an indictment for barretry, the bill of particulars affects the proof and the mode of trial only and not the indictment. It is no part of the record and is not open to demurrer. It is not a matter of technical nicety; but is simply to give notice and guard against surprise on the trial under the regulation of the court. *Ib.*

6. As the notice to the defendant forms no part of the record, it can furnish no ground for a motion in arrest of judgment. *State* v. *Chitty*, 1 Bailey 379.

7. *Quere.* Whether three acts of barretry absolutely and in all cases, constitute the perpetrator of them a common barrator. *Com.* v. *McCullock*, 15 Mass. 227.

8. The commencing of three suits where one would have served every justifiable purpose, will not amount to barretry unless there be evidence of a malicious design to harass and oppress. *Ib.*

9. An indictment for barretry will lie against a justice of the peace for promoting litigation for the purpose of obtaining fees, although the prosecutions excited by him, may not have been groundless. *State* v. *Chitty*, 1 Bailey 379. And in order to show the motives with which suits were stirred up by him, evidence may be introduced to show that the justice exacted illegal fees as the condition of compounding prosecutions. *Ib.*

10. Barretry is punished by fine and imprisonment; and, where the accused is an attorney, his name will be struck from the rolls. *State* v. *Chitty*, 1 Bailey 379.

BASTARDY.

I. Bastardy defined. Statutes respecting. Courts having Jurisdiction of. Indictment for Bastardy.
II. Complaint for Bastardy. By whom it may be made. Warrant to arrest the accused. Its requisites.
III. Examination of the complainant on the trial for Bastardy. Evidence; and competency of.
IV. Bond and recognizance in cases of Bastardy.
V. Prosecution for Bastardy. Trial. Judgment and sentence.
VI. Concealing death of bastard child.

I. Bastardy defined — Statutes respecting — Courts having jurisdiction of—Indictment for Bastardy.

1. In North Carolina, a free person of color is chargeable with the support of a bastard child begotten by him on a white woman. *State* v. *Haithcock*, 11 Iredell 32.

2. Bastardy is but a misdemeanor, and may be compromised by the parties. *Coleman* v. *Frum*, 3 Scam. 378.

3. If a married woman have a child born by an adulterous intercourse, the nuptial state of the woman does not prevent the law from pronouncing the child a bastard. *State* v. *Pettaway*, 3 Hawks. 623.

4. The act of South Carolina of 1839 is a repeal of the act of 1795, on the subject of bastardy. *State* v. *Derrick*, 1 M'Mullan 338.

5. The statute of Kentucky relative to bastardy, applies to single women only. *Sword* v. *Nestor*, 3 Dana 453.

6. In Tennessee, the County Court has jurisdiction in bastardy cases. *State* v. *Ingram*, 4 Hayw. 222.

7. When the child is born out of the State, no court in it will have jurisdiction. *Tanner* v. *Allen*, Litt. Sel. Cas. 25.

8. It has been held in Massachusetts, that these proceedings properly belong to a court having criminal jurisdiction. *Cummings* v. *Hodgdon*, 13 Metc. 246; *Hyde* v. *Chapin*, 2 Cush. 77.

9. In Georgia, an indictment for bastardy under the statute is sufficient, when it avers that the accused is the father of the child and refused to give

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security for its maintenance and education when required to do so *in terms of the law*, by the magistrate before whom he was brought. *Walker* v. *the State*, 5 Geo. Rep. 491.

10. In Georgia, if the putative father refuses or fails to give security for the maintenance and education of the child, he can be indicted for a misdemeanor. *Locke* v. *the State*, 3 Kelly 534.

11. In South Carolina, an indictment under the statute of 1795, need not aver that the defendant refused to give the security required by the act. *State* v. *Adams*, 1 Brevard 279.

12. In South Carolina, the indictment for bastardy must aver that the mother of the child is a white woman. *The State* v. *Clements*, 1 Speers 48. And therefore, where the indictment only charged that the child was the issue of a single woman, the judgment was arrested. *State* v. *Clark*, 2 Brevard 386. In South Carolina, under the act of 1839, two indictments may be sustained against the putative father of two bastard children born at one birth; but the indictments and the recognizances should describe each child by name and complexion, hair and sex, or by some means of separate identity. *State* v. *Derrick*, 1 M'Mullan 338.

13. In Maryland, an indictment for bastardy must show the residence of the mother and child. *Root* v. *the State*, 10 Gill. & John. 374.

14. An indictment for bastardy need not allege that the child is likely to become a burthen to the public, and that the accused refuses to enter into a recognizance for its support. *State* v. *M'Donald*, 2 M'Cord. 299.

15. In Pennsylvania, in an indictment for bastardy, the sex of the child must be stated. *Com.* v. *Pintard*, 1 Browne 59.

16. In Georgia, on the trial of the indictment in the Superior Court, the warrant is evidence to prove the arrest of the defendant, and to show that he was regularly brought before the magistrate. *Walker* v. *the State*, 5 Geo. 491.

II. Complaint for Bastardy; by whom it may be made—Warrant to arrest the accused—Its requisites.

17. In Maine, for the complainant to be a witness, it is not necessary that she make her complaint before a justice previous to the birth of the child. *Sweet* v. *Stubbs*, 33 Maine 481.

18. The burden of proving the inconstancy of the complainant in her accusation, is on the defendant. *Murphy* v. *Glidden*, 34 Maine 196.

19. Although the omission of the complainant to sign the complaint at the bottom, if objected to at the proper time, might be good cause for quashing the proceedings; yet it will be cured by the verdict. *Ramo* v. *Wilson*, 24 Vt. 517.

20. In Massachusetts the complaint made to the magistrate, need not be in writing. *Smith* v. *Hayden*, 6 Cush. 111.

21. In Indiana, the affidavit of the mother of the child need not show that she is a resident of the county, or that the child was born there, or that it is alive. *State* v. *Allen*, 4 Blackf. 269. *Beeman* v. *the State*, 5 Blackf. 165.

22. In Ohio it must appear on the face of the complaint that the mother of the child is an unmarried woman. *Devinney* v. *the State*, Wright 564.

23. It will not be a valid objection to the complaint that it allege the proceedings to be under a statute which was in fact repealed. *Blood* v. *Morrill*, 17 Vt. 598.

24. Where the complaint was not sworn to—but on the 13th of January the complainant made oath that on the 15th day of the previous May the child was begotten, it was held that the time was alleged with sufficient certainty. *Marston* v. *Jenness*, 12 New Hamp. 137.

25. In Connecticut, the woman must have accused the man with being the father of her child, during the time of her travail. *Warner* v. *Willey*, 2 Root 490. *Hitchcock* v. *Grant*, 1 Root 107. But where the town prosecutes the father, the mother may be a witness, though not examined during her travail. *Davis* v. *Salisbury*, 1 Day 278.

26. The period of travail for the

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purposes of the accusation, ceases with the birth of the child. *Bacon* v. *Harrington*, 5 Pick. 63.

27. In Massachusetts, it must appear that the woman charged the accused in the time of her travail, and remained constant in her accusation, and this must appear by other testimony than her own. *Drowne* v. *Stimpson*, 2 Mass. 441. And the same thing is required in Maine; but the woman need not allege this fact in her complaint. *Dennett* v. *Kneeland*, 6 Greenlf. 460. *Stiles* v. *Eastman*, 21 Pick. 132; *McManagill* v. *Ross*, 20 Pick. 99.

28. In Massachusetts, it is not sufficient that the woman accuse the man with being the father of the child about the time of her travail, although she be then in great pain, it must be *in* the time of her travail. *Com.* v. *Cole*, 5 Mass. 517.

29. The charge made by the woman before a magistrate, must be taken down in writing. *Mann* v. *Com.*, 6 Munf. 452; *Poulk* v. *Slocum*, 3 Blackf. 424; *Howard* v. *Overseers*, 1 Rand. 464.

30. In Vermont the complaint for bastardy must be in writing, and be signed and sworn to; but the complaint need not so state. *Graves* v. *Adams*, 8 Vt. 130.

31. In Vermont, it is not necessary that the woman in making complaint should swear that she is a single woman. *Robie* v. *McNiece*, 7 Vt. 419.

32. In Indiana, any single woman, a resident of the State, may make complaint before a justice of the peace against the father of her bastard child, without regard to the place where the child was born. *Cooper* v. *the State*, 4 Blackf. 316. It must, however, appear that the mother of the child was unmarried and a resident of the State. *Smith* v. *the State*, 4 Blackf. 188.

33. In Kentucky, a free woman of color may make complaint, and take out a warrant against the father of her bastard child. *Williams* v. *Blincoe*, 5 Litt. 171.

34. In New Hampshire, the statutes respecting the maintenance of bastard children authorize a complaint by a married woman; and the husband need not be joined. *Parker* v. *Way*, 15 New Hamp. 45.

35. In such case, the mother is not a witness to prove non-access; but she is a competent witness to prove the criminal connection, non-access being proved by other evidence. *Ib.*

36. In Alabama, the complaint cannot be made by a married woman. *Judge* v. *Kerr*, 17 Ala. 328.

37. In Massachusetts, bastardy process is in some respects in the form of a criminal prosecution. *Wilbur* v. *Crane*, 13 Pick. 284.

38. In Kentucky, it is essential that the warrant should state correctly the time of the child's birth; but if the time of the birth be untruly stated in the warrant, an acquittal upon it will not bar a subsequent proceeding. *Burnett* v *Com.*, 4 Monr. 106.

39. In New York, the warrant must issue upon the complaint of the overseers of the poor, or either of them. *Walworth* v. *McCullough*, 10 John. 93.

III. Examination of the Complainant on the Trial for Bastardy—Evidence and Competency of.

40. On the trial of an issue of bastardy, the examination of the woman being made by act of Assembly prima facie evidence, the defendant can only introduce evidence to show that he is not guilty. He cannot attack the credibility of the woman. *State* v. *Patton*, 5 Iredell 180.

41. Nor can he show on the trial that she was an incompetent witness at the time of her examination before the magistrate, as that she was a colored woman, or had previously been convicted of some infamous offence, which disqualified her from taking an oath. *Ib.*

42. If he wishes to avail himself of such defence, he must do so on a motion to quash the order of filiation, as being founded on incompetent evidence. *Ib.*

43. If the woman, after her examination, becomes incompetent, this subsequent disability will have no other effect than to exclude her from being a witness before the jury. *Ib.*

44. In North Carolina the examina-

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tion of a woman before justices of the peace, charging a man with being the father of her bastard child, need not be signed by her. *State* v. *Thompson*, 4 Iredell 484.

45. When such examination was not signed by two justices, but the warrant issued by them was on the same paper, and connected with it, it was held that this was a sufficient authentication of the examination, though it would have been more proper if the examination had been signed by the woman and attested by the justices. *Ib.*

46. In North Carolina, in proceedings to charge the reputed father of a bastard child, the examination of the mother before the justices of the peace must appear on the face of the proceedings, to have been taken within three years from the birth of the child; otherwise they will be quashed. *State* v. *Ledbetter*, 4 Iredell 242.

47. If the County Court, on motion, refuse to quash the proceedings, the party may either appeal, or obtain a certiorari from the Superior Court. *Ib.*

48. Where the defect for which it is moved to quash the proceedings may, consistently with the truth, be supplied at the instance of the State, it is competent to allow the necessary amendment. *Ib.*

49. But the defect is not necessarily fatal, and all objection on that account is waived if not made in the regular mode and at the proper time. The objection should be made before issue is tendered. *State* v. *Robeson*, 2 Iredell 46.

50. Notwithstanding such defect, the examination is evidence on the trial of the issue, as to the truth of the charge. *Ib.*

51. In North Carolina, where a woman has been examined on oath, under the Bastard Act, before two justices, and one of them omits to sign the examination, the Court to which the proceedings are returned may permit the justice then to sign the examination. *State* v. *Thomas*, 5 Iredell 366.

52. If the complainant have been convicted of a felony, a full pardon will restore her competency. *Hall* v. *Hall*, 17 Pick. 380.

53. The woman is admitted as a witness from necessity, and she may not be permitted to testify to any fact which is equally within the knowledge of other persons who are disinterested. *Drowne* v. *Stimpson*, 2 Mass. 441; Thach. Cr. Cas. 26.

54. In Vermont the overseers of the town are competent witnesses in a prosecution for bastardy. *Spears* v. *Forrest*, 15 Vt. 435.

55. Evidence as to the resemblance of the child to the alleged father, or the want of it, is not admissible. *Keniston* v. *Rowe*, 16 Maine 38.

56. It is not a valid objection to a witness that he is the father of the complainant. *Marston* v. *Jenness*, 12 New Hamp. 137.

57. The admissions of the accused that he was the father of the child, and his promise to marry the mother, though not of themselves sufficient to convict him, may be given in evidence to corroborate the complainant. *Woodward* v. *Shaw*, 18 Maine 304.

58. The prosecutrix is not obliged to answer whether she had an illicit connection with another man. *Low* v. *Mitchell*, 18 Maine 372.

59. The accused cannot give evidence of general good character. *Ib.*

60. In Maine the complainant is a competent witness if she have complied with the provisions of the statute, and been constant in her accusation. The having previously charged the parentage upon another person under oath, and in the same form in which she accuses the defendant, will not exclude her from testifying, but will only go to her credibility. *Burgess* v. *Bosworth*, 23 Maine 735.

61. If the complainant after the birth of the child, or after her examination, declare that the accused is not the father of her child, she is incompetent to testify against him. *Bradford* v. *Paul*, 18 Maine 30.

62. The defendant may introduce evidence to show that the complainant is unworthy of credit. *State* v. *Floyd*, 13 Ired. 382.

63. A child born in wedlock, though born within a day after marriage, is presumed to be the offspring of the

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husband. *State* v. *Herman*, 13 Ired. 502.

64. The moral character of the woman may be impeached in order to discredit or weaken her testimony. *Sword* v. *Nestor*, 3 Dana 453, S. P.; *State* v. *Coatney*, 8 Yerg. 210.

65. If the accused introduce a witness who swears that the complainant in conversation with him had said that the accused was not the father of the child, she is a competent witness to contradict this testimony. *Judson* v. *Blanchard*, 4 Conn. 557.

66. In North Carolina if the mother is of mixed blood, within the fourth degree, she cannot testify against the accused. *State* v. *Barrow*, 3 Murph. 121.

67. If the woman die, her ex parte deposition, taken before the prosecution was commenced, will not be evidence. *McDonald* v. *Hobby*, 1 Root 154.

68. The wife is not a competent witness to prove the non-access of her husband; but she may be examined as to her criminal intercourse with another. *State* v. *Pettaway*, 3 Hawks. 623.

69. In Massachusetts, if the woman at the time of her travail accuse the same person against whom she complained under oath before the magistrate, and continue constant in her accusation, she is to be admitted as a witness. Any previous charge upon another person, or denial of illicit commerce with him who is afterwards charged as the putative father, may be shown to affect her credit with the jury, but does not destroy her competency. *Maxwell* v. *Hardy*, 8 Pick. 560.

70. The credit of the complainant as a witness cannot be impeached by showing that her character for chastity was bad previous to her connection with the defendant. *Com.* v. *Moore*, 3 Pick. 194.

71. It is competent for the accused to invalidate the woman's testimony by proving that about nine months before the birth of the child she was guilty of criminal intercourse with other men; but if the defendant admit that he also had criminal intercourse with her about the same time, such proof may be rejected. *Fall* agt. *Overseers of the Poor*, 3 Munf. 495.

72. In a prosecution of this sort, as the mother of the child is a voluntary witness, she must be considered as having waived the privilege of not criminating herself, and is bound to answer all questions relevant to the point in issue. She may therefore be interrogated as to her intimacy with other men about the time she charges the defendant. *Ginn* v. *Com.*, 5 Litt. 301.

73. Under the statute of South Carolina, of 1795, the mother of the child is a competent witness to prove that the defendant is the father. *State* v. *Adams*, 1 Brevard 279.

74. In Ohio the presence and testimony of the woman upon the trial are indispensable, except in the case of a confession in open court. *Baxter* v. *Columbia Township*, 16 Ohio 56.

75. In Maine, under the Revised Statutes (ch. 97, § 23), the District Court has power after verdict, and before judgment, to grant a new trial of these proceedings, on the ground that the verdict is against evidence. *Eaton* v. *Elliot*, 28 Maine 436.

76. Evidence cannot be introduced to show that the mother of the child endeavored to procure an abortion. *Sweet* v. *Sherman*, 23 Vt. 23.

77. Nor can the accused introduce evidence to prove that another man, who is charged by the accused to be the real father of the child, but who has not been made a witness, endeavored to procure an abortion. *Ib.*

78. In Massachusetts it will be presumed after a verdict for the complainant, that it was proved on the trial that the child was a bastard. *Chapel* v. *White*, 3 Cush. 537.

79. In North Carolina the examination of the woman becomes full proof of the fact of paternity, and the jury is bound so to find, unless the defendant show the fact not to be so; and this he can do only by proof of impotency or non-access at such time as by the law of nature he could be the father. Evidence to show the improbability of his being the father is inadmissible. *State* v. *Goode*, 10 Ired. 49.

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80. In North Carolina, it is not competent for the accused to introduce any testimony to show that the child was not a bastard. The adjudication of that question belongs to the justices before whom the oath of the woman is made, and if they decide against him upon that question he has a right to bring it up by certiorari. *State* v. *Wilson*, 10 Ired. 131.

81. Where it has been shown that the mother of the child has made statements contradictory to her testimony as a witness, she may introduce proof to sustain her general character for veracity. *Sweet* v. *Sherman*, 21 Vt. 23.

82. In New Jersey, on the hearing of an appeal to the Sessions, the accused may prove his former good character. *Dally* v. *Overseers of Woodbridge*, 1 Zabriskie 491.

83. In bastardy cases the general character of the prosecutrix for chastity may be inquired into. *Short* v. *the State*, 4 Harring 568.

84. In Indiana, the qualification of the residence of the complainant in the State, essential to the support of a prosecution for bastardy under the former acts, is omitted in the present statute. *State* v. *Gray*, 8 Blackf. 274.

85. The prosecutrix may be discredited by disproving what she swore to on the preliminary examination. *Holmes* v. *State*, 1 Iowa 150.

86. In order to convict of bastardy with a married woman, non-access or impotence of the husband must be proved. *Com.* v. *Shepherd*, 6 Binn. 283.

IV. Bond and Recognizance in Cases of Bastardy.

87. The penal code of Georgia makes it the duty of the magistrate before whom the accused is brought, to require him to give security for the maintenance and education of the child in terms of the law; and if he refuses or fails to give such security, then to recognize him to appear at the next superior court to answer the charge. *Walker* v. *the State*, 5 Geo. 491.

88. In Indiana, when a justice of the peace binds a person in a recognizance to the Circuit Court to answer an accusation of bastardy, the original recognizance must be filed by the justice in the Circuit Court. *The State* v. *Lewis*, 4 Blackf. 20.

89. A defendant who has, in pursuance of the Court, entered into recognizance for the maintenance of a bastard child from the time of its birth, cannot afterwards resist a motion to escheat the recognizance on the ground that he was only liable by law for five pounds annually from the time of his conviction, or at the most, from the time information was made against him. He cannot then question the accuracy of the sentence, or avoid the recognizance given in pursuance of it. *The State* v. *Harmon*, 3 Hill S. C. 275.

90. Where the condition of the bond is, that the accused shall appear, &c., and not depart till discharged by the Court, the cognizors are bound to see that he remains during the term specified to answer any charge other than the one on which the prosecution is founded. *People* v. *Green*, 5 Hill 647.

91. Where the condition of the bond is, that the accused shall appear to answer, &c., and not depart the Court without leave, appearing and answering at the term specified is a compliance with the recognizance, and a default at the next term will be no breach. *Ib.*

92. A bond taken by a justice of the peace in a prosecution for bastardy, containing in addition to the provisions required by law, others imposing further obligations on the obligor, is bad. *The People* v. *Meighan*, 1 Hill 298.

93. A recognizance which requires that a putative father of a bastard child shall appear at the General Sessions, and abide such order as shall be made for the relief of the town in which the child was born, remains in force notwithstanding that after the time of entering into the recognizance the distinction between town and county poor is abolished, and the child by means thereof becomes a county charge. *The People* v. *Haddock*, 12 Wend. 475.

94. A bastardy bond taken by a justice pursuant to 1 N. Y. Rev. Statutes

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643 § 8, conditioned that the putative father shall appear at the next Court of General Sessions, &c., is held to be a deed and not a recognizance. *People* v. *Green*, 5 Hill 647.

95. *Quere.* Whether in New York the Court of General Sessions has any authority to make an order, even with the consent of the sureties, continuing the bond in force until a term subsequent to the one specified in the condition? *Ib.*

96. The date of the recognizance may be the day on which the accused is recognized to appear. *State* v. *Bradley*, 1 Blackf. 83.

97. In Massachusetts, under the statute of 1785, ch. 66, the security to be taken of one accused as the putative father of a bastard child, must be by a bond, and not by a recognizance. *Merrill* v. *Prince*, 7 Mass. 396, S. P.; *Johnson* v. *Randall*, 7 Mass. 340.

98. In Maine, a recognizance taken in a proceeding of this sort, is inoperative and cannot be enforced against the recognizors. The magistrate must bind the party over to answer to the charge before the proper tribunal, by bond with sureties. *Mariner* v. *Dyer*, 2 Greenlf. 165.

99. In Maine, a bond for the appearance of the accused obliges him to pay such money as the Court shall order for the maintenance of the child, as well as to the giving of a new bond for the performance of such order. *Taylor* v. *Hughes*, 3 Greenlf. 433.

100. Under the Kentucky statute authorizing the magistrate before whom a person is charged with being the father of a bastard, to bind such person in a recognizance to appear at the next County Court, it will be error to bind the defendant "to abide by and perform the order of the County Court;" to appear, is all the defendant can legally be bound to do. *Young* v. *Com.*, 2 A. K. Marsh. 63.

101. After the accused has been brought before the magistrate and entered into a recognizance for his appearance at Court to answer the charge, it is too late to object to the warrant. *Walker* v. *Com.*, 3 A. K. Marsh. 355; *Schooler* v. *Com.*, Litt. Sel. Cases, 88.

102. In Maine, the discharge of the defendant on taking the poor debtors' oath, will not exempt his body from execution issued upon a judgment recovered on the bond. *McLaughlin* v. *Whitten*, 32 Maine 21.

V. Prosecution for Bastardy—Trial—Judgment and Sentence.

103. In New Hampshire, although the form of the proceedings is criminal, it is ordinarily competent for the parties, if they see fit, to settle the prosecution, so far as the complainant is concerned. If, however, the complainant, upon an adjustment declines to prosecute further, the town may come in and prosecute. *Parker* v. *Way*, 15 N. Hamp. 45.

104. The infancy of the accused is no defence to these proceedings. *McCall* v. *Parker*, 13 Metc. 372.

105. In Vermont, it has been held that these proceedings are as exclusively local as is the administration of criminal justice. *Graham* v. *Monsergh*, 22 Ver. 543. Where, therefore, the parties were non-residents and the child was begotten and born out of the State, the proceedings were dismissed. *Ib.*

106. In Maryland, these proceedings under the acts of 1781, ch. 13, and its supplements, are treated by law as criminal proceedings. *Oldham* v. *the State*, 5 Gill. 90.

107. In North Carolina, the accused, before an issue is made up, may move to quash the proceedings on the ground that the mother is a woman of color within the fourth degree. *State* v. *Long*, 9 Iredell 488.

108. And if, upon such motion, the proceedings are quashed by the Court, a subsequent warrant, charging the same person with being the father, issued after the birth of the child, cannot be supported. *Ib.*

109. The proper relief against the order to quash is by appeal or certiorari. *Ib.*

110. Where there is a mittimus showing the commitment of a party upon a prosecution for bastardy, and subsequently a petition for a habeas corpus,

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and a recognizance executed in due form by the reputed father, a motion to quash the proceedings before the justice will not be sustained, on the ground that there is no warrant in the papers showing the arrest. *Berryman* v. *Judge of County Court*, 9 Ala. 455.

111. In Alabama, it need not appear of record that the child was born alive and is still living. *Kawich* v. *Davis*, 4 Ala. 328.

112. In Kentucky, though the mother of a bastard child cannot be compelled to institute proceedings against the putative father, yet, whenever at her instance the statutory process has been commenced, she cannot, by any agreement between her and the person charged, bar the proceedings. *Com.* v. *Turner*, 4 Dana 511.

113. In Tennessee, it must appear on the record that the child was born in the county in which the proceedings are instituted. *Edmonds* v. *the State*, 5 Humph. 94.

114. Where the defendant, in a bastardy proceeding, appears before the County Court, pleads guilty to the charge, and executes a bond which recites that the mother is a single woman and was delivered of the child in the county wherein the proceedings were had, the jurisdiction of the court is sufficiently shown, and it is then too late to object to defects in the original complaint or in the process of the magistrate. *Pruitt* v. *Judge of County Court*, 16 Ala. 705.

115. An adjudication in favor of a party charged with being the father of a bastard child, is a bar to a subsequent proceeding against him respecting the same matter. *Thayer* v. *Overseers of the Poor*, 5 Hill 443; *Davis* v. *State*, 6 Blackf. 494.

116. In Maryland, the proceedings under the act of Assembly against the putative father of an illegitimate child must be strictly pursued. *Root* v. *the State*, 10 Gill & John. 374.

117. In Massachusetts, the magistrate to whom the complaint is made, and who issues his warrant, alone has the examination of the accused, and there is no authority in the statute for returning such warrant before another magistrate. *Fisher* v. *Shattuck*, 17 Pick. 252.

118. It is not a valid objection to these proceedings that the accused was not arraigned in the usual form of persons charged with criminal offences, and asked whether he was guilty or not guilty. *Smith* v. *Hayden*, 6 Cush. 111.

119. In Vermont, three months after the arrest, and before the overseers of the town take the control and management of the prosecution, it is competent for the woman to compromise it. *Hurd* v. *Seeker*, 12 Ver. 364.

120. If, after conviction of adultery and bastardy, the defendant be pardoned, the Court may, notwithstanding, proceed to make an order for the maintenance of the child. *Duncan* v. *Com.*, 4 Serg. & Rawle 449.

121. The statute of Maine in terms authorizes the prosecution to be commenced after the birth of the child. *Keniston* v. *Rowe*, 16 Maine 38.

122. In the State of New York, justices of the peace may commit the mother of a bastard child to prison for refusing to discover the putative father. *Scott* v. *Ely*, 4 Wend. 555.

123. The record must show that the child was born before the Court proceeded to the trial of the defendant; otherwise it is error. *Penfield* v. *Norton*, 1 Root 345.

124. In New Hampshire, proceedings in bastardy were objected to, 1st, because it did not appear that the child was born alive; 2d, because it did not appear that the complainant had continued constant in her declarations that he was the father of the child; 3d, because it did not appear that she had declared him to be the father of the child in the time of her travail; but the Court overruled these objections. *R. R.* v. *J. M.*, 3 N. Hamp. 135.

125. In Maine, prosecutions for bastardy under the statute are not local. *Dennett* v. *Kneeland*, 6 Greenlf. 460.

126. Held in Maine and Massachusetts, that when the woman marries after the birth of her child, the husband must join in the prosecution. *Keniston* v. *Rowe*, 16 Maine 38; *Wilbur* v. *Crane*, 13 Pick. 284.

127. Although the accused offers to

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pay what the complainant is willing to receive, he will not be entitled to be discharged until the fees and expenses of the officer are satisfied. *Pearl* v. *Rawdin*, 5 Day 244.

128. In North Carolina, after the defendant has had an issue tried under the statute, and the verdict is against him, it is too late for him to move to quash the proceedings, because the mother of the child, who was examined on oath, was a woman of color. *State* v. *Lee*, 7 Iredell 265.

129. The marriage of the mother of the child after complaint, will not abate the proceedings. *Austin* v. *Pickett*, 9 Ala. 102.

130. When the reputed father pleads not guilty of being the father of the child, and the verdict is that he is the real father of the said child, the plea and verdict will be referred to the complaint, and an irregular issue offered by the Court will be disregarded. *Ib.*

131. Under the bastardy act of Kentucky of 1795, the sole power of originating proceedings against the putative father rests in the mother. *Burghen* v. *Straughan*, 7 J. J. Marsh. 583.

132. In Indiana, the proceedings must be in the name of the State, and the mother cannot be a party. *State* v. *Bradley*, 1 Blackf. 83; *Woodburk* v. *Williams*, Ib. 110; *Dickinson* v. *Gray*, 2 Blackf. 239.

133. In Connecticut, one justice may receive the complaint and issue the warrant, and another hear the case and bind over the defendant. *Hopkins* v. *Plainfield*, 7 Conn. 286.

134. The proceedings under the several bastardy acts of England are considered criminal prosecutions, and are regulated by the rules which govern criminal processes. *Hill* v. *Wells*, 6 Pick. 104, per Morton, J.

135. A prosecution by the mother of a bastard child against the putative father under the statute of Massachusetts, is neither wholly civil nor wholly criminal, but has many of the features and incidents of each. *Ib.*

136. Whether the provisions of the statute of Maine respecting the granting of reviews and new trials extend to prosecutions for bastardy,—*quere*. *Gowen ex parte*, 4 Greenlf. 58.

137. In New York, if the father of the child refuse to pay the amount certified for the costs of apprehending him and of the order of filiation, the justices may issue a warrant for his commitment, though he has executed a bond pursuant to the fourteenth section of the statute concerning the support of bastards. *People* v. *Stowell*, 2 Denio 127.

138. Where a bond in such case has been given, but the costs are not paid, the warrant should direct the father to be safely kept until discharged by the Court of General Sessions or until he shall pay the costs. *Ib.*

139. Where the poor of the county are supported by a tax on the whole county, a sentence that one convicted of bastardy shall give security to indemnify any particular town, is erroneous. *Dorsey* v. *Com.*, 8 Serg. & Rawle 261.

140. In Pennsylvania, upon conviction of the defendant, the Court may require him to give security for the performance of all the sentence except the fine and costs. *Goddard* v. *Com.*, 6 Serg. & Rawle 282.

141. The only mode of enforcing performance of the order that the accused support the child, is to commit the defendant to prison until he comply. *Woodcock* v. *Walker*, 14 Mass. 386.

VI. Concealing Death of Bastard Child.

142. In Pennsylvania, in order to make the concealment of the birth of a bastard child criminal, the concealment must be such as to bring the case within the mischief of the law. *Com.* v. *Clarke*, 2 Ashm. 105.

143. The indictment under the statute of Pennsylvania, must distinctly aver the death of the child, *Douglass* v. *Com.*, 8 Watts 538. And the prosecution must prove the birth of a bastard child, its death, and the concealment of its death. *Ib.*

144. The indictment in Pennsylvania must pursue the language of the act. *Ib.*

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145. In South Carolina, where it appeared that the accused concealed her bastard child after its death; but there was also some evidence that the child was still-born; she was acquitted. *State* v. *Love*, 1 Bay 167.

146. Under the statute of Pennsylvania, mere concealment of the child is not sufficient to convict; it must be further proved that the accused wilfully and maliciously destroyed the child. *Pennsyl.* v. *McKee*, Addis. 1.

147. Under the act of North Carolina, of 1818, the corpus delicti is concealing the death of a being upon whom the crime of murder could have been committed. Therefore if the child is born dead, the concealment is not an offence against the statute. *State* v. *Joiner*, 4 Hawks 350.

148. Where, in Pennsylvania, the indictment alleged that "the child having died on the day and year, &c., the mother did endeavor privately to conceal the death of said child;" it was held that the averment of the death of the child was sufficient. *Boyles* v. *Com.*, 2 Serg. & Rawle 40.

149. The manner in which the accused endeavored to conceal the death of the child, need not be set out in the indictment. *Ib.*

150. In Pennsylvania the verdict must find the bastardy of the child. *Ib.*

BIGAMY.

BIGAMY DEFINED — STATUTES RESPECTING—INDICTMENT—EVIDENCE ON THE TRIAL.

1. Held in South Carolina, that a nephew may lawfully marry his aunt; so that if he marry again while she is alive, it is bigamy. *State* v. *Barefoot*, 2 Rich. 209.

2. In Ohio, the marriage of a male under the age of eighteen, with a female under fourteen, does not subject the parties to punishment for bigamy, by contracting a subsequent marriage while the first husband or wife is living, unless the first marriage was confirmed by cohabitation after arriving at those ages respectively. *Shafher* v. *the State*, 20 Ohio 1.

3. In the State of New York, notwithstanding the provision in 2 Rev. Sts. 573, § 8, sub. 3, it is no defence to an indictment for bigamy, that after the second marriage, the first has been dissolved by the decree of a competent court, for some cause other than the adultery of the defendant. *Baker* v. *the People*, 2 Hill 325. Contra, if such a decree be obtained prior to the second marriage. *Ib.*

4. In New York bigamy cannot be punished as an offence against the laws of that State, unless the second marriage was within the territorial limits of that State. *People* v. *Mosher*, 2 Parker's Crim. R. 195.

5. It was not the intention of the Rev. Sts. of Mass., ch. 130, to make the legality of a second marriage whilst the former husband or wife is in fact living, depend upon ignorance of such absent party's being alive, or even upon an honest belief of such person's death. *Com.* v. *Mash*, 7 Met. 472.

6. Where, therefore, a woman's husband suddenly left her without notice, and saying when he went out, that he should return immediately, and who was absent three or four years, and she married again; it was held that she was guilty of bigamy, although she had made inquiry after her husband and was ignorant of his being alive, but honestly believed him to be dead. *Ib.*

7. The New York statute concerning bigamy, does not render the second marriage legal, although the former husband or wife may have been absent above five years, and not heard of; it only declares that the party who marries again in consequence of such absence of the former partner, shall be exempted from the operation of the statute. *Fenton* v. *Reed*, 4 Johns. 51.

8. The statute of North Carolina, defining bigamy, provides that it shall not extend to any person whose husband or wife shall continually remain beyond sea for the space of seven years together; nor to any person whose husband or wife shall absent him or herself in any other manner for

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the space of seven years together, such person not knowing his or her husband or wife to be living within the time. *State* v. *Patterson*, 2 Iredell 346.

9. It is not necessary in an indictment for bigamy to state the place where the first marriage took place. *State* v. *Bray*, 13 Iredell 289.

10. An indictment for bigamy will not be bad because it does not contain the words "with force and arms." *The State* v. *Kean*, 10 New Hamp. 347.

11. An indictment for bigamy which states that the wife was alive at the second marriage, need not aver that the first marriage then subsisted. *State* v. *Norman*, 2 Dev. 222.

12. On the trial of an indictment for bigamy, the confessions of the defendant, though supported by proof of cohabitation and reputation are not sufficient to establish the first marriage; proof of actual marriage, either by the record or by the evidence of an eye-witness, is requisite. *Gahagan* v. *the People*, 1 Parker 378.

13. On the trial of an indictment for bigamy, the first marriage may be proved by the declarations of the defendant, and evidence of cohabitation. *State* v. *Hilton*, 3 Rich. 434.

14. On an indictment for bigamy, the admissions of the defendant as to a prior marriage, may be given in evidence to prove the fact of such marriage. *Wolverton* v. *the State*, 16 Ohio Rep. 173.

15. In Illinois, the prosecution are authorized by statute, to prove the marriage by the license and certificate, or by such other evidence as is admissible to prove a marriage in other cases. *Jackson* v. *the People*, 2 Scam. 231.

16. On an indictment for bigamy, the second wife is admissible as a witness, either for or against the prisoner. *State* v. *Patterson*, 2 Iredell 346.

17. On a trial for bigamy, parol evidence of a license of marriage may be given, by the prosecution, although it be in the power of the State to produce the license. *Moore's case*, 9 Leigh. 639.

18. In a prosecution for bigamy, a certificate of marriage is proper evidence against the prisoner, although it does not show on its face that the person whose name is subscribed thereto, was a person authorized to celebrate marriage. *Ib.*

19. If the husband be alive, a second marriage is void, though the husband may have been absent eight or nine years. *Kenley* v. *Kenley*, 2 Yeates 207.

20. In prosecutions for bigamy, there must be proof of an actual marriage. *Fenton* v. *Reed*, 4 John. 51.

21. The marriage may be proved by declarations of the accused, and proof of long cohabitation. *State* v. *Britton*, 4 McCord. 256.

22. The mere confession of the prisoner held sufficient evidence of the first marriage. *Com.* v. *Murtagh*, 1 Ashm. 272.

23. In a prosecution for bigamy, the acknowledgment of the husband that he is married, and his cohabitation with the woman as his wife, are evidence of the first marriage. *Warner* v. *Com.*, 2 Va. Cas. 95.

24. The parol evidence of a witness who was present at the first marriage, is sufficient to prove it. *Warner* v. *Com.*, 2 Va. Cas. 95; and see *the State* v. *Kean*, 10 New Hamp. 347.

BLASPHEMY.

1. Blasphemy against God, and contumelious reproaches, and profane ridicule of Christ or the Holy Scriptures, are held to be offences punishable at Common Law, whether uttered by words or writings. *People* v. *Ruggles*, 8 Johns. 290.

2. Wantonly, wickedly, and maliciously uttering the following words, "Jesus Christ was a bastard, and his mother must be a whore," was held in New York to be a public offence, and one punishable by the Common Law of that State. *Ib.*

3. To maliciously vilify the Christian religion is an indictable offence in Pennsylvania. *Updegraph* v. *Com.*, 11 Serg. & Rawle 394.

4. In an indictment for blasphemy under the Pennsylvania statute, it must be averred that the words were

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spoken profanely, and the words themselves must be set out. *Ib.*

5. Blasphemy, at Common Law, is profaneness against the general principles of religion and morality. But it is only committed by uttering such things in a scoffing and railing manner, out of a reproachful disposition in the speaker, and, as it were, with passion against the Almighty, rather than with any purpose of propagating the irreverent opinion. *Com.* v. *Kneeland*, Thach. Cr. Cas. 346.

6. To constitute the offence under the statute of Massachusetts, there must be a wilful denial of God and of his creation and government, with an intent to impair and destroy the reverence due to him. *Com.* v. *Kneeland*, 20 Pick. 206.

7. The jury having found the defendant guilty under the act of Delaware against blasphemy, charging him with having proclaimed publicly and maliciously, with intent to vilify the Christian religion, and to blaspheme God, that "the Virgin Mary was a whore, and Jesus Christ was a bastard," the Court held the offence found to be blasphemy, and refused to arrest the judgment. *State* v. *Chandler*, 2 Harring. 553.

8. Blasphemy is a gross offence against society, on account of its tendency to disturb the public peace, and for that reason it was prohibited and punished at Common Law. *Ib.*

9. The law will not permit the essential truths of revealed religion to be ridiculed and reviled. *Andrew* v. *N. Y. Bible and Prayer-Book Soc.*, 4 Sandf. Sup. Ct. 156.

10. When an indictment lies for blasphemy, the defendant cannot be convicted on his own confession, made out of Court, with reference to the words charged. It must be proved in addition that the offensive words were used, or actually uttered. *People* v. *Porter*, 2 Parker Crim. 14.

BILL OF EXCEPTIONS.

I. Bill of Exceptions, what it should contain; filing, &c.
II. Grounds for Exceptions.

I. Bill of Exceptions; What it should Contain—Filing, &c.

1. A bill of exceptions, after having given the evidence, stated that "here the evidence closed." Held that this was a sufficient allegation that all the testimony heard at the trial was put in the bill of exceptions. *Yates* v. *the State*, 10 Yerg. 549.

2. Where the defendant was indicted for a libel, and the bill of exceptions did not recite the evidence; held that the Court was bound to presume that the evidence sustained the verdict, and that there was no variance between the libel set out in the indictment and that produced in evidence in the court below. *Melton* v. *the State*, 3 Hump. 389.

3. This court will presume that the Circuit Court decided correctly, unless the contrary appears from the facts and proceedings preserved in the bill of exceptions. *Ingram* v. *State*, 7 Mo. Rep. 293.

4. On criminal trials in Mississippi, the Court, when requested to modify its instructions to the jury, may do so verbally; and the prisoner, if he would except to the modifications, must have the modified instructions reduced to writing, and except to them at the same time; and if he does not except before the jury retire, the Court will properly refuse to call the jury back to repeat its instructions, or to send a statement in writing of the instructions to the jury on the motion of the prisoner's counsel, because he states that he understood the instructions given to the jury to be different from those afterwards written out. *Bechler* v. *State*, 10 Smedes & Marsh. 192.

5. When a bill of exceptions is allowed in a criminal case, the facts embodied in it become a part of the record; and if a writ of error is allowed, it brings up the entire record, and er-

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ror may be assigned on any part of it. *State* v. *Jones*, 5 Alabama Rep. 666.

6. On the trial of an indictment, a witness being objected to, for the reason that his name was not written on the indictment pursuant to the Iowa statute, and the objection was overruled. Held that the proceeding should be made a matter of record by a bill of exceptions for the purpose of making it a cause of error. *Ray* v. *State*, 1 Iowa 316.

7. A bill of exception lies only for the purpose of correcting an erroneous decision upon some point of law made on the trial, or some erroneous opinion given to the jury in the charge of the Court, as to which an exception was taken at the time. *The People* v *Stockham*, 1 Parker's Crim. 424.

8. It is settled that in criminal prosecutions, no alleged error in the instructions to the jury will be noticed, unless the party objecting excepts, and by means of a bill of exceptions places the objectionable charge on the record; this plaintiff in error objected to do. *Wash.* v. *the State*, 14 Smedes & Marsh. R. 120.

9. Whether it could be required of the Superior Court in a case of indictment to spread either the evidence or the facts upon the record in a bill of exceptions after a conviction, and upon overruling a motion for a new trial. *Burgess* v. *Commonwealth*, 2 Virg. Cas. 483.

10. Where a bill of exceptions shows that certain evidence was excluded in the court below, on objection being made, but does not mention the ground of either the objection or decision, any objection which might have been available during the trial, may be resorted to on the argument in this court. Per Nelson, Ch. J. *Ward* v. *People*, 3 Hill, 395.

11. When instructions to the jury actually given, are excepted to as mistaking the law, no part of the testimony need be stated to authorize the appellate court to revise the case upon the bill of exceptions. *Sharp* v. *the State*, 15 Ala. R. 749.

12. In Massachusetts, under the Rev. Stats. c. 86. § 11, and c. 188, § 13, exceptions in criminal cases, filed in the Municipal Court, or Court of Common Pleas, must be entered in the Supreme Judicial Court, which is next to be held for the same county; and where the party who files such exceptions, recognizes to enter and prosecute them in the Supreme Judicial Court, then in session, the recognizance is of no effect. *The Commonwealth* v. *Harley*, 7 Met. 467.

13. Where no bill of exceptions nor statement in the nature thereof accompanies the record of a case sent to this Court, the judgment below is affirmed as of course, there appearing no error in the record. *State* v. *Orrell*, Busbee N. C. 217.

14. The Supreme Court in cases at law, is strictly a Court of Error, and therefore an appeal can notice only matters of law appearing on the record propper, or a bill of exceptions, or statement in the nature thereof. *State* v. *Langford*, Busbee N. Car. Rep. 436.

15. Where an exception shows or supposes a state of things inconsistent with the statement made up by the judge, it must be disregarded and the statement taken to be true. *Ib.* 436.

16. Where a record shows that the prisoner was brought to the bar in the custody of the sheriff, and then setting out the drawing, &c., of the jury, and their verdict contains this entry, the prisoner is remanded, the presence of the prisoner during the whole trial appears with judicial certainty. *Ib.*

17. Where the court refuses to postpone a cause, such refusal cannot be reviewed on bill of exceptions. *People* v. *Colt*, 3 Hill's 432.

18. In Missouri, on trial of an indictment for exercising the business of auctioneers without license, the defendants were not entitled to a bill of exceptions until the passage of the act at the Session of 1834–'5. It seems that a bill of exceptions could not be allowed on the trial of any indictment. *Vaughn* v. *State*, 4 Mo. 290.

19. In Tennessee, where an appeal is taken, the bill of exceptions must be made out before the adjournment of the court, and no order can be made that it be taken at a subsequent term, whether general or special. *Staggs* v. *State*, 3 Humph. 372.

20. Where, upon a challenge for

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favor, the court commits an error in admitting or rejecting evidence or instructing the triers upon matters of law, a bill of exception lies. *People* v. *Bodine*, 1 Denio 281.

21. In Massachusetts, a defendant after being convicted of an offence in the Court of Common Pleas, at the March term thereof, made exceptions to the opinion of the court, and entered into a recognizance to enter and prosecute the same, not at the Supreme Judicial Court "next to be holden for the same county," as the law requires, which was in April, but at the next November term of that court. The defendant not having entered his exceptions, either at the April or November term, the attorney-general filed a complaint stating the facts, and praying the court to order a capias to be issued and the defendant brought into court. The court held that they had jurisdiction of the cause, and directed a capias to issue against the defendant. On his being brought in, his counsel refused to argue the exceptions, and the court passed sentence upon him on his conviction. *Com.* v. *Dow*, 5 Met. 329.

22. In Massachusetts, under the Rev. Stats. c. 138, §§ 11, 14, the Supreme Judicial Court has power in criminal cases brought there from the Court of Common Pleas, and the Municipal Court, upon exceptions to award a new trial, for other sufficient cause, shown after overruling the exceptions, or to remand the cause to the court from which it came, for the purpose, among others, of their hearing a motion for a new trial. *The Commonwealth* v. *Peck*, 1 Met. 428.

23. Where two bills of exceptions are placed upon the record of the County Court, and each appears to contain an entire statement of the case, and they are contradictory to each other, both will be considered as forming part of the record of the case. *Ib.*

II. Grounds for Exceptions.

24. Exceptions may now be taken in criminal prosecutions, in the same cases and manner provided by law in civil cases. *Safford* v. *the People*, 1 Parker's Crim. R. 474.

25. In Massachusetts, matters, though rare within the discretion of an inferior tribunal, are not grounds of exceptions under the statute of that State. *The Com.* v. *Sackett*, 22 Pick. 394.

26. Where an exception is taken, in a manner so indistinct that the Court cannot readily perceive the exact point of the objection, the appellate Court will disregard it. Per Mitchell, J. *Campbell* v. *the People*, 1 Parker's Crim. R. 272.

27. Where there is an omission by the judge to give the instruction which counsel in addressing the jury may have contended for, it furnishes no ground for exceptions unless the judge was asked to give such instruction. *The State* v. *Straw*, 33 Maine 3 (Red.) 554.

28. It is no ground for exception that the presiding judge, on the trial of an indictment, instructed the jury that if any of them differed in their views of the evidence from the majority of their fellows, they should be thereby led to distrust the correctness of their own judgments, and led to examine the facts of the case for the purpose of correcting their opinions. *The Commonwealth* v. *Tuey*, 8 Cush. 1.

29. When three defendants are indicted by the grand jury, and unanimously demand separate trials, *quere*, whether by so doing they do not deprive themselves of the right of any exception to the bill, on the ground that it was never legally found. *Commonwealth* v. *Chauncey*, 2 Ashmead 90.

30. Where the Court charges the jury with an expression of opinion, as to the effect of the evidence, leaving the jury to decide the question, notwithstanding such expression, it does not furnish a valid ground of exception: *aliter*, if the language which is the subject of exception amounts to an instruction as to the law applicable to the evidence in the case. *The People* v. *Quin*, 1 Parker's Crim. R. 340.

31. Where the question on the trial was whether the accused was guilty

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of murder or manslaughter, and the presiding judge, in giving his charge to the jury, after commenting on the evidence for the prosecution, said: "Now, gentlemen, if you believe this evidence, and believe that the crime was committed by the defendant, under the circumstances as given to you by these witnesses, I see no ground to warrant you in not finding the defendant guilty of manslaughter, but in my judgment he is then guilty of murder," it was held to be equivalent to an instruction upon a conclusion of law, and the case properly presented questions of fact to be passed upon by the jury, viz.: whether the killing was by "premeditated design to effect murder," &c. The charge was held to be erroneous, and a new trial was awarded. *Ib.*

32. *Quere.* Whether the setting aside a person called upon the venire, on the motion of the Commonwealth, would be a ground of exception by the prisoner. *Bell's case*, 8 Gratt. 600.

33. Exceptions taken at the trial, and exceptions taken to the rulings upon the motion in arrest, are incompatible. It must be held that both be dismissed, or that the one or the other have been withdrawn or waived. If it should be held that either of the exceptions have been withdrawn, it is reasonable to consider that those taken first in order of time, are the ones withdrawn. *State* v. *Wing*, 32 Maine R. 581.

34. An exception is available in order to correct an error in the admission or exclusion of evidence, in granting or refusing a nonsuit, in charging or refusing to charge the jury on a specific proposition, or in deciding any question on the trial going to the merits; but all that has reference to the manner of conducting the trial, to the forms of the questions asked, if not objectionable in substance, and to the range allowed counsel on their arguments, are matters of discretion, as to which a remedy for a supposed error cannot be made by an exception. *The People* v. *Finnegan*, 1 Parker's Crim. R. 147.

35. Where the Court allowed the counsel for the people to press upon the jury that they might infer from the accused's omission to prove a good character, that his character was bad, because the counsel for the accused had stated to the jury, in opening the defence, that he had known the accused from his youth, and knew him to be a man of fair character; held that such decision could not be reviewed on exception, the latitude to be given counsel, in addressing the jury, being a matter of discretion; but that the way by which to have raised the question was by asking the Court to charge, after the Counsel had addressed the jury on a specific proposition as to the legal presumption, and if the Court refused so to charge, then to except to such refusal. *Ib.*

36. It is to be presumed, after verdict, that all necessary and proper instructions, in matter of law, for the aid and information of a jury, were given; and it must of necessity be presumed that such instructions were legally correct, in cases where no exceptions have been taken and no points reserved. *The Commonwealth* v. *Kneeland*, 20 Pick. 206.

BRIBERY.

1. Bribery is included in the 8th section of the 1st article of the Constitution of the United States, conferring on Congress the power to create, define and punish crimes and offences. *U. S.* v. *Worrall*, 2 Dallas 384.

2. One may be indicted for offering to bribe, though the bribe be not accepted. *Ib.*

3. Writing a letter offering a bribe in one State, and putting it in the post-office there, directed to an individual in another State, is an offence completed in the State where the post-office is situated. *Ib.*

4. In a prosecution for bribery in an election, it must appear that the offence existed otherwise than in intention, and that it was actually carried into execution, which could only be by an election held, and the corrupt vote then given; and this cannot be intended,

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but must be clearly alleged. *Newell* v. *Com.*, 2 Wash. 88.

5. Defendant was indicted for attempting to bribe a deputy sheriff, and by a corrupt offer of money to induce him to summon such persons on the jury as he, the defendant, should name and designate. Held, that this was an offence at Common Law, and that it was not necessary to charge in the indictment that the accused offered any specific sum of money, or other thing, to the deputy sheriff. *Com.* v. *Chapman*, 1 Va. Cas. 138.

6. An agreement between A. and B. that A. will vote for C. as commissioner of the revenue in consideration that B. will vote for D. as clerk; and that B. will vote for D. as clerk in consideration that A. will vote for C. as commissioner of the revenue, and the actual voting of A. and B. in pursuance of said corrupt agreement, is not an offence within the statute of Virginia against buying and selling offices. *Com.* v. *Callaghan*, 2 Va. Cas. 460.

7. In Pennsylvania, where a sheriff bribes a voter previous to his election, it is not an infamous crime within the meaning of the constitution of that State, disqualifying him on conviction from holding office. *Com* v. *Shaver*, 3 Watts & Serg. 338.

8. In order to consummate the crime of bribing a legislative or judicial officer, under the statute of Alabama, it must be shown that the cause or proceeding was pending before the officer at the time the gift or promise was made; or that the cause or proceeding was afterwards instituted before the officer, or so instituted that in the ordinary mode of proceeding the same would come before him. *Barefield* v. *the State*, 14 Ala. 603.

BURGLARY.

I. What constitutes Burglary.
II. Indictment for Burglary.
III. Evidence on the trial; competency of.
IV. Conviction and judgment.

I. What constitutes Burglary.

1. A burglary may be committed in a store-house standing twenty-four yards from the dwelling-house, and separated therefrom by a fence, if the owner or his servants sometimes sleep therein. *State* v. *Wilson*, 1 Haywood R. 279.

2. The breaking and entering a dwelling-house, with intent to cut off an ear of an inhabitant, is not a felony. *Com.* v. *Newell, et al.*, 7 Mass. Rep. 245.

3. In burglary, there must be a breaking, removing or putting aside of something material which constitutes a part of the dwelling-house, and is relied on as a security against intrusion. A door or window left open is no such security. But if the door or window be shut, it is not necessary to resort to locks, bolts or nails; a latch to the door or the weight of the window is sufficient. *State* v. *Boon*, 13 Iredell's R. 244.

4. When a man burglariously entered a room where a young lady was sleeping, and grasped her ancle, without any attempt at explanation when she screamed, this is some evidence of an attempt to commit a rape, and must be submitted by the court to the jury. *Ib.*

5. There cannot be a constructive breaking, so as to constitute burglary, by enticing the owner out of his house by fraud and circumvention, and thus inducing him to open his door, unless the entry of the trespasser be immediate, or in so short a time that the owner or his family has not the opportunity of re-fastening his door. *The State* v. *Henry*, 9 Iredell's R. 403.

6. As when the owner, by the stratagem of the trespasser, was decoyed to a distance from his house, leaving his house unfastened, and his family neglected to fasten it after his departure, and the trespasser, at the expiration of about fifteen minutes, entered the house, without breaking any part, but through the unfastened door, with intent to commit a felony, held that this was not burglary. *Ib.* Ruffin, C. J., dissented.

7. The mere forcing open the shut-

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ters and thrusting the hand within them, will not constitute burglary, no entry into the dwelling having been made. *State* v. *M'Call*, 4 Ala. 643.

8. The breaking and entering a dwelling-house with intent to commit adultery, is not burglary within the statute of Vermont. *State* v. *Cooper*, 16 Vt. 551.

9. As to what is night to constitute burglary. *State* v. *Bancroft*, 10 New Hamp. 105.

10. When one breaks open, in the night-time, a store at the distance of twenty feet from a dwelling-house, but not connected with it by any fence or enclosure, it is not burglary. *The People* v. *Parker*, 4 John R. 423.

11. House-breaking with a felonious intent, has always been considered a crime of an aggravated nature; if committed in the night-time, it has been, both in England and in this country, a capital offence. *Com.* v. *Hope*, 22 Pick. 1.

12. The true definition of burglary is breaking, &c., with intent to commit felony, of which the actual commission is so strong a presumptive evidence that the law has adopted it, and admits it to be equivalent to a charge of the intent in the indictment. *Com.* v. *Hope*, 22 Pick. 1.

13. Where a man lifts up the latch of an outer door, or, where the outer door being open, he enters, or unlatches or unlocks a chamber door, it is such a breaking as will constitute the crime of burglary. *State* v. *Wilson*, Coxe 439. *Aliter*, if all the doors are open, and a thief enters, though he afterwards breaks open a chest or cupboard. *Ib.* See *Commonwealth* v. *Steward*, 7 Dane's Ab. 136.

14. Burglary may be committed in a house in a city, where the prosecutor intended to reside on his return from the country, and into which he had removed his furniture on going into the country, notwithstanding neither he nor his family had ever lodged in it; but it had merely been used by them occasionally as a stopping-place. *Com.* v. *Brown*, 3 Rawle 207.

15. It does not constitute burglary to break the door of a store within three feet of the dwelling-house, and enclosed in the same yard, when the store is not necessary to the house as a dwelling. *State* v. *Langford*, 1 Dev. 253.

16. Burglary is an offence by the Common Law. *Rex* v. *Hanson*, 1 Root 59. And it consists in the breaking and entering of a dwelling-house in the night-time, with intent to commit a felony. *State* v. *Wilson*, Coxe 441; *Commonwealth* v. *Newell*, 7 Mass. 247.

17. In Georgia, burglary may be committed in the day or night. *State* v. *Thompson*, R. M. Charl. 80.

18. If at the time of committing the burglary, laid in the indictment, there was light enough to discern a man's face, it was burglary. *Thomas* v. *The State*, 5 Howard's Reps. 20.

19. Where a prisoner is lawfully *in* a house, or has the right to enter, as the guest of an inn, he cannot be convicted of the offence of entering in the night-time with intent to steal. *State* v. *Moore*, 12 N. H. 42.

20. Where a defendant was charged with breaking and entering, on the 28th of April, 1835, in the night-time, "a certain house, not then occupied as a dwelling-house," and stealing therein goods and chattels to the amount of about sixteen dollars; held to be only larceny. *Wilde* v. *Commonwealth*, 2 Metc. 408.

21. The statute 29, Ohio laws, 144, prescribes the punishment for breaking and entering a mansion-house in the night-season, *in which any person shall reside or dwell*, and committing, or attempting to commit, any personal *violence or abuse*. The *intent* with which the party enters forms no ingredient of the offence. The inquiries presented by the statute are: did the accused break and enter the house in the night-season? If so, did he commit, or attempt to commit, any personal abuse or violence. *Forsyth* v. *State*, 6 Ham. 20.

22. The lifting the latch and opening the door, though not bolted or locked, the shoving up a window, though not fastened, the getting down a chimney, and various other acts done to effect an entry, are held to be a breaking. The offence consists in violating the common security of a dwelling-house

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in the night-time for the purpose of committing a felony. It makes no difference whether the door is barred and bolted, or the window secured or not, it is enough that the house is secured in the ordinary way, so that by the carelessness of the owner, in leaving the door or window open, the party accused of burglary be not tempted to enter. *Com.* v. *Stephenson*, 8 Pick. 354.

23. Where two persons contrive together for the purpose of executing a burglary, and one breaks into the house and obtains the property, while the other waits without, both will be guilty of breaking and entering. *People* v. *Boujet*, 2 Parker's Crim. Rep. 11.

24. A district school-house is not an out-house within the terms of 30th section of the act of 1830, concerning crimes and punishments. *State* v. *Bailey*, 10 Conn. 144.

25. The statute of Maine, in defining this offence, makes no distinction respecting the time of breaking and entrance. The same acts will constitute the offence irrespective of light or darkness. *State* v. *Newbergen*, 25 Me. 500.

26. In North Carolina the statute of 1806, ch. 6, makes capital the offence of breaking a dwelling-house in the day-time, and feloniously taking therefrom *money, goods, or chattels*—a bank-note was not the subject of larceny before the statute of 1811, ch. 11. *State* v. *Jim*, 3 Murph. 3.

27. In Massachusetts there is no statute provision for the punishment of the crime of breaking and entering a warehouse in the night-time. *Commonwealth* v. *Carrol*, 8 Mass. Reports 490.

28. Removing a plank which is loose, and is not fixed to the freehold in a partition wall of a building, is not a breaking-in within the statute. *Commonwealth* v. *Trimmer, et al.*, 1 Massachusetts Term R. 476.

29. Every dwelling-house is taken to be a habitation wherein burglary may be committed. So all out-houses attached to the dwelling, and intended for the comfort and convenience of the family, are, in legal signification, part and parcel of it. *Armour* v. *State*, 3 Humph. 379.

30. A store, in which no member of the family slept, is not part and parcel of the mansion-house, though within thirty feet of it, and within a common enclosure. *Ib.*

31. The cabin of a vessel is a "shop," and a barn not connected with the mansion-house is an "outhouse" within the terms of the statute of Connecticut, for the punishment of burglary. *State* v. *Carrier*, 5 Day 131; *State* v. *Brooks*, 4 Conn. 446. See, also, *Rex* v. *Humphrey*, 1 Root 63. *Aliter* of a district school-house. *State* v. *Bailey*, 10 Conn. 144.

II. Indictment for Burglary.

32. An indictment for burglary must lay a felonious intent, and that intent must be proved. The Court will presume that a confession made before a magistrate was reduced to writing; but it must be shown that the defendant signed it, or admitted it to be correct, in order to exclude parol proof of the confession. *The State* v. *Eaton*, 3 Harrington 554.

33. In an indictment for burglary it is sufficient to lay the ownership of the house in a married woman who lives apart from her husband, and has the occupancy and control of the dwelling. *Dutcher* v. *State*, 18 O. 708.

34. In Massachusetts an indictment for breaking a store cannot be supported under the act of March 15th, 1785, unless it be averred in the indictment that the store is a building. *Commonwealth* v. *McMonagle*, 1 Mass. Term R. 517.

35. In Virginia it is indispensable that the indictment charge the offence to have been committed in the night-time. *Mark's case*, 4 Leigh. 658.

36. The offence of entering a dwelling-house in the night-time, without breaking, is included in an indictment for breaking and entering. *State* v. *Moore*, 12 New Hamp. 42.

37. As the crime of burglary and the crime of larceny committed in the night-time have a close connection in

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fact, they may be charged in the same indictment. Upon such an indictment the prisoner may be acquitted of burglary and convicted of the theft; whilst a general verdict of guilty will cover both offences. *State* v. *Brady*, 14 Vt. 353.

38. An indictment under the statute of Massachusetts of 1839, ch. 31, for breaking and entering in the night-time any shop or warehouse adjoining to, or occupied with a dwelling-house, with intent to commit murder, larceny, or other felony, need not allege that the prisoner broke and entered the shop with intent to commit larceny or other felony. The averment that he broke and entered the shop, the goods of A. B. then and there being found, feloniously to steal, take, and carry away, is sufficient. Nor is it necessary to describe the goods intended to be stolen. A general intent to steal goods would complete the offence; and, therefore, the averment of such intent, without more, is sufficient to charge it. *Josslyn* v. *Com.*, 6 Metc. 236.

39. An indictment under the Revised Statutes of Mass. of 1804, ch. 143, § 4, for breaking and entering in the night-time a shop or office, and committing larceny therein, need not allege that the shop or office was "not adjoining to or occupied with a dwelling-house." *Devoe* v. *Com.*, 3 Metc. 316.

40. It is not necessary that an indictment for burglary in the third degree should state that the offence was committed in the day-time. *Butler* v. *People*, 4 Denio's R. 68.

41. In an indictment for burglary with intent to steal goods and chattels, it is not necessary to aver what specific goods were intended to be stolen. *Spencer* v. *the State*, 13 Ohio R. 401.

42. The term "goods and chattels," imports value, and it is not necessary under the statute to aver any certain value. *Ib.*

43. On trial, proof of their value is not necessary. *Ib.* In an indictment for burglary, a description of the premises as "the warehouse of W. M., at Scioto County," is sufficient. *Ib.*

44. An indictment for breaking and entering a dwelling-house in the night-time, and stealing, need not allege an intent to steal. *Jones* v. *State*, 11 New Hamp. 269.

45. In Massachusetts, an indictment under the Revised Statutes, for burglary, need not allege the act to have been done burglariously. *Tully* v. *Com.*, 4 Metc. 357.

46. In Virginia, previous to the statute of 1804, an indictment was held fatally defective for not averring expressly that the burglary was committed within the jurisdiction of the Court, or within the district comprising the counties for which the Court was held, although it did charge that the offence was committed in the county of N., which was, *in fact*, within the district and jurisdiction. *Commonwealth* v. *Richards*, 1 Virg. Cas. 1.

47. An indictment charging the crime to have been committed between the hours of twelve at night and nine of the evening succeeding, will be quashed, for the omission of a *noctanter*. *State* v. *Mather*, N. Chip. 32.

48. It is not indispensable to charge the defendant in the indictment with breaking and entering with intent to commit a felony, where a felony is alleged to have been committed after breaking and entering. *Commonwealth* v. *Brown*, 3 Rawle 207.

49. In Missouri, in an indictment under the statute, for setting fire to a dwelling-house in which there was a human being, it is not necessary to mention the name of the person in the house. *State* v. *Aguilar*, 14 Mo. 130.

50. Where an indictment is laid for house-breaking, under the statute of Missouri, it must specify the manner of the breaking, so as to show on the face of the indictment the exact offence intended to be charged, and to shut out other offences of house-breaking described by the statute. *Conner* v. *State*, 14 Mo. 561.

51. Where an indictment alleges that "A. with an axe the dwelling-house of one B. in the night-time, feloniously and burglariously did break, and with the intent with said axe to open and enter, and the goods and chattels of

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the said B. in the said dwelling-house being, feloniously and burglariously to steal and carry away, but the said A. did then and there fail in the perpetration of said offence," &c.; held that it contains a sufficient description of the misdemeanor charged. *Hackett* v. *Commonwealth*, 15 Penn. State R. (3 Harris) 95.

52. Such a misdemeanor in Pennsylvania is liable to punishment by imprisonment in the State penitentiary for the term of two years and one month. *Ib.*

53. Indictment against A. for breaking a dwelling-house in the day-time, no person being therein, and feloniously taking therefrom a bank-note of the value of five pounds, concludes against the *form of the statute.* A. cannot be convicted of a capital felony. Such indictment should conclude against the form of the *statutes.* *State* v. *Jim*, 3 Murph. 3.

54. Where an information for burglary charged that the prisoner "feloniously and burglariously" broke and entered, without charging that the acts were done in the night season, or stating at what hour they were done, after a verdict of guilty and judgment thereon, held: 1st. That the information was fatally defective. 2d. That the defect was not cured by verdict. *Lewis* v. *the State*, 16 Con. R. 32.

55. Where there are two statutes, one punishing the offence of breaking, in the night-time, into an office adjoining a dwelling-house, and another that of breaking in the night-time into an office not adjoining a dwelling-house, both imposing a similar punishment; held that it is not necessary to allege whether the office was adjoining or not to the dwelling-house. *Larned* v. *Commonwealth*, 12 Metc. 240.

56. The charge of an actual larceny is not necessary to constitute the principal offence of burglary; the mere intent to commit larceny would be sufficient, and a further allegation of an actual larceny is only to be taken in aid of the charge of the intent; and if a conviction ensues, the punishment would be for the burglary, and not a distinct sentence for the larceny. Hence, in reference to the burglary, the specific charge of an actual larceny is surplusage; and if informally set forth and wholly defective, there would *still* remain sufficient to sustain a conviction, and judgment thereon. *Larned* v. *Commonwealth*, 12 Metc. 240.

57. In an indictment for burglary, the house is sufficiently described as a *dwelling*-house by the word *mansion.* *Commonwealth* agt. *Pennock*, 3 Serg. & R. 199.

58. An indictment setting forth that the defendant broke and entered a shop, with intent to steal, would be good, and the addition of the fact that he did steal, which is the best evidence of his intention, does not vitiate an indictment. *The State* v. *Ayer*, 3 Foster's R. 301.

59. An allegation in an indictment for burglary that the respondent broke and entered the dwelling-house of one person, with intent to steal his goods, and having so entered, then and there stole and carried away the goods of another person, then and there being found, is not a misjoinder of offences. *State* v. *Brady*, 4 Weston 353.

60. Where an indictment for burglary charges that the defendants broke and entered "the City Hall of the City of Charlestown;" held that this was a sufficient averment to show that ownership of the property was in the city of Charlestown. *Com.* v. *Williams*, 2 Cush. 582.

61. It is the breaking and entering in the night-time a public building, and stealing therein, that is the subject of punishment under the statute; the amount of property stolen is immaterial. *Ib.*

62. Where, in an indictment for burglary, the building alleged to have been entered was described as the shop of William S. Amigh, it was held no variance that the shop was occupied in the business of one Winters, of whom Amigh was the agent, it appearing that Amigh hired and paid for the shop, and that it was under his charge. *The People* v. *Smith*, 1 Parker's Crim. Rep. 329.

63. It has been considered proper and necessary, until the statute of 1847, c. 13, and such are the usual pre-

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cedents, to state some particular hour of the night in which the burglary was alleged to have been committed. The reason for this seems to have been, that one might with a felonious intent have broken and entered a building at a time properly called in popular language night-time, and yet not have committed the crime of burglary; the time in which that offence can be committed being not so far extended as to embrace the night-time, in the ordinary use of that word, but a period when the light of day had so far disappeared that the face of a person was not discernable by the light of the sun or twilight, but the statute just cited has defined "night-time" for all purposes of criminal proceedings. *Commonwealth* v. *Williams*, 2 Cush. 582.

64. Whenever "night-time" is now used in an indictment, as descriptive of the time of the commission of an offence, it is to be understood of the night-time as defined by this statute. *Ib.*

65. The allegations that the breaking and entering were in that night-time, is virtually an allegation that the offence was committed during the time between one hour after sun-setting on one day, and one hour before sun-rising on the next day. *Ib.*

III. Evidence on the trial—Competency of.

66. Proof of a constructive breaking a common jail, is sufficient to warrant a conviction under our statute which provides against a forcible breaking and entering. *Dutcher* v. *the State*, 18 Ohio R. 308.

67. When an actual stealing is charged in burglary, it must be proved, and proof of an intent to steal, is not sufficient. *Jones* v. *the State*, 11 New Hamp. 269.

68. In New Hampshire, where the indictment alleges the breaking and entering a dwelling-house in the night-time, with intent to steal, the actual larceny, if proved, is sufficient evidence of the intent. *State* v. *Moore*, 12 New Hamp. 42.

69. Where, on the trial of an indictment for burglary, it was proved that the door had been forced open; it was held that the jury might infer that the door had been duly shut on the night of the offence. *Com.* v. *Merrill*, Thach. Cr. Cas. 1.

70. In a prosecution for burglary, evidence tending to show the character of the burglarious acts, cannot be objected to on the ground that the circumstances offered to be proved, would, upon the trial of another offence, have a tendency to convict the accused of such latter offence. The intent with which the accused entered may be shown by proof of circumstances tending to establish a felony committed in a store adjoining. *Osborn* v. *the People*, 2 Parker's Crim. R. 583.

71. That the entry was made in the night, may be shown by circumstantial evidence, like other facts. *State* v. *Brancroft*, 10 New Hamp. 105.

72. Proof of burglary, on trial of a charge of larceny, does not give the accused a right to an acquittal. *Wyatt* v. *State*, 1 Blackf. 257.

73. Before one can be convicted of burglary there must be proof to show that the doors were shut. *State* v. *Wilson*, Coxe 439.

74. Proof of an illegal entrance merely such as would enable the party injured to maintain trespass, *quære clausum*, will not be sufficient. Nor will proof of an entrance merely, for a purpose ever so felonious and foul, accompanied by any conceivable stratagem, be sufficient, if there be no actual breaking. There must indeed be proof of a felonious intent; but however clearly that may be proved, and however full may be the proof of entrance, the offence is not proved until there be proof of an actual breaking, or its equivalent. It is immaterial by what kind of violence the breaking is effected. *State* v. *Newbergin*, 25 Me. Rep. 500.

75. Upon a trial for burglary, it is not material to inquire whether or not it was light enough to distinguish a man's face. *Thomas* v. *the State*, 5 How. Miss. 20.

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76. Where a burglary and a larceny are connected, the mere possession of the stolen goods, without any other evidence of guilt, is not to be considered as prima facie or presumptive evidence of the burglary. *Davis* v. *the People*, 1 Parker's Crim. Reports 447.

77. But where property has been feloniously taken by means of a burglary, and they are immediately or soon thereafter discovered in the actual possession of one who gives a false account or refuses to give any account of the manner in which the property came into his possession, proof of such possession and guilty conduct is presumptive evidence not only that he stole the goods, but that he made use of the burglary by which access to them was obtained. *Ib.*

78. There ought to be some evidence of guilty conduct in addition to the bare possession of the stolen property, before the presumption of burglary is superadded to that of the larceny. *Ib.*

79. In a prosecution for burglary, where the property charged to have been stolen in a burglarious manner was found in the possession of one A., an alleged accomplice of the accused, and was brought to and identified by the prosecutor, proof of the confession of the accused that he and A. went to the prosecutor's house together, and that the accused waited without until A. entered the house through the window and stole the property, and that they departed thence together, is sufficient evidence of the accused's guilt and the identity of the property. *People* v. *Bouget*, 2 Parker's Crim. Reports 11.

80. On the trial of an indictment for breaking and entering the city hall of Charlestown, after submitting to the inspection of the jury various tools and implements found in the possession of the defendant, the government offered evidence to prove that the ward of a certain key thus found was made and fitted by the defendant to open the door of the Lancaster bank building. Held that such evidence was improper. *Commonwealth* v. *Wilson*, 2 Cush. Rep. 590.

81. As to the sufficiency of evidence to establish such a breaking as to constitute the crime of burglary. *Hunter* v. *the Commonwealth*, 7 Grattan's Rep. 641.

IV. Conviction and Judgment.

82. A person indicted for breaking and entering a warehouse, with intent to steal, and also with stealing, may be convicted of the larceny simply. *The State* v. *Crocker*, 3 Harrington's R. 554; *People* v. *Snyder*, 2 Parker's Crim. R. 23.

83. In Georgia, under an indictment for burglary, the jury found the accused "guilty of stealing from the dwelling-house." Held that the verdict could not be sustained. *State* v. *Thompson*, R. M. Charlt. 80, S. P.; *State* v. *Maloney*, Ib. 84.

84. In Pennsylvania, in order to authorize judgment of imprisonment for life, on a second conviction of burglary, it must appear by the record that the defendant received judgment of imprisonment at hard labor, &c., for his first offence; it is not enough when the indictment avers only that the defendant was convicted on the former indictment, and that "the Court gave judgment." *Smith* v. *Commonwealth*, 14 S. & R. 69.

85. It is in the power of the county attorney to nolle prosequi as to the breaking and entering, and thereby leave the defendant punishable for the simple larceny only. *Anon.*, 31 Maine 592.

CERTIORARI.

I. When a Certiorari lies; and to what Court.
II. What the return to the writ should contain.
III. Who may remove a case by Certiorari. Effect of a Certiorari.
IV. Certiorari; by what Court allowed, and how served and returned.

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V. What facts the Court above will inquire into on Certiorari.
VI. Miscellaneous.

I. When a Certiorari lies; and to what Court.

1. In Massachusetts the proceedings on an information filed under the statute, for the purpose of causing a convict in the State prison to be sentenced to additional punishment, cannot be removed by a writ of certiorari. *Ex parte Cooke*, 15 Pick. 234.

2. In Pennsylvania the defendant must show cause before he is entitled to a certiorari. *Pennsylvania* v. *Kirkpatrick*, Addis. 197, note.

3. This writ lies to remove the proceedings of three justices in Georgia, in the trial of a party charged with inveigling a negro. *Ex parte George*, Charlt. 80.

4. In North Carolina, habeas corpus and certiorari were issued to remove the accused and the record of her conviction and sentence by the County Court, in the case of a slave who was convicted and sentenced to be executed for an offence not capital, and the sentence was reversed and the accused remanded to the County Court "to receive such judgment as the laws and constitution of the State will warrant." *State* v. *Sue*, C. & N. 54.

5. In Tennessee a criminal case may be removed from a justice of the peace into the Circuit Court, by the writ of *certiorari*. *Kendrick* v. *State*, Cooke 475. And it is good ground for such removal that a fair trial cannot be had before the justice. *Ib.*

6. An indictment against a corporation may be removed from the Sessions by certiorari upon individuals entering into recognizance on behalf of the company; and the certiorari may be allowed by a single judge at Chambers. *State* v. *Morris Canal and Banking Company*, 1 Green's R. 192.

7. In the courts of Virginia a certiorari may be awarded after verdict, and before judgment, and where it does appear from the record that there has in fact been no verdict of conviction against the defendants, there can be no doubt whatever of the propriety of awarding a certiorari. *Robert Mackaboy* v. *the Commonwealth*, 2 Virginia Cases 268.

8. Under the act of 1807, ch. 10, a slave convicted in the County Court of any offence, the punishment of which extends to life, limb or member, is entitled to an appeal to the Superior Court; and if such appeal be prayed for and denied, a writ of certiorari is the proper remedy to bring up the case to the Superior Court, where there shall be a trial de novo. *State* v. *Washington*, 2 Murph. Rep. 100.

9. In criminal cases brought to the Supreme Court upon points reserved, it is not correct practice for the defendant to assign errors in the record. In such cases, this Court is confined in their decision to the points reserved as novel and difficult, and a certiorari to bring up other parts of the record, will not be awarded. *State* v. *Shelton*, 3 Stewart's R. 343.

10. It seems to be well settled, by the English authorities, that after final judgment in a Court of Record, proceeding according to the course of Common Law, the only remedy is by writ of error. Cooke, petitioner. 15 Pick. Rep. 234.

11. But where the court below is not a Court of Record, or does not proceed according to the course of the Common Law, no writ of error will lie, and the proper remedy is by certiorari. *Ib.*

12. If a party, entitled to an appeal from an inferior to a superior tribunal, is denied that right, or deprived of it by fraud, or accident, or inability to comply with the requiremeuts of the law, he is entitled to have his whole case, both as to law and fact, brought up by certiorari, and to a trial de novo in the Superior Court. *State* v. *Bill*, 13 Iredell's Rep. 373.

13. In criminal prosecutions, doubts upon the admission or legal effect of testimony, cannot be brought before a Superior Court by certiorari or writ of error. *Ex parte Vermilyea*, &c., 6 Cowen 555.

14. But a challenge for principal cause constitutes a part of the record;

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and to review this, a certiorari will lie in a criminal cause; and a writ of error in a civil cause. *Ex parte Vermilyea*, 6 Cowen 555.

15. Contra of a challenge to the favor. *Ib.*

16. When the defendant has made the usual oath, as a ground for allowing a certiorari; the judge will, of course, allow it, unless something is shown, in relation to his character and conduct, which will induce the Court to suppose that public justice is likely to be impaired or defeated by the removal. *Com.* v. *Lyon*, 4 Dallas' Rep. 302.

17. The writ of certiorari is the appropriate writ where a statute creating an inferior Criminal Court has provided no means to review its judgment. *John* v. *State*, 1 Ala. 95.

18. An application for a writ of certiorari must be maintained, if at all, upon the ground of the irregularity of the proceedings in the cause, apparent upon the record and documents properly before the Court upon a return of the same by the magistrate. The sufficiency of the evidence to sustain the complaint ought not to be revised by the Court, it not appearing on the record that any objection to the competence of the evidence was taken before the justice. *Stratton* v. *the Commonwealth*, 10 Metc. 217.

19. A certiorari to remove an indictment, directed to the Oyer and Terminer, will not be quashed because at the time of the allowance of the writ the indictment is in the Sessions, if, when the writ be served, the indictment be in the Oyer and Terminer. *People* v. *Jewett*, 3 Wend. 314.

20. Where, by a private act of assembly abolishing jury trials in the County Courts of Richmond county, in cases where free negroes were charged with unlawfully migrating into this State, the proper course under the act of 1836 (sec. 8, ch. 1, Rev. Stat.) would be to remove the same by writ of certiorari to the Superior Court for trial: held, however, that the removal of such case by consent of parties dispensed with the necessity of a certiorari, and gave the Court the jurisdiction. *State* v. *Jacobs*, Busbee's N. C. Rep. 218.

21. It is a particular rule that a certiorari will lie to all inferior jurisdictions (the proceedings of which cannot be corrected by writ of error), to remove their proceedings into the Superior Court, to be there affirmed, or quashed, or otherwise corrected, as law and justice shall require. *Bob* v. *the State*, 2 Yerger's Reports 176.

22. It lies to all courts not proceeding according to the course of the Common Law, and where, without the writ of certiorari, there would be no remedy against an illegal sentence. *Ib.*

23. By the act of 1809, ch. 45, sec. 4, of Tennessee, the Circuit Courts, within their respective circuits, shall have original jurisdiction over all criminal matters and causes whereof the Superior Courts had jurisdiction; also exclusive jurisdiction over all criminal matters, of what nature, degree or denomination whatsoever, brought before them by certiorari. *Ib.*

24. In all such criminal matters as, by Common and Statute Law, could be brought before the Court of King's Bench in England, the circuit judges of Tennessee at present have the same powers, so far as regards certiorari, as the Court of King's Bench, except so far as they are restricted by the constitution or laws of this State. *Ib.*

II. What the Return to the Writ should Contain.

25. The magistrate to whom a Common Law certiorari is issued to remove proceedings had before him, under the act respecting disorderly persons (1 R. S. 638), should, in his return, state in hæc verba all the proceedings before him. *Bennac* v. *People*, 4 Barb. S. C. Rep. 164.

26. An order of removal, directing that "the trial of the prosecution shall be removed," &c., is sufficient, without directing further, that "a copy of the record of the said cause be removed," &c. *State* v. *Shepherd*, 8 Iredell's Rep. 195.

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27. Where the certiorari is intended to bring up a record to be offered in evidence only, or for other collateral purpose, there the tenor only of the record is to be called for and certified; but that where the Court above is to take further proceeding upon it, there the record itself is to be certified. *State* v. *Gibbons*, 1 South. 40.

28. The individual record is never sent, but a transcript only; which transcript, being properly certified, however, as the record, and not as a tenor or transcript, which is now always done. *Ib.*

29. The individual indictment, therefore, presented by the grand jury, never comes up with the certiorari, but the record only, which contains the whole proceeding against the defendant, to any part of which he may except. *Ib.*

30. In all cases where a certiorari is presented, whether before or after plea pleaded, it is essential that the proceedings, so far as they have gone, be enrolled, and that the roll, and nothing else, be certified to the upper court. *Ib.*

31. What return of certiorari to Oyer and Terminer necessary. *Ib.*

32. A certiorari, calling for the removal of an indictment against four generally, will not remove an indictment which charges only three persons in one of its counts. *Commonwealth* v. *Franklin*, 4 Dallas 316.

33. For the form of a writ of certiorari to bring up the proceedings and judgment from a Court of Special Sessions, and for the form of a return thereto, see the case of *The People* v. *Benjamin*, 2 Parker's Crim. R. 201.

34. In cases where a writ of certiorari is allowed to remove a decision on habeas corpus; for the form and return thereto, see the case of *the People* v. *Cavenaugh*, 2 Parker's Crim. R. 650.

III. Who may Remove a Case by Certiorari—Effect of a Certiorari.

35. A certiorari, to remove an indictment for a forcible entry and detainer to this court, may be granted as of course, at the instance of the defendant, without showing special cause. *People* v. *Rumkel, et al.*, 6 Johnson's Rep. 334.

36. As to right of the district attorney to remove causes by certiorari. *People* v. *Vermilyea*, 7 Cow. 108.

37. It is always correct to insert a special clause in a writ of certiorari to a criminal court, directing it to operate as a supersedeas, and, if necessary, to also direct a special writ of supersedeas to the sheriff to delay execution until the case is heard and determined. *John* v. *State*, 1 Ala. 95.

38. Although the special courts for the trial of slaves charged with capital offences created by the act of 1832 (Aiken's Digest), are required to fix the time of execution of a condemned slave within a period of ten days from the sentence, yet the allowance of a certiorari is a supersedeas of the sentence until it is quashed or the inferior tribunal directed to go on by writ of procedendo. *Ib.*

39. A certiorari removes the record only. *Ex parte Vermilyea*, 6 Cow. Rep. 555.

IV. Certiorari; by what Court allowed, and how served and returned.

40. When a removal of a criminal case is indispensable for the due administration of justice, an allowance of the writ by one of the judges of the Supreme Court will be granted to the defendant of right. *Com.* v. *McGinnis*, 2 Whart. 117. A special *allocatur* is necessary. *Ib.*

41. See, also, *Com.* v. *Profit*, 4 Binn. 428; *Com.* v. *Lyon*, 4 Dall. 302.

42. Where a slave is tried before a justice and jury under the statute of 1819, and is convicted of murder and sentenced to death, the Circuit Court has power to remove the proceedings and affirm or quash them, or order a new trial. *Bob* v. *State*, 2 Yerg. 173.

43. A judge of the General Court has the power and authority to allow a certiorari in vacation, in a case arising

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within his jurisdiction. *Mackaboy* v. *Com.*, 2 Virg. Cas. 268.

44. The justice of the Supreme Court should always be one of those returning the writ of certiorari, in order that it may appear to be the act of the Court, and not of any individual justice or justices thereof; for though a certiorari, or other writ of that nature, should have been allowed without the assent, or even contrary to the opinion of the justice of the Supreme Court, as well it may, yet such allowance being lawfully made, such justice is obliged to join in the return, according to the command of the writ, his dissent from the allowance notwithstanding. *State* v. *Gibbons*, 1 South. 40.

45. When a certiorari is directed to the judges of the Court of Common Pleas, the direction of the certiorari is fatal. The power and cognizance of the judges of the Court of Common Pleas do not extend to criminal cases. *Com.* v. *Franklin*, 4 Dallas' Rep. 316.

46. The Circuit Court have jurisdiction to award writs of certiorari to review the proceedings of inferior courts of criminal jurisdiction. *John* v. *the State*, 1 Ala. Rep. 95.

47. After a certiorari has been returned to this Court, removing an indictment, the Court will allow a rule to return the record to the court from which it was removed, for the purpose of amending the caption. *State* v. *Jones*, 4 Halst. 2.

48. The record is never sent with the writ, but the tenor only. *Nicholls* v. *the State*, 2 South. 542.

49. Form of record to be returned with certiorari. *Ib.* 746.

50. In sending a transcript of record in pursuance of a certiorari from one court to another, it is not necessary that the transcript should be affixed to the writ of certiorari (though it is most proper it should be so), provided enough appears to show the court into which it is certified that it is in truth the proper transcript. *State* v. *Hardy Carroll*, 5 N. C. 139.

51. On error in a criminal case, a certiorari to return diminution need not be allowed by a judge. *Lambert* v. *People*, 7 Cow. 108.

52. It may be served by delivering it to the clerk of the court below during vacation, who may return it immediately, notwithstanding it be directed to the court. *Ib.*

53. It is proper that it should be directed to the Court, and a motion to amend by directing it to the clerk, was denied. *Ib.* The Court of Error will not grant a rule upon the clerk of the court below to return. *Ib.*

54. Such rule should be directed to the Court below, who should order their clerk to return, if he improperly refuse. *Ib.*

V. What Facts the Court above will Inquire into on Certiorari.

55. It is not error to poll the jury, and when each juror agrees to the *same* verdict, to enter it as the verdict of the whole jury. *State* v. *John*, 8 Iredell Rep. 330.

56. Upon a certiorari to a court of special sessions, the Supreme Court, it seems, is restricted from reversing the conviction, because the verdict is against the weight of evidence. But it may look into any other errors in the proceedings and judgment, which appear on the face of the return. *Pulling* v. *People*, 8 Barbour's S. C. Rep. 384.

57. The statement in the return to a writ of certiorari, that two were jointly arrested, and jointly examined, and that a separate trial was granted to the plaintiff in error, must be considered the same as a statement that they were jointly charged in the same complaint, with the commission of the same offence, and is the same in effect as a charge against two in an indictment. *Pullen* v. *People*, 1 Douglass M. R. 48.

58. On certiorari, the Court will not look into facts improperly *returned*; e. g., the evidence returned by a Court of Oyer and Terminer. *People* v. *Vermilyea*, 7 Cowen 108.

VI. Miscellaneous.

59. The Court to which the writ is directed, has no power to refuse re-

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turning an indictment, &c. *State* v. *Hunt*, Coxe 287.

60. Where the record of the proceedings on an indictment for murder, uses the past tense, instead of the present, this is not error. *State* v. *Reeves*, 8 Iredell Rep. 19.

61. A certiorari to remove an indictment, directed to the Oyer and Terminer, will not be quashed, on the ground that at the time of the allowance of the writ, the indictment is in the sessions, if when the writ be served, the indictment be in the Oyer and Terminer. *People* v. *Jewett*, 3 Wend. Rep. 314.

62. An indictment found by a grand jury, summoned by a sheriff, without process, will be quashed on motion; defendant may withdraw the plea of not guilty, in order to make the motion to quash. *Nicholls* v. *The State*, 2 South. 539.

63. Proceedings on the accused's removing an indictment for a misdemeanor by certiorari. *The People* v. *Winchell*, 7 Cowen 160.

CHEAT.

I. What constitutes the offence of obtaining goods, &c., under false pretences and tokens.
II. What constitutes a false token and pretence.
III. Statutes respecting false pretences, cheats, &c. Construction of.
IV. When an indictment will lie for cheating by false tokens, &c.
V. What the indictment must charge. Its contents, &c.
VI. What charges must be proved to sustain an indictment; evidence to warrant a conviction.
VII. Evidence admissible on the trial.
VIII. Miscellaneous. Arresting judgment. Jurisdiction.

I. What Constitutes the Offence of obtaining Goods, &c., under false Pretences and Tokens.

1. A false representation, tending only to induce a party to pay a debt previously due from him, is not within the statute obtaining property by false pretences, though payment be thereby obtained. *The People* v. *Thomas*, 3 Hill's Rep. 169.

2. In New York, to make a case come within the statute, punishing the obtaining of the signature of a person to a written instrument by false pretences, the instrument must be of such a character as that it may work a prejudice to the property of the person affixing the signature, or of some other person. *People* v. *Galloway*, 17 Wend. 540.

3. A representation, though false, is not within the meaning of the statute against obtaining property, &c., by false pretences, unless designed to mislead persons of ordinary prudence and caution. *People* v. *Williams*, 4 Hill 1.

4. Where one by lying only, without using any false weights, measures, or tokens, defrauds another of his property, the injury is a civil one, and an indictment cannot be supported as for a public offence. *Commonwealth* v. *Warren*, 6 Mass. R. 72.

5. Where one giving credit to the false pretences and affirmations of the defendant, sold him shoes, and took as security the note of the defendant, subscribed by him, with the name of William Waterman's fictitious name; held not to be indictable as for a cheat. *Ib.*

6. A fraud, to be an indictable offence at Common Law, must be one affecting the public, and such as common prudence is not sufficient to guard against; as the using of false weights and measures, or false tokens, or where there has been a conspiracy to cheat. *People* v. *Miller*, 14 John. 370.

7. Where a person got possession of a promissory note by pretending that he wished to look at it, and then carried it away, and refused to deliver it to the holder; it was held that this was merely a private fraud, and not punishable criminally. *Ib.*

8. To constitute a cheat or fraud an indictable offence at Common Law, it must be such a fraud as would affect the public; such a deception that common prudence cannot guard against; as by using false weights and measures, or false tokens, or where there is

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a conspiracy to cheat; where D. had a judgment against W., and W. came to D. and said he would settle it by paying money in part, and giving a note for the residue, on which D. drew a receipt in full in discharge of the judgment, and W. got possession of the receipt without paying the money or giving the note; and the indictment charged him with having obtained the receipt falsely, fraudulently, and deceitfully, and under false acts, colors, and pretences, and under pretence that he had the money in his pocket, and would pay it immediately, and give his note for the residue; it was held that there was no false token, but only a false assertion, and that an indictment would not lie. *The People* v. *Babcock*, 7 Johns. R. 200.

9. The offence of cheating by false pretences, is in judgment of law committed when the false pretences are successfully employed, and where the money or property is obtained, although the fraud originated and was contrived in another place. *People* v. *Adams*, 3 Denio 190.

10. Obtaining horses from an ignorant countryman by threats of a criminal prosecution for horse-stealing, and also by threats of his life, constitutes the offence of swindling under the act of 1791. *The State* v. *Vaughn*, 1 Bay's R. 282.

11. There can be no rational doubt, if there be one pretence, and that proved to be false, and made with a fraudulent design to obtain credit for goods, and credit is induced to be given thereby, that the offence is complete. *State* v. *Dunlap*, 24 Maine R. 77.

12. In the State of Massachusetts, where the proprietor of an intelligence office agreed to procure a place for an applicant, in consideration of $2, paid in advancement, and by falsely alleging that he had a situation in view, induced the applicant to pay the money, he was held to be guilty of obtaining money by false pretences. *The Commonwealth* v. *Parker*, Thacher's Crim. Cases, 24.

13. It does not constitute the offence of false pretences to obtain from a minor his note, which at the time of the prosecution was not due nor paid. *Com.* v. *Lancaster*, Thacher's Crim. Cas. 428.

14. The note of a minor is not property within the Massachusetts act of 1815, c. 136, Rev. Sts. c. 126, § 32. *Ib.*

15. Where a receipt was obtained in discharge of a debt which was paid with the worthless notes of a broken bank, it is not such property or valuable thing as is contemplated by the Pennsylvania statute of July 12, 1842, § 21, rendering the obtaining money, personal property, or other valuable thing, by false tokens or false pretences an indictable offence. *Moore* v. *Commonwealth*, 8 Barr. 260.

16. Where the fraud at Common Law is alleged to have been effected by means of a false token, the token must be such as shows a general intent to defraud; a mere privy token, or counterfeit letters in other men's names, do not appear to come within the meaning of the term false token as used at Common Law. *People* v. *Stone*, 9 Wend. 182.

17. The cases in which fraud is an indictable offence at Common Law, seem to be confined to the use of false weights and measures, the selling goods with counterfeit marks, playing with false dice, and frauds affecting the course of justice and immediately injuring the interests of the public. *Ib.*

18. Defendants purchased goods from the prosecutor's clerk and gave in payment an instrument purporting to be a five dollar bill of the bank of Tallahassee in Florida, the blanks of which were filled up except those opposite the words cashier and president. In those blanks an illegible scrawl was written, which on careless inspection might have been mistaken for the names of those officers. Defendants knew before they passed the instrument that it was worthless. Held that they were guilty at Common Law of cheating by a false token. *State* v. *Stroll & Carr*, 1 Rich. Rep. 244.

19. To sustain an indictment at Common Law for cheating by a false token, the instrument or device by which the cheat was effected must be calculated to deceive the public; that is, it must be the semblance of a public, and not aprivate instrument; it

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must be such as affects or may affect the public. *Ib.*

20. A false bank bill is a public token, for cheating with which an indictment will lie at Common Law, and it makes no difference that it purports to be the bill of a bank of another State or territory. *Ib.*

21. By the Revised Statutes, where one obtains through pretence the signature of a person to a written instrument, it is classed with the obtaining of money by false pretence. *People* v. *Stone*, 9 Wend. 182.

22. Where one obtains an indorsement to a promissory note by false pretences and with a fraudulent intent, and which the party obtaining it has actually used for his own benefit, it is within the spirit of the act rendering punishable the obtaining by false pretence money, goods or chattels or other effects; the words, other effects, in our statute are equivalent to the words, or other valuable thing, in the British act. *Ib.*

23. To constitute the offence of obtaining goods by false pretences, it is not necessary that any false token should be employed, or that the false pretences should be such as that ordinary care and common prudence were insufficient to guard against the deception. *People* v. *Haynes*, 14 Wend. 546.

24. The offence consists in intentionally and fraudulently prevailing upon the owner to part with his goods, or other things of value, either by a wilful falsehood, or by the offender's claiming a character he does not sustain, or by representing himself to be in a situation which he knows he does not occupy. *Ib.*

25. It is not necessary to constitute the offence of obtaining goods by false pretences that the owner should have been prevailed upon to part with his property solely and entirely by pretences which were false, if the jury are satisfied that the pretences proved to have been false and fraudulent, were a part of the moving causes which induced the owner to part with his property, and that the defendant would not have got the goods had not the false pretences been superadded to statements, which may have been true, or to other circumstances having a partial influence upon the mind of the owner, they will be justified in finding the accused guilty of the offence charged within the letter as well as within the spirit of the act. *People* v. *Haynes*, 14 Wend. 546. Vide *The People* v. *Herrick*, 13 Wend. 87.

26. Where a purchase of goods is made, the goods selected, put in a box, and the name of the purchaser and his place of residence marked on the box, and the goods sent by the vender and put on board a steamboat named by the purchaser, to be forwarded to his residence, the sale is said to be complete, and the goods become the property of the purchaser. *The People* v. *Haynes*, 14 Wend. R. 546.

27. And where, after such delivery, the vender, on receiving information giving him reason to suspect the solvency of the purchaser, said that he would reclaim the goods, and the purchaser thereupon made representations in respect to his ability to pay for the goods by means of which the vender abandoned his intention to reclaim them; and the purchaser was then indicted, and charged with the offence of having obtained the goods by false pretences, the representations made by him being charged as false pretences; it was held that the sale being complete before the representations were made, the accused could not be considered guilty of the crime charged against him. *Ib.*

28. Where the prisoner is accused of obtaining property of another by means of threats, an instruction to the jury, that if the threats were maliciously made with intent thereby to extort the property from the owner—it being immaterial whether they did or did not produce any effect upon the mind of such owner—is correct, as the offence consists in maliciously threatening to accuse one of an offence or to injure his person or property, with intent to extort money or pecuniary advantage, or with intent to compel him to do an act against his will. *The State* v. *Bruce*, 11 Shep. 71.

29. To constitute the offence of obtaining property by false pretences,

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under the statute, two things are necessary, viz.: a false representation as to an existing fact, and a reliance upon that representation as true. *The People* v. *Tompkins*, 1 Parker's Criminal Reports 224.

30. Where it appeared from the depositions taken, before the police justice, that A. agreed to sell to B. one hundred shares of stock, deliverable and payable the next day, before transferring the stock N. sent for B.'s check, and received for answer that B. had sent his check to be certified, and would send it to A. in ten or fifteen minutes; and relying upon this state ment, A. thereupon transferred the stock to B; held that it was apparent that N.'s reliance was on the promise, and not upon the representation that the check had been sent to be certified, and that a case was not proven within the statute, especially as there was no proof showing that the check had not been sent to be certified, and the prisoner was discharged. *Ib.*

31. Where a deed of lands by a wife conveying real estate belonging to her in her own right, was executed by her with her husband, at the solicitation of the husband, under the pretence that it was a deed of lands belonging to him, but not acknowledged by the wife in the mode prescribed by law for passing the estate of a feme covert, it is not such an instrument as is intended in the statute. *People* v. *Galloway*, 17 Wend. 540.

32. A false representation will warrant the inference of an intent to defraud. *People* v. *Herrick*, 13 Wend. 87.

II. What constitutes a False Token and Pretence.

33. A false pretence made to an agent, who communicates it to his principal, and who is, thereby, induced by it to act, is a false pretence to the principal. *The Com.* v. *Call*, 21 Pick 59.

34. So likewise obtaining money by false pretences from an agent, who pays it by direction of his principal. *Ib.*

35. A mere naked lie may not be sufficient to sustain an indictment on the statute of Massachusetts of 1815, for it is not the policy of government to punish criminally every wrong which is committed. *Commonwealth* v. *Wilgas*, 4 Pick. R. 177.

36. What is a false pretence, within the meaning of the statute? It may be defined to be a representation of some fact or circumstance, calculated to mislead, which is not true. To give it a criminal character, there must be a scienter and a fraudulent intent. *Commonwealth* v. *Drew*, 19 Pick. R. 179.

37. Under the Massachusetts statute of 1815, ch. 136, the defendant's assuming a false name and delivering spurious quarter lottery tickets to B., for sale on commission, declaring that he (the defendant) had in a bank the genuine corresponding whole tickets, and thereby obtaining money from B., were held to be false pretences, and sufficient evidence of an intent to defraud B. *Com'lth.* v. *Wilgas*, 4 Pick. 177.

38. The false statement of the possession of money, on the credit of which goods were obtained, is a false pretence within the meaning of the Pennsylvania act of July 12, 1842. *Commonwealth* v. *Burdick* 2 Barr 163

39. A writing in the form of a bond, neither having the signature or purporting to have the signature of any one attached to it, is not a false writing, within the statute; to constitute it such, it must be some instrument, letter or other writing false in fact, but purporting to have been executed by some person, and to be his act, and so framed as to have more weight and influence in carrying out the fraud of obtaining a signature to a written instrument, or goods, &c., than the mere naked assertion of the party defrauding. *The People* v. *Gates*, 13 Wend. 311.

40. An indictment for obtaining goods by false pretences, the accused having from time to time deposited money in, and drawn checks upon, a bank, in a fictitious name, and had at length, and with a fraudulent intent, drawn a check when he had no funds on deposit, and presented it himself,

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and the bank paid it, though without regard to the credit of the name, was not sustained. *The Com.* v. *Drew*, 19 Pick. 179.

41. Proof of the assuming a fictitious name, in the foregoing case, would have been a false pretence, if it had been shown to have been the motive which induced the bank to part with its money. *Ib.*

42. But the simply opening and continuing the account with the bank, though a part of the defendant's system of fraud, was not a false pretence. *Ib.*

43. Acts as well as words, may amount in some cases to false pretences. *Ib.*

44. It would be a false pretence, if the drawer of a check on a bank should pass it to a third person, when he has no reason to expect it would be paid. *Ib.*

45. A false pretence, is a representation of some fact, or circumstance, calculated to mislead, which is not true. *Ib.*

III. Statutes respecting False Pretences, Cheats, &c.—Construction of.

46. The New York statute relative to obtaining money, &c., by false tokens or pretences, was not designed to protect any but innocent persons, not those who appear to have been in any degree particeps criminis with the offender. It is an essential ingredient of the offence that the party alleged to have been defrauded should have believed the false representations to be true, otherwise he cannot claim that he was influenced by them. If in parting with his property, &c., he was himself guilty of a crime, he is not protected by the statute. Per Welles, J. *People* v. *Stetson*, 4. Barb. 151.

47. The statute of Connecticut, tit. 21, s. 114 (ed. 1835), against cheating by false pretences, includes the provisions of the statutes of 33 Hen. 8, 32 Geo. 2, and 52 Geo. 3; and the decisions in Great Britain under those statutes are strictly applicable to cases arising here under the statute of Connecticut. *State* v. *Rowley*, 12 Conn. Rep. 102.

48. The statute against obtaining goods by false pretences extends to every case where one has obtained money or goods by falsely representing himself to be in a condition in which he is not, or by falsely representing any occurrence that has not taken place, and to which representations persons of ordinary caution may give credit. *The People* v. *Haynes*, 11 Wend. Rep. 557.

49. The words "other false pretence" in the statute, considered in connection with the other terms used, and the circumstances under which the statute 30 Geo. 2 was passed, upon which the statutes of New York are founded, mean not a bare naked lie, unaccompanied with any artful contrivance fitted to deceive, although intentionally and fraudulently told with the purpose of obtaining the property of another; but they mean an artfully contrived story which would naturally have an influence on the mind of the person addressed equivalent to a false token or false writing—an ingenious contrivance—an unusual artifice, against which common sagacity and the exercise of ordinary caution is not a sufficient guard. *People* v. *Haynes*, 14 Wend. 546.

50. In Arkansas, the word pretence, as used in statutes in relation to obtaining property by false pretences, has not been regarded by the courts in its lexicographic sense, but they have attached to it a legal and technical meaning. *McKenzie* v. *State*, 6 English 594.

51. Where a known statute has been re-enacted in terms, its known interpretation will be presumed to have been also adopted by the legislature. *Ib.*

52. The act of 1811, concerning the use of false tokens or pretences, requires that the cheat should be accomplished by means of some token or false contrivance, calculated to impose on the credulity of ordinary men; a mere lie was not in the contemplation of the legislature. *State* v. *Simpson*, 3 Hawk's N. C. Rep. 620.

53. A person who obtains goods un-

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der pretence that he lived with and was employed by A. B., who sent him for them, is indictable for obtaining goods by false pretences, under the statute, session 36, c. 29, § 13. *The People* v. *Johnson*, 12 John. Rep. 291.

54. The statute (1 N. R. L. 410) declares, that if any person shall knowingly and designedly, by false pretence, obtain any money, goods or chattels, &c., with intent to cheat or defraud any person, he shall be punished, &c. This is a transcript of the English statute (30 Geo. 2, ch. 24), which, according to the English decisions, has been considered as extending the Common Law offence of cheating, and as introducing a new rule of law. *Ib.*

55. The Common Law extended to cheats effected by means of any false token, having the semblance of public authority, or in any manner touching the public interest. *Ib.*

56. The statute (33 Hen. 8, ch. 1) extended the Common Law rule, but still required some false token to be used. *Ib.*

57. But this being found too limited to prevent the evil intended, the statute of Geo. 2 was passed, which adopted the more general terms of false pretences; and which has been considered in England as extending to every case where a party has obtained money or goods by falsely representing any occurrence that had not happened, to which persons of ordinary caution might give credit. *Ib.*

58. The ingredients of the offence are, obtaining the goods by false pretences, and with an intent to defraud. *Ib.*

59. If the false pretence created the credit, it has been considered as bringing the case within the statute. *Ib.*

IV. When an Indictment will lie for Cheating by False Tokens, &c.

60. An indictment will lie for obtaining goods by false pretences, when a party represents himself to be the owner of property which does not belong to him, and thus fraudulently induces the owner to sell the goods to him on credit. *People* v. *Kendall*, 25 Wend. 399.

61. Although a minor within the age of 21 years cannot be made responsible in a civil action for goods thus obtained, he may be proceeded against criminally, under the statute in respect to obtaining goods by false pretences. *Ib.*

62. Selling a promissory note which the party selling knew had been paid, but represented to the purchaser that it was still due according to its face, is not an indictable offence, but a mere civil injury to be redressed by action. *Middleton* v. *the State*, Dudley's S. C. Rep. 275.

63. A fraud on an individual without false tokens or any deceitful practice affecting the community at large, and without conspiracy, is not indictable. *The State* v. *Justice*, 2 Dev. 199.

64. An intention to cheat, at Common Law is not indictable. *Com.* v. *Morse*, 2 Mass. Rep. 138.

65. A person who, by false and fraudulent representations of his estate and circumstances, obtains the goods, &c., of another, is not indictable under the 30th section of the statute for the punishment of high crimes and misdemeanors. *State* v. *Sumner*, 10 Vermont Rep. 587.

66. An indictment does not lie for obtaining money by false pretences where the money is parted with as a charitable donation, notwithstanding the pretences moving to the gift are false and fraudulent. *People* v. *Clough*, 17 Wend. 351.

67. Cheating with false dice has been indicted in Pennsylvania. *Respublica* v. *Teischer*, 1 Dallas's R. 335.

68. Selling a blind horse as a sound one, is not an indictable offence, though a very good ground for an action of deceit. *The State* v. *Delyon*, 1 Bay's R. 353.

69. By the Common Law no indictment can be sustained "for a naked lie," or false affirmation. *The State* v. *Mills*, 17 Maine R. 211.

70. An indictment will lie against a defendant, a baker employed by the army of the United States, for a cheat, in baking 219 barrels of bread, and

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marking them as weighing 88 lbs. each, whereas they only weighed 68 lbs. *Respublica* v. *Powell*, 1 Dallas's R. 47.

71. False tokens are only indictable by the st. of 33 Henry 8, c. 1, which has no operation in Pennsylvania. *Ib.*

72. Where one leads an illiterate man, by false representations and false reading, to sign a note for a different amount from that agreed on, he is liable to indictment for the cheat. *Hill* v. *State*, 1 Yerg. 76.

73. Where there is a conspiracy to cheat, by offering to sell forged foreign bank-notes, of a denomination the circulation of which is prohibited in Pennsylvania, it is indictable in that State. *Twitchell* v. *Commonwealth*, 9 Barr. 211.

74. A fraud, to be indictable at Common Law, must be such as affects the public, or is calculated to defraud members, and which ordinary care and caution cannot guard against—as the use of false weights and measures—defrauding another under false tokens, or by a conspiracy to cheat. *People* v. *Stone*, 9 Wend. 182.

75. At Common Law private cheats were not indictable offences. *People* v. *Gates*, 13 Wend. 311.

76. Where, upon an exchange of personal property, one of the parties falsely and fraudulently pretends that the property which he is parting with belongs to himself, and is unincumbered, and also warrants it against encumbrances, an indictment may be supported against him where the false pretences, and not the warrant, was the inducement which controlled the other party in making the exchange. *State* v. *Dorr*, 33 Maine (3 Red.) 498.

77. The general proposition that frauds effected by means of false tokens are indictable at Common Law, has reference only to such false tokens as affect the public at large; such as are intended to defraud members, to deceive the people in general—such as false weights and measures. This view of the Common Law offence of cheating derives strong confirmation from the provisions of the statute of 38 Hen. 8, ch. 1. *People* v. *Stone*, 9 Wend. 182.

78. By that statute, when one obtains goods by privy tokens, or counterfeit letters in other men's names, &c., it is expressly made an indictable offence. As to privy tokens, at least this statute has always been considered as creating a new offence, though counterfeit letters of a certain description were perhaps indictable as forgeries at Common Law. *Ib.*

79. The cases in which fraud was an indictable offence at Common Law were, the use of false weights and measures, the selling goods with counterfeit marks, playing with false dice, and frauds affecting the course of justice, and immediately injuring the interests of the public or the crown. *People* v. *Herrick*, 13 Wend. 87.

80. A conspiracy to cheat and defraud is an indictable offence under the laws of Pennsylvania. *Rhoads* v. *Commonwealth*, 15 Penn. State R. (3 Harris) 272.

81. A fraud, to be an indictable offence at Common Law, must be such as affects the public, or is calculated to defraud members, and which ordinary care and caution cannot guard against—as the use of false weights and measures, defrauding another under false tokens, or by a conspiracy to cheat. *People* v. *Stone*, 9 Wend. 182.

82. A. was indicted in the city of New York for obtaining money from a firm of commission merchants in that city, by exhibiting to them a fictitious receipt, signed by a forwarder in Ohio, falsely acknowledging the delivery to him of a quantity of produce for the use of, and subject to the order of the firm. The accused pleaded that he was a natural born citizen of Ohio, had always resided there, and had never been in the State of New York; that the receipt was drawn and signed in Ohio, and the offence was committed by the receipt being presented to the firm in New York, by an innocent agent of the accused, employed by him while he was a resident of, and actually within the State of Ohio; held that the plea was bad, and that the accused was properly indicted in the city of New York. *Adams* v. *People*, 1 Comstock 173.

83. By the English statute of 33 H. 8, ch. 1, passed before the settlement

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of this country, and considered as part of the Massachusetts Common Law, cheating by false tokens is made an indictable offence. *Commonwealth* v. *Warren*, 6 Mass. R. 72.

84. As prudent persons may be overreached by means of false weights, measures, or tokens, or by a conspiracy, where two or more persons confederate to cheat, frauds effected in either of these ways are punishable by indictment. *Ib.*

85. Whether a note or endorsement, of which no use has been made, can be deemed either money, goods, chattels, other effects, or valuable things. *Quere.* *People* v. *Stone*, 9 Wend. 182.

86. False pretences made by one of several persons, in pursuance of an agreement made between them, are chargeable against all. *Cowen* v. *the People*, 14 Ill. 348.

V. What the Indictment must Charge; its Contents, &c.

87. In an indictment for obtaining goods under false pretences, all the false pretences relied on to support the indictment, and to convict the prisoner, must be specifically negatived; but to authorize a conviction it is not necessary to show all the pretences laid in the indictment to be false, unless all are material to constitute the offence charged. *People* v. *Haynes*, 11 Wend. 557.

88. An indictment for obtaining goods, or the signature of a person to a written instrument, by false pretences, &c., must contain all the material facts and circumstances which the public prosecutor will be obliged to prove, to produce a conviction; it must show upon the face of it, that the offence charged, has been committed, or, in the language of Lord Mansfield, it must be an intelligible story, so explicit as to support itself. *The People* v. *Gates*, 13 Wend. R. 311.

89. Where the treasurer of a religious corporation, presented to the President thereof a bond for the payment of money, appearing on its face to be made in pursuance of a resolution of the Consistory of the Church, and obtained his signature thereto, and the Treasurer was indicted under the statute prescribing punishment for the obtaining of signatures to written instruments by false pretences, &c., it was held that it was not sufficient to charge in the indictment the presentment of the bond to which the signature was obtained; that the President believed it to be a true instrument, and also believed that its making and presentation had been authorized by the Consistory of the Church, although it was charged that the Treasurer knew it to be a false writing, and that the issuing thereof was not authorized by the Consistory, and that he, in fact, had no warrant or authority for the making of the bond, or the obtaining of the signature, and it was further held that the material facts and circumstances appertaining to the transaction should have been alleged with due certainty, so as to show how the presentation of the bond operated to effect the fraud. *Ib.*

90. In Massachusetts, an indictment for obtaining money by false pretences, which alleged that the false pretences were practiced upon one, and his money obtained with intent to defraud another, was held good. *The Com.* v. *Call*, 21 Pick. 59.

91. An indictment charged that the prisoner falsely and knowingly presented, and pretended to A. that a certain writing, in the form of a bank-bill, was a good and true bank-bill, for the payment of five dollars; that A. believing, and on representation, was thereby induced to deliver to the prisoner B. certain goods, and certain good bank-bills and coins, in exchange for said paper writing, and that B. the prisoner, thereupon delivered said paper writing to A. for five dollars, whereas said paper writing was not a good bank-bill for five dollars, as the prisoner then well knew, &c.; held that the indictment did not describe a genuine note of a worthless bank, but a counterfeit note of a real bank, or a note purporting to be of some bank that had no existence, and, therefore, that the indictment was not proved by evidence that the paper writing was a bill of a

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bank that had failed, and ceased to pay its bills. *Com.* v. *Stone*, 4 Met. 43.

92. Where an indictment charged that the defendant falsely pretended to one A., that B., C. and D. were indebted to him, the defendant, in a certain sum, and that they were bound to pay a certain bill of exchange, then in the defendant's possession, and over-due, drawn by the defendant on said B., C. and D., payable to their order ninety days after date, and accepted by them, and which they endorsed to the defendant, and obtained from said A. certain goods with intent to cheat, &c.; whereas, in fact, the said B. and C. were not then indebted to the defendant, nor were said B., C. and D. bound to pay said bill; it was held that the first pretence was not well negatived, and as to the second, that there should have been an averment that the defendant knew that B., C. and D. were not bound to pay the bill. *State* v. *Smith*, 8 Blackford's Rep. 489.

93. *Quere*, as to what must be the character of the false pretence by which money or goods have been obtained, to render the offence indictable. *Ib.*

94. An indictment for obtaining goods by false pretences, must allege to whom the goods belonged. *Ib.*

95. Where an indictment charged that B., who held a promissory note against D., which was due, called for payment, and with intent to defraud, D. falsely represented the note to have been lost or burned up, whereby the latter was induced to pay it; held not sufficient to sustain a conviction, as not showing any legal injury resulting to D., nor an intent on the part of B. to work such injury. *People* v. *Thomas*, 3 Hill 169.

96. So, semble, even had the indictment contained the additional charge, that B., after obtaining payment of the note, negotiated it to another for value without notice of its having been paid, especially if there was no averment that B. intended negotiating it when he made the representation. *Ib.*

97. The provisions of the act of 1811, ch. 814, Rev. Code, Revised Statutes, ch. 34, § 61, punishing the cheating by false tokens, &c., do not apply to the case of conveyances of lands. *State* v. *Burrows*, 11 Iredell's Rep. 477.

98. Where the charge intended to be made in such an indictment is, that the defendant intended to cheat the plaintiff out of twenty acres of land, the excess in quantity over thirty-five acres, the indictment should expressly aver that there was, in fact, such an excess of twenty acres. *Ib.*

99. Where the true ground of complaint was, that the defendant, by means of a forged paper, induced the prosecutor to execute a deed for 35½ acres of land, instead of 55½ acres, thereby defrauding the prosecutor, the indictment should distinctly aver this fraudulent purpose; but, though this be a fraud, it does not come within the definition of any crime or misdemeanor known either to the Common or Statute Law. *Ib.*

100. On an indictment for obtaining possession of a deed fraudulently and by false pretences, judgment was arrested after the defendant had pleaded guilty, it not appearing by the indictment that anything more was charged than a breach of contract, and for which the only remedy was by action. *Com.* v. *Hearsey*, 1 Mass. Term Rep. 137.

101. On an indictment under the statute for obtaining goods and chattels by false pretences, it is necessary to allege that they were the property of some person, as in a case of larceny, or an excuse must be stated for not making the averment. *State* v. *Lathrop*, Vol. 15 Verm. Rep. 279.

102. Where an indictment is found for obtaining property by false pretences, it need not allege that the property was of any particular value. *People* v. *Stetson*, 4 Barb. 151.

103. Where the false pretence charged was that defendant would assign to B. P. a certain note which he had before that time for a valuable consideration passed to B. P., and that by means of this false pretence he obtained the note with intent to cheat and defraud B. P., and then failed to assign or return the note to him; held that this indictment charged no false pretence within the meaning of Digest, page 345, art. 8, because the promise

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to assign the note was an agreement to do a future act and not a misrepresentation as to an existing fact *McKenzie* v. *State*, 6 Eng. 594.

104. It is not necessary that an indictment for false pretences should state all the property which the defendant obtained by the false pretences set forth. *People* v. *Parish*, 4 Denio 153.

105. How the offence of obtaining goods, &c., on false pretences should be charged. *Lambert* v. *the People*, 9 Cow. R. 577.

106. In an indictment for a cheat at Common Law, the false token must be described. *Ib.*

107. An indictment for cheating, either at Common Law, or under the statute, must allege the false tokens, the false pretences, or other means by which the cheat was effected; "that the party may know," in the language of the Court, "against what he is to defend himself, and that the Court may see that there is an indictable offence charged; as there are some pretences (and some tokens and various means) which are not within the meaning of statute." *Ib.*

108. In an indictment for obtaining the signature of a person to a written instrument, by false pretences, it is only necessary that it should appear that the instrument on its face is one calculated to prejudice the party who has signed it, though on the facts stated in the indictment it would be void for fraud. *People* v. *C. Rissie & Harvey*, 4 Denio's R. 525.

109. An indictment, charging that the defendants falsely pretended to a third person, that a drove of sheep which they offered to sell to him, were free from disease and foot ail, and that a certain lameness apparent in some of them was owing to an accidental injury, by means of which they obtained a certain sum of money on the sale of said sheep to such person, with proper qualifying words, and an averment negativing the facts represented, is sufficient under the statute against cheating by false pretences. *Ib.*

110. Where an indictment for fraud does not charge that the goods were sold to any particular person, but states that they were "sold to divers persons," held too vague and indefinite, in a criminal charge. The party ought to be notified, by the indictment, of the transaction in relation to which he is called on to defend himself. *The State* v. *Woodson*, 5 Humph. 55.

111. It is not necessary that all the false pretences used should be set forth in the indictment, under the statute of Illinois. *Cowan* v. *People*, 14 Ill. 348.

112. In South Carolina, under the statute of 1791, an indictment was held defective which merely charged that the defendant falsely, fraudulently, &c., pretending that a certain mulatto was a slave, did falsely, &c., cheat and defraud one A., by selling said mulatto to him for a slave, when said mulatto was free. *State* v. *Wilson*, 2 Rep. Const. Ct. 135.

113. In Massachusetts, an indictment under the Rev. Sts. c. 126, § 32, for obtaining money, goods or other property, by any false pretence, with intent to defraud, must allege all the material facts and circumstances which the prosecutor would be bound to show, in order to procure a conviction; an indictment on that section is insufficient when *it only* charges that the defendant intending to cheat and defraud B. of his money and property, designedly and knowingly, did falsely pretend to B. that a watch which the defendant had, was a gold watch, by means whereof the defendant did designedly and knowingly obtain from B. $35, with intent to cheat and defraud him of the same, whereas, in truth, the said watch was not a gold watch, and the defendant knew that it was not. *Commonwealth* v. *Strain*, 10 Met. 521.

114. In an indictment for false pretences, it is not sufficient to charge false pretences in general terms, but it is necessary to set them out specifically and with strict certainty. *Burrows* v. *State*, 7 Eng. 65.

115. False pretences, within the meaning of the statute, must be of some existing fact, and not of future transactions, as held in *McKenzie* v. *the State*, (6 Eng. 594,) hence an indictment charging that defendant obtained the property of A. by falsely pretend-

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ing to him that his goods and chattels were about to be attached, is bad. *Ib.*

116. A count in the indictment charged that the defendant falsely pretended to A. that divers persons had conspired to seize and unjustly deprive him of a slave, by means of which false pretences defendant induced A. to convey to him said negro; held that the pretences here charged, were of too vague and indefinite a character to deceive a person of ordinary prudence and understanding, and therefore not within the purview of the statute. *Ib.*

117. An indictment for obtaining goods by false pretences must absolutely negative the truth of the pretences employed. *Tyler* v. *State*, 2 Humph. 37.

118. An order as follows: "Mr. A., please let the bearer, B., have five dollars in goods on my account.—C." is sufficiently negatived by an averment in the following words: "Whereas the said C. never did write or send, or cause to be written or sent, any such letter to the said A. or to any one else, to let the bearer have any amount in the store whatever." *Ib.*

119. Where an indictment for a conspiracy to cheat by offering to sell forged foreign bank notes of a denomination the circulation of which was forbidden by law, alleged that the defendants in pursuance of their conspiracy did "offer to sell, pass, utter and publish to," &c.; held that the means whereby the conspiracy was to be effected were sufficiently stated. *Twitchell* v. *Commonwealth*, 8 Barr 260.

120. An indictment for obtaining money or goods by false pretences, where it is in the words of the first section of the Tennessee statute of 1842, c. 48, is sufficient, and it need not charge the money or goods to have been obtained with intent to steal them. *Jim* v. *State*, 8 Humph. 603.

121. It is not necessary to negative all the pretences alleged in an indictment for obtaining property in violation of the Revised Statutes; but those relied on by the pleader, and which he expects to prove were false, must be specifically and directly negatived. It is, however, enough to prove one of several assignments in a count. *People* v. *Strong*, 9 Wend. 182.

122. Promissory notes are not public tokens of themselves; bank-notes are; an indictment, therefore, for a cheat at Common Law, by passing certain "promissory notes" as and for bank-notes, without an averment that they resembled bank notes, cannot be sustained. *State* v. *Patillo*, 4 Hawks' R. 348.

123. Where it is stated in an indictment for fraud, that the notes passed by the defendant to the prosecutor purported to be signed by one Randolph, and to be payable to bearer, and that they were worthless, without any averment or charge that they had any resemblance to bank notes, the indictment will be bad. *Ib.*

124. As false pretences must be proved as laid, and as none can be proved but such as are laid, it is not sufficient merely to state that the defendant did falsely pretend, &c., setting forth the several pretences; but after stating the false pretences at large, the pleader must, by averments, falsify each pretence which he intends to rely on at the trial, as he would on an indictment for perjury. *People* v. *Gates*, 13 Wend. 311.

125. In order to sustain a criminal prosecution for obtaining the signature of one to a mortgage by false pretences, the mere fact of the instrument having been signed is not sufficient; a delivery must also be shown. Per Nelson, Ch. J. *Fenton* v. *the People*, 4 Hill 126.

126. If the indictment in such case pursue the words of the statute, by averring that the defendant unlawfully, &c., obtained the signature, it will be sufficient though it do not aver a delivery in terms. *Ib.*

127. The indictment need not designate the premises covered by the mortgage. *Ib.*

128. In Mississippi, an indictment under the act of 1842, c. 48, § 1, must allege that the possession of the goods was feloniously obtained, by means of false and fraudulent pretence. *State* v. *Tate*, 6 Humph. 424. *Same* v. *Johnson*, Ib. note.

129. In Virginia, under the statute

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of 1789, c. 45, re-enacting in substance the provision of the statute of Hen. 8, but limiting the offence to the fraudulent obtaining of money, goods, or chattels, an indictment was held to be bad, which charged the defendant with obtaining by means of a counterfeit letter, one hundred dollars in a note of the Bank of Virginia, on the ground, it would seem, that a bank-note was not money in the same sense in which it was employed in the statute. *Com'lth.* v. *Swiney*, 1 Virg. Cas. 146, 151, note.

130. But an indictment was held sufficient, which charged the obtaining from the Bank of Virginia, by similar means, of fifty dollars, in money current in the Commonwealth of Virginia, although it was contended that as the preamble of the statute recited a pre-existing evil, &c., as the cause of its enactment, it could not extend to banks which had no existence in Virginia until many years after the date of the State. *Commonwealth* v. *Swiney*, Virg. Cas. 150, 151, note. See, also, *State* v. *Patillo*, 4 Hawks' R. 348.

131. An indictment charging the defendant with obtaining money by false pretences, is defective, unless it states what those false pretences were. *People* v. *Gates*, 13 Wend. 311.

132. A considerable degree of particularity in stating the false pretences is necessary, because it is necessary that they should be proved as laid, and slight variances may be fatal to the prosecution. *Ib.*

133. An indictment founded on the Rev. Sts. of Mass. c. 126, s. 32, charged that G. designedly and unlawfully pretended to N. that A. wanted to buy cheese of N. and had sent G. to buy it for him, and that a certain paper described, purporting to be a ten dollar bill of the Globe Bank in the city of New York, was a good bill, and of the value of ten dollars, by means of which false pretences said G. illegally obtained from said N. forty pounds of cheese, of the value of four dollars, and sundry bank bills and silver coins, amounting to, and of the value of six dollars, with intent to cheat and defraud, whereas the said A. did not want to buy cheese of N. and had not sent G. to him for that purpose, and the said paper was not a good bill of the Globe Bank in the city of New York, and was not of the value of ten dollars, but was spurious and worthless. It was held, on motion in arrest of judgment, that the false pretences charged were such as might have been effectual in accomplishing a fraud on N. in the manner alleged; that neither the omission to charge that G. knowingly made the false pretences, nor the omission to mention any person whom he intended to defraud, rendered the indictment defective, and that there was no objection to the indictment on the ground of duplicity. *Commonwealth* v. *Hurlbert*, 12 Met. 446.

134. Where an indictment charged that the accused by false pretences obtained the proper money of A., due, owing, and payable to B. and C., with intent to defraud them of the same; it was held that the word "them" must be referred to B. & C., to which the tenor of the indictment and the principles of law required that it should relate. *Com.* v. *Call*, 21 Pick. 59.

135. In an affidavit for the arrest of one for fraudulently obtaining goods, &c., the facts which may be within the knowledge of the plaintiff, such as the existence of the debt and the manner in which it was contracted, &c., must be averred positively. And where any of the facts necessarily rest upon information obtained from others, such as the facts of the false representations and fraud on the part of the defendant, they may be so stated, but the sources and nature of the information should be particularly set out, and good reasons given why a positive statement cannot be procured. *Whitlock* v. *Roth*, 10 Barb. 78.

136. The allegation of information and belief merely in reference to such facts, is not sufficient. *Ib.*

137. Where an indictment is found for obtaining property by false pretences, it should allege the sale or exchange, and aver that the false pretences were made with a view to effect such sale or exchange, and that by reason thereof the party was induced to part with his property. *State* v. *Philbrick*, 31 Maine (1 Red.) 401.

138. Where an indictment is found for

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obtaining goods by false pretences, it must charge the falsity of the pretences by special averment. *Amos* v. *State*, 10 Humph. 117.

139. An indictment for obtaining money by false tokens must describe the offence as to time and place, and must allege every material fact connected with the offence; but in Vermont the intent need not be stated in the indictment. *State* v. *Bacon*, 7 Ver. 222.

140. Where a part of an indictment alleges that the accused, by false pretences, intended to cheat and defraud Samuel W. Goff, and proposed an exchange of his mare for the horse of Goff, but there is no averment that such an exchange was made, or that the false pretences were made with a view or design to effect such exchange, it was held bad. *State* v. *Philbrick*, 31 Maine 402.

141. An indictment for obtaining by false pretences the signature of a person to a deed of real estate, should allege that the prosecutor owned, or had some interest in the lands described in the deed, or that the deed contained covenants making him liable to an action. *Dord v. People*, 9 Barb. Rep. 671.

142. And the deed should be so set forth that it may be identified by the record, in case the defendant is afterward indicted for the same offence. *Ib.*

143. Where such an indictment did not charge that the grantor in the deed owned or claimed any title to the lands conveyed thereby, and the description of such lands was in the most general terms, as, "certain lands in the State of Texas and United States of America," and the date of the deed was nowhere alleged, so that it would be impossible to identify the instrument, and it did not appear that the deed would tend to the prejudice of the prosecutor, it was held, in the absence of any allegation that the deed could not be more particularly described, that the instrument was defective. *Ib.*

VI. What Charges must be Proved to Sustain an Indictment—Evidence to Warrant a Conviction.

144. A single pretence proved as laid, will be enough to support the conviction, though such pretence be joined with others in the same count; nor need the indictment aver in express terms that the pretence was "false." *Britt* v. *State*, 9 Humph. 31.

145. Where an indictment charges that the accused obtained goods of partners in trade by false pretences made to them, it is supported by proof that the defendant made the alleged false pretences to their clerk and salesman, who communicated them to one of the partners, and that the goods were delivered to the accused in consequence of these false pretences. *Com.* v. *Harley*, 7 Met. 462.

146. In Massachusetts, on a trial for obtaining goods on false pretences from a commercial house, pretences proved to have been made to one partner, were held to sustain the indictment under the statute of 1815. *Com.* v. *Mooar*, Thach. Crim. Cases 410.

147. Where a person is indicted for swindling in selling a tract of land a second time, it is not necessary to show that the second purchaser has tested his title by action. *The State* v. *Dozier*, Dudley Geo. 155.

148. Where an indictment is found for obtaining by false pretences the signature of a party to a promissory note, and the pretence was that the prisoner had money in the hands of a third person, absent at the time, it was held that it was not material to prove the amount represented to be the identical sum stated in the indictment—that it was enough if it was sufficient to meet the payment of the note which the party was induced to sign. *The People* v. *Herrick*, 13 Wend. Rep. 87.

149. It is a well-settled and rational rule, that the false pretences, in order to sustain an indictment, must be such that, if true, they would naturally and according to the usual operation of motives upon the minds of persons of ordinary prudence, produce the alleged results; or, in other words, that the act done by the person defrauded must be such as the apparent exigency of the case would directly induce an honest and ordinarily prudent person to do if the pretences were true. Per Maynard, P. J. *People* v. *Stetson*, 4 Barb. 151.

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150. Accordingly, held on demurrer, that an indictment for obtaining a watch from a person upon the false representation that the accused was a constable and had a warrant against such person, issued by a justice of the peace for the crime of rape, and that he would settle the same if the person defrauded would give the defendant the watch, could not be sustained. *Ib.*

151. Where there are several pretences charged in the indictment to be false, all must be proved to be false. The offence consists of two distinct elements, to wit: false pretences and obtaining the goods of another. All the pretences together are but one portion of the offence; and every pretence, therefore, charged and alleged to be false, is a substantive part or constituent element of the offence, and cannot be regarded as immaterial The petit jury can convict only upon the pretences found by the grand jury. As it cannot be known that they would have found the bill true, unless it had been proved before them that all the pretences found to have been made had really been made, and falsely made. *People* v. *Haynes*, 14 Wend. 546.

152. Where one or more of the pretences are shown to be false, and the pretence or pretences thus shown to be false are sufficient per se to constitute the offence, the accused will be found guilty, notwithstanding that the public prosecutor fails in proving to be false other pretences charged in the indictment. Such other pretences will in such case be regarded as surplusage. *People* v. *Haynes*, 11 Wend. 557.

153. Where two are jointly indicted for obtaining goods by false pretences, evidence that one of them, with the knowledge and direction of the other, so made the false pretences charged, authorizes the conviction of both. *The Commonwealth* v. *Harley*, 7 Met. 462.

154. And in order to convict the defendants on such trial, it need not be shown that they or either of them obtained the goods on their own account, or derived, or expected to derive, personally any pecuniary benefit therefrom. *Ib.*

155. In order to render a verdict of guilty on a trial for obtaining goods under false pretences, it is sufficient for the jury to be satisfied that the false pretences were a material inducement to the party to deliver the goods, and that without such pretences the goods would not have been delivered. *Com.* v. *Hershell*, Thach. Crim. Cas. 70.

156. Where an indictment charged the defendant with obtaining A.'s signature to a deed of lands, by falsely pretending that B., who held a bond and mortgage against A., was about to sue him on the bond, foreclose the mortgage, &c., and that B. had so told the defendant; held that the pretences set forth were not sufficient to warrant a conviction. *People* v. *Williams*, 4 Hill 1.

157. In the foregoing case, it was proved that the party to whom the false pretences were made, owed B., the party alleged to be defrauded, and that the accused, who had once been B.'s agent for collecting bills, but whose authority had then been revoked, though without notice to A., presented a bill of B.'s to A., and on receiving payment from him, gave a valid discharge on behalf of B., and then fraudulently misapplied the money to his own use. This was held sufficient evidence to sustain the indictment. *Com.* v. *Call*, 21 Pick. 59.

158. Held, further, that if the accused paid the money collected from A. to a rightful agent of B., but with a fraudulent agreement to divide it with him, or with the knowledge or belief that it was the agent's intent to squander it, and not account for it to his principal, this would constitute an intent on the part of the defendant to defraud B. *Ib.*

159. Where an indictment charged that the defendant obtained the money of the prosecutor under false pretences, and it appeared that the money belonged to another, but was in the custody of the prosecutor as bailee; held that this state of facts sustained the indictment. *Britt* v. *State*, 9 Humph. 31.

160. Where an indictment for cheating by false pretences, charged that the defendant represented a firm of which he was a member, to be then

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owing not more than three hundred dollars, and evidence was given of a representation by him that the firm did not then owe more than four hundred dollars; it was held to be a fatal variance. *Com.* v. *Davidson*, 1 Cush. R. 33.

161. When one of the representations set forth in an indictment for cheating by false pretences, and proved, was, that the defendant gave a false name; and the prosecutor testified that this misrepresentation had no influence in inducing him to part with his goods; held that it was the duty of the Court, either at the time, or in the charge, to instruct the jury that such misrepresentation was not upon the evidence proved to have an inducing motive to the obtaining of the goods by the defendant. *Ib.*

162. Where an indictment is found for cheating by false pretences, it was held that an allegation that the prosecutor, by means of the false representations, was induced to deliver, and did deliver to the defendant, certain goods, "as upon a sale upon credit," is sufficiently proved by evidence of a sale of the goods to the defendant, on his promissory note, payable in four months. *Ib.*

VII. Evidence Admissible on the Trial.

163. The acts or declarations of a supposed agent or joint conspirator are not admissible in evidence until proof has first been given to establish the agency or combination; in such cases the order of producing the evidence is not a matter of discretion. Semble. Per Bronson, C. J. *People* v. *Parish*, 4 Denio's Rep. 153.

164. Therefore, where the prosecution seeks to prove false pretences made to the prosecutor by a third person by the procurement of the defendant, it must be first proved that the defendant instigated such persons to make them. Per Bronson, C. J. *Ib.*

165. Where an indictment for cheating by false pretences, averred that the defendants had falsely represented one Miner of the town of Pike, to be responsible for a sum of money, and the public prosecutor was permitted to ask a witness examined on his part, this question—though objected to as leading—had Miner absconded from Pike in July, 1842? held that the question was improper, for the reason stated in the objection. *Ib.*

166. On a trial for cheating an Insurance Company, the President of the Company swore to certain instructions given by him to one of the prisoners, relative to the character of the evidence of the loss required. Held that the declarations of such prisoner, made to a third party, in the absence of the President, after the giving of such instructions, were not admissible to explain or contradict the testimony of the President. *The Commonwealth* v. *Drake*, Thacher's Crim. Cas. 485.

167. On the trial for obtaining goods under false pretences, under an indictment which averred that the defendant had obtained the goods under pretence of sending them to Charleston, S. C., the evidence of the person usually employed to cart goods for the defendant, that no goods had been carried by him for the defendant to any ship bound for that port, was held to be admissible. *The Commonwealth* v. *Hershell*, Thacher's Crim. Cas. 70.

168. Proof, that a party from whom a note was obtained by false pretences, has been subjected to a suit, or to the payment of the money specified in the note, is incompetent, unless there be a count for obtaining money by false pretences. *People* v. *Gates*, 13 Wend. 311.

169. If the defendant attempts to show his ability to pay, the proof must be limited to the time when the signature was obtained. *People* v. *Herrick*, 13 Wend. 87.

170. On the trial of an indictment for cheating by false pretences, by representing that a bill of an insolvent bank was worth its nominal value, and passing it at that value; in order to prove that the bill was worthless, evidence need not be given, that none of the stockholders of the bank are sol-

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vent, or that they have already paid the amount of their stock. *The Commonwealth* v. *Stone*, 4 Met. 43.

171. On such trial, evidence of the depreciated value of the bills of such bank, connected with proof, that the bank has refused to pay its bills, and that they are not passable, as current bills, is competent to prove that the bill which was passed by the accused, was not worth its nominal value, and also to prove his fraudulent intent in passing it. *Ib.*

172. To prove that a prisoner passed a worthless bank bill, knowing that it was such, evidence is admissible of his having in possession, and of his passing other similar bills. *Ib.*

173. Although the facts and circumstances are such as fully to make out the offence, they are not admissible in evidence, if not set forth in the indictment; and it was accordingly held, that evidence that the accused was Treasurer of a Corporation, that it was his duty to prepare such bonds and notes for signature as the Corporation had resolved to execute, and to present them to the President for signature, and that the President never did sign such instruments, but upon the representation of the Treasurer that they were duly authorized by the Corporation, or by a majority of the members of the board, was inadmissible, because not alleged in the indictment. *People* v. *Gates*, 13 Wend. 311.

174. Had it been alleged in the indictment, that in the ordinary course of the business of the Corporation, such instruments were signed upon the representation of the Treasurer that they were duly authorized, it seems that the evidence of the President, that he never signed such instruments unless such representation was made, would have been held admissible, although he had no distinct recollection of the particular transaction under inquiry. Such evidence in itself would not, however, be enough to convict, but would be admissible, as a link in a chain of circumstances. *Ib.*

175. Where the defendant falsely pretended that he had a warrant against the prosecutor for passing counterfeit money, and by means of threats and promises in regard thereto, extracted bank-notes from the prosecutor, in the county of Roan; and on the next day defendant again pursued the prosecutor into an adjoining county and falsely pretended that he had stolen his overcoat, and by means thereof extracted from the prosecutor articles of clothing, and the indictment charged the defendant with obtaining the bank-notes by falsely pretending that defendant had passed counterfeit money; it was held that evidence of the transaction in the adjoining county was admissible evidence to sustain the charge in the indictment, that it was part of the res gestæ. *Britt* v. *State*, 9 Humph. Rep. 31. It is competent to one whose signature has been fraudulently obtained to state the reasons why he did not rely upon the personal responsibility of the accused. *People* v. *Herrick*, 13 Wend. 87.

176. Where an indictment for cheating by false pretences, alleged that the defendant represented that he was a partner in trade with another person, who had put into the partnership a capital of one thousand dollars, which they (the defendant and his partner) then had invested and employed in their partnership business, and that the copartners were worth property of the value of fifteen hundred dollars, and did not owe debts amounting to more than three hundred dollars; held, that evidence of the individual indebtedness of the defendant and his partner was not admissible to prove that the representations as to the solvency of the partnership were false. *Com.* v. *Davidson*, 1 Cush. R. 33.

VIII. Miscellaneous—Arresting Judgment—Jurisdiction.

177. Where A. was indicted for obtaining the horse of B. by the false pretence that the mare which he exchanged therefor was his own, and was unencumbered, and the indictment did not charge that the mare was of any value; held, after conviction, that this was not a good ground for an ar-

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rest of judgment. *State* v. *Dorr*, 33 Maine (3 Red.) 498.

178. The defendant knowing that it was not genuine, passed a bill or paper having the appearance of having been long used, and printed in the ordinary form of a bank bill, but not signed by any one as President or Cashier. The jury found him guilty of swindling, and the Court sustained the verdict. *State* v. *Grooms*, 5 Strobh. 158.

179. It is no cause for arresting judgment on indictment for obtaining goods by false pretences, that one of the pretences alleged therein is not distinctly negatived, provided the indictment contains an averment of one or more false pretences upon which the defendant may be convicted, which are properly negatived and established by the evidence. *Com.* v. *Morrill*, 8 Cush. 571.

180. It constitutes no defence to an indictment for obtaining goods by false pretences, that the party defrauded made false representations to the defendant as to the goods so obtained, nor that the goods were of less value than stated in the indictment. *Ib.*

181. A Court of Special Sessions of the peace has jurisdiction of the offence of cheating. *The People* v. *Miller*, 14 Johns. R. 370.

182. In the record of a conviction before a Court of Special Sessions, the place where the offence was committed must be mentioned, that it may appear to have been within the jurisdiction of the Court. *Ib.*

183. In determining the criminality of the false pretences employed by the prisoner, it is necessary for the jury to take into consideration the ability or capacity to detect them, of the person to whom they were addressed, and who was deceived by them. *Cowen* v. *People*, 14 Ill. 348.

COMMITMENT.

1. In Virginia, where a party was acquitted on a charge of a felony, and thereupon committed by the Circuit Court to take his trial for a misdemeanor, the General Court discharged him on habeas corpus, because the order of commitment failed to specify the offence with sufficient certainty. *Young's case*, 1 Robinson 744.

2. But where it appeared from the record of the proceedings in the Circuit Court, that there was reasonable ground to suspect the party of having committed a violation of the criminal law (other than the specific crime of which he was acquitted) proper to be made the subject of judicial inquiry, the Court directed the sheriff to take him again into custody, and carry him forthwith before a justice of the peace, to be dealt with according to law. *Ib.*

3. A mittimus must not only run in the name of the State, but allege the offence with which the defendant is charged, or of which he is convicted. *Rohe ex parte*, 5 Ark. 104.

4. When a court in session orders a commitment, the minute is sufficient to authorize the officer to act; no writ is necessary. *The State* v. *Heathman*, Wright 690.

5. It is not necessary that a warrant should contain a statement of facts on which the charge is founded. The nature of the crime only need be clearly specified. *The State* v. *Everett*, Dudley S. C. 295.

CONSPIRACY.

I. What constitutes a Conspiracy.
II. Indictment for Conspiracy. Trial and Judgment.
III. Offence indictable as for a Conspiracy.
IV. Evidence on the trial for Conspiracy. What evidence admissible. Evidence sustaining the Indictment.

I. What Constitutes a Conspiracy.

1. The Common Law as to conspiracy still exists in New Hampshire, so far

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as it is not repugnant to the laws of the State. *State* v. *Burnham*, 15 N. H. 396.

2. A conspiracy consists in a confederacy to do an unlawful act by unlawful means, whether to the prejudice of an individual or the public, and it is not essential that its objects should be the commission of a crime. *Ib.*

3. Where the object to be accomplished by the conspiracy is lawful, the illegal means must be alleged and proved. *Ib.*

4. But it does not follow that the illegal means should be indictable offences, it will be enough if they be fraudulent and immoral. The gist of the offence is the conspiracy. *Ib.*

5. But whether a conspiracy to effect a lawful purpose be an indictable offence in that State, if the means employed be no otherwise illegal than as they become so by conspiracy. *Quere.* *Ib.*

6. Where an indictment for a conspiracy charged that the respondents fraudulently contriving to procure the election of certain persons as directors of an insurance company, and thereby to cause themselves to be employed in the service of the company, fraudulently conspired to induce persons, by issuing to them fraudulent policies of insurance, to appear at the annual meeting of the company and vote for directors; it was held that the ultimate object of the respondents, that is, the procuring themselves to be employed by the company, was lawful. *Ib.*

7. Held further, that the charge of issuing fraudulent policies was proved both by evidence that the respondents procured the directors to issue them, and also by proof that the respondents, after they were issued, delivered them to the insured. *Ib.*

8. Held, also, that the means were fraudulent, immoral and illegal, when it appeared that the respondents made an agreement with the insured that policies should be held and treated as mere nullities for every purpose but that of authorizing the holders to vote thereon, at the annual meeting, although the respondents agreed also that the policies should be duly approved by the requisite number of directors, cognizant of the designed fraud, upon applications in regular form, and although the policies might be binding on both parties. *Ib.*

9. To conspire "to injure the property" of an individual, is a crime against the statute in Maine. *State* v. *Ripley*, 31 Maine (1 Red.) 386.

10. By "injury to property" is meant injury to the property *in rem*, by which it is destroyed or its value lessened. *Ib.*

11. Where there is a conspiracy to do an injury to the person of an individual, or to do any unlawful act injurious to the administration of justice, it is a statutory offence. *State* v. *Ripley*, 31 Maine (1 Red.) 386.

12. No overt act is essential to complete the crime. *Ib.*

13. When there is a conspiracy to commit a felony, when it is executed it is merged in the felony; but a conspiracy to commit a misdemeanor is not merged in the misdemeanor. *People* v. *Richards*, 1 Manf. (Mich.) 216.

14. In a conspiracy the offence depends upon the unlawful agreement, and not in the acts that follow. *Ib.*

15. Where goods are obtained on credit by an insolvent person, without disclosing his insolvency, and without having any reasonable expectation of being able to pay for such goods, in and by the means of fair and ordinary course of his business, it is not of itself such an unlawful act as may be the subject of a conspiracy; though it is otherwise, it seems, in the case of a purchase made with no expectation of payment. *Com.* v. *Eastman*, 1 Cush. 189.

16. Where possession of goods is obtained under the pretence of paying cash for them on delivery, the buyer knowing that he has no funds to pay with, and appropriating the goods to his own use, in fraud of the seller, it is such a fraud or cheat as may be the subject of a conspiracy. *Ib.*

17. Where an indictment for conspiracy charges in the first count, that the defendants conspired together to cheat and defraud P. S. S. of his goods; in the second, that they conspired to get the goods of P. S. S. into their possession, under color and pretence of same; and in the third, that they

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conspired to get possession of the goods of P. S. S. upon trust and credit, and then to remove the same out of the commonwealth; and on the trial of this indictment, proof having been given of a purchase of goods by the defendants of P. S. S. ostensibly for cash, but, in fact, on the short credit resulting from the indulgence usually allowed on cash sales; it was held that the officer for the prosecution might inquire of a witness whether, at the time of the sale, the standing and credit of the defendants were such that they could have bought goods on credit; also, that other purchases of goods made by the defendants of other persons, about the same time, and under the same circumstances with the purchase of P. S. S., were competent as evidence to show the nature and extent of the defendants' business, and to establish the criminal intent alleged in the indictment; also, that proof of the defendants having obtained bills of lading about the same time, and forwarded them to their correspondents in other places, accompanied by drafts thereon, before the goods described in such bills of lading had been in fact purchased, was held admissible, to show the criminal intent. *Ib.*

18. The gist of the offence of conspiracy is a confederacy to do an illegal act, and the offence is complete when the confederacy is found. It is not necessary to complete the offence that the confederacy should be to commit an indictable act. *Com.* v. *Hunt*, Thacher's Crim. Cas. 609.

19. Where there is a combination among journeymen boot-makers, to compel, by force of numbers and discipline, and by imposition of fines and penalties, other journeymen to join their society, and masters to employ none but members, it is an unlawful conspiracy at Common Law in Massachusetts. *Ib.*

20. A confederacy to assist a female infant to escape from her father's control, with a view to marry her, against his will, is held to be an indictable offence, as a conspiracy at Common Law. *Miffin* v. *the Com.* 5 Watts & Serg. 461.

21. Where there is a conspiracy to commit a misdemeanor, it is not merged in the commission. *The State* v. *Murray*, 3 Shep. 100.

22. The vital principle in the offence of conspiracy is the fraudulent and corrupt combination between the alleged confederates in crime; and the combination must be shown, either by direct proof or through the exhibition of such circumstances as necessarily tend to its establishment. *The Com.* v. *Ridgeway*, 2 Ashmead 247.

23. To make conspiracy an indictable offence, there should be either a direct intent that injury shall result from it, or the object should be to benefit the conspirators, to the injury of the public or the oppression of individuals. *Ib.*

24. Where a town endeavors to get rid of one who is likely to become a pauper, but who is not settled, they cannot be held liable for a conspiracy. *The Overseers* v. *Aurand*, 10 Watts 134.

25. To make a conspiracy indictable there must be a combination of two or more persons, by some concerted action, to effect some criminal or unlawful purpose, not in itself criminal or unlawful, by criminal or unlawful means. *The Com.* v. *Hunt*, 4 Met. 111.

26. An association the object of which is to adopt measures that tend to impoverish a person—that is, to diminish his gains and profits—is lawful or unlawful, according as the means by which that object is to be accomplished are lawful or unlawful. *Ib.*

27. The offence of conspiring to cheat and defraud is not embraced within the exceptions of the act of 1836, (Rev. stat. ch. 35, § 8,) limiting the time in which prosecutions for misdemeanors shall commence. *State* v. *Christianbury*, Busbee N. Car. 46.

28. The word "deceive" in the act seems to have been used for cheating by false tokens, which offence may be committed by one person, and is distinct from the offence of conspiracy, the gist whereof consists in the confederation by two or more to do the act charged. *Ib.*

29. The offence of impeding an officer is not a felony, but is in the nature of a misdemeanor; and the offence

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of conspiracy to hinder and that of hindering the officer, are in effect of the same grade. *State* v. *Noyes*, 25 Vt. (2. Deane) 415.

30. The offence of conspiracy to hinder an officer in the discharge of his official duty does not merge in the offence of impeding the officer. *Ib.*

31. To constitute an indictable conspiracy at Common Law, there must have been an unlawful confederacy of two or more persons to accomplish either an unlawful or criminal purpose, or a purpose not unlawful, by criminal or unlawful means. *State* v. *Hewetts*, 31 Maine, (1 Red.) 396.

32. The Revised Statutes of Maine, chap. 161, § 11, define the crime of conspiracy both in the purposes designed to be promoted and the combination essential to effect them. Of the former, is an injury to the person of another individual, and to do any illegal act injurious to the administration of public justice. The latter consists in any two or more persons conspiring, confederating and agreeing together, with the fraudulent or malicious intent wrongfully and wickedly to effect those purposes. No overt act in carrying out the designs of those who have conspired, confederated and agreed together for such object, is necessary to make up the crime; it may be fully complete without it. *State* v. *Ripley*, 31 Maine (1 Red.) 386.

33. The offence of conspiracy defined: all conspiracies to injure others by perverting, obstructing, or defeating the course of public justice, in a criminal, or civil proceeding, by suppression or fabrication of evidence, are indictable offences. And where two or more conspire for that purpose and destroy a will, with a view to defraud the devisees, they are liable to be indicted. *State* v. *Dewitt*, 2 Hill's S. C. Reports 282.

34. The *conspiring together* to commit a crime, of an indictable nature, is a crime, and the offence is complete when the *conspiracy* is formed, though no act be done in consequence of it. *State* v. *Rickey*. 4 Halst. 293.

35. A *conspiracy* of journeymen workers of any trade or handicraft, *to raise their wages*, by entering into combinations to coerce journeymen and master workmen, engaged in the same trade or business, to conform to rules established by such combination for the purpose of regulating the price of labor, and carrying such rules into effect by overt acts, is an offence indictable as a misdemeanor; and it was *accordingly held*, where journeymen shoemakers conspired together, and fixed the price of making coarse boots, and entered into an agreement that if a *journeyman shoemaker* should make such boots for a compensation below the rates established, he should pay a penalty of ten dollars, and if any *master shoemaker* employed a journeyman who had violated their rules, that they would refuse to work for him, and would quit his employment, and carried such agreement into effect, by leaving the employment of a master workman, in whose services was a journeyman who had violated their rules, and thus compelled the master shoemaker to discharge such journeyman from his employ—that the parties thus conspiring were guilty of a misdemeanor, and punishable accordingly. *The People* v. *Fisher*, 14 Wend. 9.

36. Many acts which, if committed by an individual, are not indictable, are punishable criminally when committed in pursuance of a conspiracy between two or more persons; and it seems that an indictment may be sustained whenever there is a conspiracy for an unlawful purpose, or to effect a lawful purpose by unlawful means. *The State* v. *Rowley*, 12 Conn. Rep. 101.

37. Accordingly, where an information alleged that A., who owned wood worth two hundred dollars only, and B. who owned lumber worth one hundred dollars only, conspired together to cheat and defraud C. and D., and with that object in view, it was agreed between A. and B., that B. should apply to C., and prevail upon him to purchase in his own name for B., A.'s wood for 1500 dollars, and that B. should then refuse to take the wood of C., or pay him for it, that A. should in like manner apply to D., and prevail upon him to purchase in his own name for A., B.'s lumber for 1200 dollars, and

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that A. should then refuse to take the lumber of D., or pay him for it; and in pursuance of such conspiracy A. and B. prevailed upon C. and D. respectively to make such purchases, A. and B. falsely representing that they wanted to be owners of such wood and lumber respectively, and promising to take the same of C. and D. and pay them the prices which they were to pay, that C. and D. gave to A. and B. their promissory notes for the purchase-money, and that A. and B. then refused to take the wood and lumber of C. and D., or to indemnify them, and that by means of such conspiracy and false pretences, A. and B. got possession of such notes from C. and D.; it was held that these facts constituted an offence within the statute, tit. 21, § 114 (ed. 1835), and the Court were strongly inclined to the opinion that such facts also constituted a misdemeanor at Common Law. *The State* v. *Rowley*, 12 Com. Rep. 101.

38. A *conspiracy* to commit a misdemeanor is not merged in the misdemeanor, the result of the conspiracy when committed — where the offence committed is of a higher grade than a misdemeanor, the misdemeanor is merged in the offence. *People* v. *Mather*, 4 Wend. 229.

39. The crime of *conspiracy* to effect an unlawful act is complete when the agreement to do the act is concluded— no *overt act* is necessary to be proved. *People* v. *Mather*, 4 Wend. 229. Those who accede to a conspiracy after its formation, and while it is being executed, become conspirators. *Ib.*

40. When a new party with a full knowledge of the facts *concurs* in the plans of the conspirators as originally formed, and comes in and assists in the execution of them, he is from that moment a fellow-conspirator; his concurrence without particular proof of an agreement to concur is conclusive evidence against him. He is guilty of the offence whenever he agrees to become a party to the transaction, or does any act in furtherance of the original scheme. *Ib.*

41. The fact of *conspiracy* need not be shown; if parties concur in committing the act, although they were not previously acquainted with each other, it is a conspiracy. *Ib.*

42. If the agreement be made in *one* county, and the conspirators go into *another* county to execute their plans of mischief, and there do an overt act, they may be punished in the latter county without any proof of an express renewal of the agreement; such overt act of any one of the conspirators in furtherance of the common purpose, is considered in law a renewal, or rather continuance of the original agreement by all the conspirators. *Ib.*

43. To constitute the offence of conspiracy, there must be a conspiracy to cheat and defraud some one of his property. Although there may have been an intention to defraud, yet if the means employed could not possibly have that effect, the offence is not complete. *March* v. *People*, 7 Barb. 391.

44. A conspiracy at Common Law, consists in the unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, or in the unlawful agreement to compass or promote a purpose not in itself criminal or unlawful by criminal and unlawful means. *State* v. *Bartlett*, 30 Me. Rep. 132.

45. It is not necessary to constitute the crime of conspiracy, that the conspirators should succeed. At Common Law the mere conspiracy constituted the offence; under the statute, some act must be done in execution of the design agreed upon, to complete the offence. *State* v. *Norton*, 3 Zabris. 33.

46. By the statute of 1802, providing against conspiracies and insurrections among slaves, a conspiracy to murder, though unaccompanied by an intent to rebel or make insurrection, is a punishable offence. *State* v. *Tom*, 2 Dev. 569.

47. It is not necessarily in law a crime which subjects the perpetrator to punishment, to defraud one of his money, goods, chattels, or estate, nor to cheat and defraud one of the same, nor wrongfully and wickedly to obtain his money and other property, designedly and with intent to defraud. *State* v. *Roberts*, 34 Maine (4 Red.) 320.

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II. INDICTMENT FOR CONSPIRACY—TRIAL AND JUDGMENT.

48. In an indictment for a conspiracy where the means by which the alleged purpose was to be accomplished are not alleged, the intention should appear to have been clearly illegal. *State* v. *Hewitt*, 31 Maine (1 Red.) 396.

49. The indictment should allege the facts necessary to constitute the offence as well as describe the crime meant to be charged. *Ib.*

50. Where an indictment is found at Common Law for a conspiracy to do an act which, if done, would be a well-known offence perfectly understood by the name used to designate it, no further description of the crime is necessary, and the means by which the crime was to be accomplished is not necessary to be stated. *State* v. *Ripley*, 31 Maine (1 Red.) 386.

51. In an indictment for a conspiracy, the agreement or combination must be alleged, but the means to be used in executing the conspiracy, need not be, unless they become component parts of the offence, as where the combination and object to be accomplished are not in themselves unlawful, but the means to be used to effect the object are. *People* v. *Richards*, 1 Mann (Mich.) 216.

52. In an indictment for a conspiracy to cheat an individual of his lands and goods, it is not necessary to state the means by which that object was to be accomplished. *Ib.*

53. An indictment lies both for a conspiracy to cheat an individual of real estate and out of personal property. *The People* v. *Richards*, 1 Mann (Mich.) 216.

54. Where an indictment is found for conspiracy to cheat and defraud, which does not set forth the means intended to be used for that purpose, it is insufficient, and is not aided by allegations of overt acts done in pursuance of the conspiracy. *Com.* v. *Shedd*, 7 Cush. 514.

55. In an indictment which alleges a conspiracy for a purpose not necessarily criminal, and where the offence charged must, therefore, consist in the means designed to be used, it is not sufficient only to describe these means designed to be used "as false pretences," for the defendant is not thereby sufficiently informed of the acts to which he is to answer. *The State* v. *Roberts*, 34 Maine, (4 Red.) 320.

56. An indictment for a conspiracy to defraud individuals of private property must allege the means contrived by the conspirators. *Vide* this case in connection with *Lambert* v. *the People* 7 Cowen, 103. *The people* v. *Eckford, et al.*, 7 Cowen's Rep. 103.

57. An indictment charging a conspiracy, without setting out the means by which it was to be accomplished, or an overt act in its execution, is defective. *State* v. *Norton*, 3 Zabris. 33.

58. Each count in an indictment for conspiracy must contain an express charge, in itself, of the conspiracy; reference to a conspiracy set forth in a previous count is not sufficient. *Ib.*

59. It is not the practice to strike out of an indictment such counts as may be held bad. *Ib.*

60. Where it is alleged generally in an indictment for conspiracy to defraud creditors, that goods of unknown quality and quantity were removed and secreted by the prisoner, it was held that the indictment was insufficient in not alleging the particular circumstances of removal and secretion. *Hartman* v. *Commonwealth*, 5 Barr 60.

61. Where a defendant is indicted for conspiring to commit an offence for which there is no name in the Common Law that will designate its nature, it is necessary to set out in the indictment the offence as to its illegality with as much precision as though the indictment was laid for the offence instead of the conspiracy to commit it. *Ib.*

62. In an indictment for conspiracy to commit an offence which has not a Common Law name to designate its nature, the offence should, in order to show its legality, be alleged with as much certainty as would be necessary in an indictment for the offence itself. *Hartman* v. *Com.*, 5 Barr 60.

63. Where an indictment is found for a conspiracy to defraud creditors, which charges generally that the de-

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fendant secreted and removed goods, of quantity and quality unknown, in order to defraud A. and other creditors, it is sufficient; the particular circumstances of the removal and secreting should be alleged, as also the names of the persons intended to be defrauded thereby. *Ib.*

64. Where an indictment is found for a conspiracy to do an act which is a well-known and recognized offence at Common Law, the object of the conspiracy may be set forth by the general terms by which it is familiarly known; if the alleged purpose be the doing of an act which is not unlawful in itself, but which is to be the use of unlawful means, those means should be particularly alleged; if it be the doing of an act which is not an offence at Common Law, but only by statute, the purpose of the conspiracy must be charged in such a manner as to show that it is within the terms of the statute. *Com.* v. *Eastman*, 1 Cush. 189.

65. When a conspiracy is plainly and technically charged, the acts done in pursuance of it may not be set out—they may not be proved. *Ib.*

66. It is not a sufficient allegation of the offence in an indictment for a conspiracy to cheat, to charge that the defendants conspired together to cheat and defraud P. T. S. of his goods; or to acquire and get into their possession the goods of P. T. S., under color and pretence of buying them; or to get possession of the goods of P. T. S. upon trust and credit, and then to remove and carry them out of the commonwealth. *Ib.*

67. The words "cheat and defraud" do not necessarily mean any offence, either by statute or at Common Law; and therefore where there is an indictment for a conspiracy, in which the object is alleged to be to "cheat and defraud," it must set forth in detail such further allegations as will show the object to be an offence either by statute or at Common Law. *Ib.*

68. An indictment for a conspiracy which does not directly state facts sufficient to constitute the offence, is not cured by matter which precedes or follows the direct averments; nor by qualifying epithets (as "unlawful, deceitful, pernicious," &c.) attached to the facts alleged. *Com.* v. *Hunt*, 4 Met. 111.

69. An indictment charged that the defendants, being journeymen boot-makers, unlawfully, &c., confederated and formed themselves into a club, and agreed together not to work for any master boot-maker, or other persons, who should employ any journeyman or other workman who should not be a member of said club, after notice given to such master or other person to discharge such workman. Held that there was no sufficient allegation of any unlawful design or means. *Ib.*

70. The same is true of an indictment which charged that the defendants, being journeymen boot-makers, unlawfully, &c., conspired, confederated and agreed together not to work for any person who should employ any workman not being a member of a club called the journeymen boot-makers' society, or who should break any of their by-laws, unless such person should pay to said club such sums as should be agreed upon as a penalty for the breach of such by-laws, and, by means of said conspiracy, did force one B., a master cordwainer, to turn out of his employ one D., a journeyman boot-maker, because said D. would not pay a sum of money to said club for an alleged penalty of some of said by-laws. *Ib.*

71. So it was held of an indictment which charged that the defendants, intending, unlawfully and by indirect means, to impoverish one A., a journeyman boot-maker, and hinder him from following his trade, did unlawfully conspire, &c., by wrongful and indirect means, to impoverish him, and to deprive and hinder him from following his trade of journeyman boot-maker, and from getting his livelihood and maintenance thereby, and in pursuance of said conspiracy they did, unlawfully, &c., prevent him from following his trade, and did greatly impoverish him. *Ib.*

72. So it was also held of an indictment which charged that the defendants, designing to injure one B., and divers others, all being master boot-makers employing journeymen, unlawfully, &c., did conspire and agree to-

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gether by indirect means, to prejudice and impoverish one B., and divers others, all being master cordwainers, and employing journeymen boot-makers, and to prevent them from employing any journeymen who should not, after notice, become members of a club called the journeymen boot-makers' society, or who should break or violate any of the by-laws of said club, or refuse or neglect to pay any sum of money demanded from them by said club as a penalty for such breach of said by-laws. *Ib.*

73. An indictment for a conspiracy to compass or carry out a criminal or unlawful purpose, must aver that purpose fully and clearly. *Com.* v. *Hunt*, 4 Met. 111.

74. An indictment for a conspiracy to compass or effect a purpose not in itself criminal or unlawful by the use of criminal or unlawful means, must allege the means intended to be used. *Ib.*

75. In an indictment for a conspiracy to accuse one of a crime, it is not necessary to allege that the defendants procured or intended to procure an indictment or other legal process. *Com.* v. *Tibbetts*, 2 Mass. Rep. 536.

76. The conspiracy being the gist of the offence, and acts done in pursuance of it being only matter of aggravation, any informality or uncertainty in alleging such acts, will not vitiate the indictment. *Ib.*

77. Where the object of a conspiracy is to commit an offence punishable by law, it is not necessary that the means to be used in committing the offence should be set forth in the indictment for the conspiracy; but if the indictment be for the offence committed, then the means used in committing the offence must be clearly shown in the indictment. *State* v. *Noyes*, 25 Ver. (2 Deane) 415.

78. In a conspiracy, the unlawful agreement is the gist of the offence, and it is not necessary to aver in the indictment the execution of the unlawful agreement, and if averred and supported by evidence, it is to be regarded as proof of the intent or as matter in aggravation; therefore proof of it, if charged, is not necessary to a conviction. *Ib.*

79. Where such a fraud as may be punished criminally is actually committed by several persons in pursuance of a conspiracy between them for that purpose, the conspiracy, as such, is not indictable, but the fraud only. Per Spencer, senator. *Lambert* v. *People*, 9 Cow. 577.

80. Whether an indictment lies for a conspiracy to produce a mere private injury, which is not a legal crime, and would not affect the public or obstruct public justice,—*quere*? Per Spencer, senator. *Ib.*

81. An indictment alleging generally that the accused conspired to defraud an individual, and not showing the intended means by which the fraud was to be compassed, is bad. *Ib.*

82. Provisions in the new revised laws (pt. 4, ch. 1, tit. 6, §§ 8, 9, 10) on the subject of conspiracy, with the reasons in their favor as rendered by the reviewers: By these provisions, conspiracies to commit any offence, falsely to charge another with, or arrest or indict him for an offence, falsely to move or maintain a suit to defraud another of property by criminal means, or by means which, if executed, would amount to a cheat, or obtaining goods, &c., by false pretences, or to commit any act injurious to the public health or morals, or to trade or commerce, or for the perversion or obstruction of justice, or the due administration of the laws, are misdemeanors, and such only are indictable. And no agreement, except to commit felony on the person of another, or to commit arson or burglary, shall be deemed a conspiracy, unless some act be done beside the agreement by one or more of the conspirators. Note (b) at the end of the case, English and American cases and authorities, cited, stated, and commented upon in reference to the following questions: Whether a conspiracy to commit a private fraud, or a fraud upon a private individual, or any other wrong not punishable as a crime, be indictable? and in what cases, whether a conspiracy to commit a fraud on an insurance corporation, or other corporation for the public benefit be indictable? the means in each case not being other than the mere act of con-

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spiring; whether charging by indictment simply a conspiracy to cheat, without saying what kind of cheat, imports a cheat punishable criminally? whether in charging a conspiracy to commit either a civil or criminal fraud it be necessary to set out the means beyond the act of conspiracy? and whether a conspiracy to commit a crime shall be said to be merged or absorbed by being carried into effect? Per Stebbins, senator. *Lambert* v. *People*, 9 Cow. 577.

83. An indictment for a *conspiracy* was, that the accused designing unlawfully by indirect means to cheat and defraud a certain incorporate company (naming it), and divers others unknown of their effects, did fraudulently and unlawfully conspire together, injuriously and unjustly, by wrongful and indirect means, to cheat and defraud the company and unknown persons of their effects; and that in execution thereof, they did, by certain undue, indirect, and unlawful means, unlawfully cheat and defraud the company and unknown persons of divers effects. The Court for the trial of impeachments and correction of errors being equally divided on the question whether this was a good indictment, it was decided by the casting vote of the president that it was defective, and the judgment of the Supreme Court sustaining, it was reversed. *Ib.*

84. Where an indictment for a conspiracy does not allege the object specifically, and show that such object is a legal crime, it should particularly set out the *means* intended to be employed by the conspirators, and show that those means are criminal, otherwise it charges no offence which the law can notice. *Ib.*

85. It is not an indictable offence for several persons to conspire to obtain money from a bank by drawing their checks on the bank when they have no funds there. *State* v. *Rickey*, 4 Halst. 293.

86. An indictment will not lie for a conspiracy to commit a civil injury of any description that is not of itself an indictable offence. *Ib.*

87. An indictment laid for a conspiracy to defraud individuals of private property, must allege the means agreed upon by the conspirators. *Vide* this case in connection with *Lambert* v. *the People*, 7 Cowen 166.

88. An indictment for conspiracy, charging the object of the conspiracy to be to cheat and defraud the citizens at large, or particular individuals, out of their land entries, is not supported by evidence that the defendants conspired "to make entries in the land office before it was opened, or before it was declared to be opened, or after it was opened, for the purpose of appropriating the lands to their own use, and excluding others." *State* v. *Trammell*, 2 Iredell 379.

89. An indictment for conspiracy, charging the defendant with having conspired with divers persons to the jurors unknown, is good, notwithstanding that the co-conspirators are known to the jury, and their names might have been stated. *People* v. *Mather*, 4 Wend. 229.

90. In an indictment for a conspiracy, it is not necessary to set out the overt acts relied on as evidence of the accused's guilt, where a legal offence is charged; *e. g.*, a conspiracy to assault and imprison a citizen. The unlawful agreement is sufficient to convict. It is usual, but not necessary, after stating the conspiracy, to aver that, in pursuance of it, certain acts were done. *Ib.*

91. Upon an indictment for a conspiracy to cheat one, the conspiracy is the gist of the offence, and the cheating is but aggravation. *Commonwealth* v. *Davis*, 9 Mass. Rep. 415.

92. An indictment is unobjectionable, both in form and substance, which alleges a conspiracy, falsely and fraudulently to seduce from her virtue and carnally to know an unmarried female, by procuring the consent of herself and parents to her marriage with one of the conspirators, and then, in furtherance of such conspiracy, producing a forged license, assuring them of its genuineness, falsely and fraudulently representing another of the conspirators to be authorized to celebrate the espousals, who actually performed the

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ceremony, in consequence of all which the daughter and her father and mother were deceived, &c., and she cohabited with her pretended husband. And in such case it is immaterial whether a license was necessary or not. *State* v. *Murphy*, 4 Ala. 765.

93. A conspiracy to commit an offence is not merged, when the conspiracy is executed, where the conspiracy and the act done are misdemeanors of the same grade; but the indictment may be framed with a view to the punishment of either. *Ib.*

94. An indictment for a conspiracy to cheat and defraud, must specify the particular means intended to be used by the conspirators to compass the alleged fraud. *March* v. *People*, 7 Barb. 391.

95. An indictment for conspiracy to destroy a warrant in the name of the State, issued against a defendant on a criminal charge, and a recognizance for the appearance of said defendant to answer such charge, with the intent thereby to impede the due administration of justice, should *positively aver* the facts, that such warrant did issue, and such a recognizance was acknowledged; and should also set forth so much of the warrant and recognizance as is necessary to show that they were valid, and therefore the destruction of them might be prejudicial to the administration of justice. Hence, if the warrant and recognizance be mentioned only by way of reference and recital, and it be not stated with any precision by whom the warrant was issued, nor before whom the recognizance was taken, and if the substance of the warrant and recognizance be not set forth so that it may be seen whether they or either of them had legal validity, the indictment will be insufficient. *State* v. *Enloe, et al.*, 4 Dev. & Batt. 373.

96. Where an indictment alleged a conspiracy to defraud by means of false pretences, and false, unlawful, and unauthorized writings in the form and similitude of bank-notes, that were of no value, and purported to have been promissory notes, and to have been signed, &c., and charged the overt act to consist in passing a note purporting to be a bank-note, and to have been signed, &c., it will be sufficient. *Collins* v. *Commonwealth*, 3 S. & R. 220.

97. Where an indictment alleges, first, an executed conspiracy falsely, &c., by wrongful and indirect means, to cheat, defraud, &c., the Bank of the United States; and, secondly, alleges a conspiracy only (as before) when one of the defendants was president of the office of discount, &c., of the bank, and another the cashier of the office, and another a director of the mother bank; it was held to allege sufficiently in each count a punishable conspiracy at Common Law. *State* v. *Buchanan*, 5 Har. & J. 317.

98. If the act of conspiring becomes illegal from the means used to effect it, so much must be set out in the indictment as will show its illegality, and charge the defendant with a substantial offence. *State* v. *Bartlett*, 30 Me. Rep. 132.

99. These principles of Common Law are applicable to prosecutions for conspiracies under the statute of Maine, inasmuch as the latter has furnished no modes by which prosecutions may be conducted. Such modes are to be sought in the rules prescribed by the Common Law. *Ib.*

100. Where three persons were combined in a conspiracy, and one of them died before trial, and another was acquitted; it was held that the survivor might be tried and convicted. *People* v. *Olcott*, 2 Johns. Cases, 2 ed. 301.

101. Where A. and B. were indicted for a conspiracy to defraud C., and the jury found a verdict that there was an agreement between A. and B. to obtain money from C., but with an intent to return it again, this was not to be a verdict of acquittal, or a verdict upon which any judgment could be given. *Ib.*

102. A conspiracy is, in its nature, a joint offence; less than two persons cannot be charged with it; and where this offence is alleged, the Court cannot grant a separate trial. *The Com.* v. *Mason*, 2 Ashmead 31.

103. One who is guilty of a conspiracy may be tried in the county where the overt act is done, in pursuance of the

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conspiracy. *Commonwealth* v. *Gillespie*, 7 S. & R. 478. See 2 Yeates 1.

104. Where two persons only are charged with a conspiracy, the acquittal of one is held to be the acquittal of the other. *State* v. *Tom*, 2 Dev. 569.

105. A verdict in a case where two conspire together, that there was an agreement between A. and the defendant to obtain money from B., but with intent to return it again, is defective, and no judgment can be rendered on it. *Ib.* See 12 Pick. 173. *Commonwealth* v. *Manly*.

106. A. and B. were indicted for a conspiracy to defraud C. B. was tried and acquitted, and the jury not being able to agree on a verdict as to whether A. was guilty or not, the Court, without the consent of A., ordered a juror to be withdrawn, and the jury discharged. It was held that the Court might, in their discretion, in a criminal case, discharge a jury who are unable to agree on a verdict, and against the consent of the accused, who may be brought to trial a second time for the same offence. *People* v. *Olcott*, 2 Johns. Cases, 2d ed. 301.

107. Where there is a conspiracy to commit an offence, it cannot be more severely punished than the offence itself. *Hartman* v. *Com.*, 5 Barr. 60.

108. Where several are indicted for a conspiracy, and one only appears, it was held that if he move to be tried separately, he may be tried separately. *State* v. *Buchanan*, 5 Har. & J. 500.

109. On an indictment against two for a conspiracy to cheat, the judgment should be against each prisoner severally, and not against them jointly. *March* v. *People*, 7 Barb. 391.

III. Offences Indictable as for a Conspiracy.

110. When a felony or misdemeanor is in fact committed, a conspiracy to commit such felony or misdemeanor cannot be indicted and punished as a distinct offence. *Commonwealth* v. *Kingsbury*, 5 Mass. Rep. 106.

111. Where there is a conspiracy to defraud a third person, accomplished by means of an act that would not amount to an indictable cheat if done by an individual, it is indictable by the Common Law of Maryland. *State* v. *Buchanan*, 5 Har. & J. 317.

112. Where there is a conspiracy to seduce and carry off a female over sixteen years of age, it is indictable under the laws of Virginia, though the seduction and abduction be not indictable. *Anderson* v. *Commonwealth*, 5 Rand. 627.

113. The Common Law offence of conspiracy is not abolished by the statute defining conspiracy in certain cases, but such a conspiracy as was indictable before the statute at Common Law is so still. *State* v. *Norton*, 3 Zabris. 33.

114. Whether a conspiracy to injure or defraud an individual, or to commit a civil injury by means not in themselves criminal, is a misdemeanor at Common Law,—*quere*. But a conspiracy to defraud an incorporated bank of issue, so that the securities for the circulation held by the public are impaired, is an offence of so public a nature, that it is indictable at Common Law. *Ib.*

115. The destruction or erasure of the endorsement on a promissory note, with intent to defraud any person, is a misdemeanor in New Jersey, and a conspiracy to do it is an indictable conspiracy under the statute. *Ib.*

IV. Evidence on the Trial for Conspiracy—What Evidence admissible—Evidence sustaining the Indictment.

116. Where an indictment is laid for a conspiracy in inveigling a young girl from her mother's house and reciting the marriage ceremony between her and one of the defendants, a subsequent carrying her off with force, and threats after she had been relieved on a habeas corpus, was permitted to be offered in evidence. *Respublica* v. *Hevice*, 2 Yeates 114.

117. In cases of conspiracy, acts

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may be evidence of the combination. For any other purpose it is not necessary that they should be stated or proved. *State* v. *Ripley*, 31 Maine (1 Red.) 386.

118. Upon the trial of an indictment for conspiracy, where evidence has been given which warrants the jury to consider whether the prisoner was engaged in the alleged conspiracy, and had combined with others for the same illegal purpose, any act done or declarations made by one of the party in pursuance and promotion of the common object, are evidence against the rest, but what one of the party may have said, not in pursuance of the plot, cannot be received against the others. *State* v. *Simmons*, 4 Strob. 266.

119. Although there was evidence of the co-operation of the defendant with his co-defendants to elude the creditors of the latter in procuring a discharge under the insolvent debtors' act, sufficient to support a charge of conspiracy to detain and secrete funds and effects of the co-defendant from the claims of his creditors, yet where the only evidence that the defendant had any such funds, or that they had been deposited with him, consisted in the declarations of his co-defendant, whose unprincipled character was admitted by all parties, and who made the declaration under the strong influence of resentment, fear, and interest, and in contradiction of circumstances, the fund deposited being the corpus delicti, the Court held the evidence in support of the charge against the defendant to be unsatisfactory, and ordered a new trial. *Ib.*

120. Of the evidence necessary to support an indictment for a conspiracy. *Commonwealth* v. *Warren*, 6 Mass. 74.

121. Where there was a conspiracy to commit an offence, it is not competent on the trial of one of the conspirators to give in evidence the declarations of another conspirator, made after the offence had been committed, because they were not made in furtherance of the common design. *State* v. *Dean*, 13 Ired. 63.

122. In an indictment for a conspiracy to prosecute a person who was not guilty, it is not competent to show that the defendants prosecuted other persons who were guilty. *State* v. *Walker*, 32 Maine (2 Red.) 195.

123. Where a witness, on the trial of an indictment for conspiracy, testified that the prisoner in his presence, and the presence of A., said that B. had offered him, the prisoner, a sum of money if he would kill W., that the prisoner told B. he would give him an answer at a future day, that the prisoner offered the witness a part of the money if he would kill W., that A. proposed a mode of doing it, that the witness declined having anything to do with it, and the prisoner said he was in jest, the murder being committed by B. a few days afterwards; held that this was sufficient evidence of the conspiracy of the prisoner and A. to make the declarations of A. admissible evidence against the prisoner. *Commonwealth* v. *Crowinshield*, 10 Pick. 497.

124. Where an indictment is found for a conspiracy, alleging that the defendants on the 5th of January, 1850, conspired to defraud the H. Insurance Company, by removing and secreting the goods belonging to one of the defendants, and insured by said Company, and then pretending that they had been destroyed by fire, and the proof was that the policy was issued on the 2d of January, 1850, that the goods were removed on the 5th, that the shop from which they were removed was destroyed by fire on the 7th, and that the defendants had no knowledge of any insurance of the goods by the H. Insurance Company until after the fire; held that such proof did not support the allegation in the indictment. *Com.* v. *Kellogg*, 7 Cush. 473.

125. Where there is proof of an overt act by one in pursuance of the conspiracy, it is sufficient to convict all. *Collins* v. *Commonwealth*, 3 S. & R. 220.

126. Where the facts shown are insufficient to establish a conspiracy between the prisoner and a third person to commit an offence, the declarations of such third person made in the absence of the prisoner, are incompetent as evidence against him. *Williamson* v. *the Com.*, 4 Gratt. 547.

127. An allegation in an indictment for a conspiracy, that the defendants

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conspired to defraud B., is not sustained by evidence that they conspired to defraud the public generally, or any, individually, whom they might meet and be able to defraud. *The Com.* v. *Harley*, 7 Met. 506.

128. On a trial for conspiracy among journeymen bootmakers, &c., the counsel for the defence inquired of a witness the price of flour at the formation of the society, to prove that the object of the defendants in forming their society, was to raise the price of wages proportionally to the price of flour and other necessaries; held that such proof was inadmissible. *Com.* v. *Hunt*. Thacher's Crim. Cas. 609.

CONTINUANCE.

I. Grounds for a Continuance.
II. Miscellaneous.

I. Grounds for a Continuance.

1. In South Carolina, where one is indicted for a misdemeanor, he is entitled to a continuance until the next term after the indictment is found. *State* v. *Frazer*, 2 Bay 96. Aliter, in the case of an indictment for a forcible entry. *State* v. *Daley*, 2 N. & M. 121. But it is a matter within the discretion of the Court to continue a cause on the part of the State. *State* v. *Patterson*, 1 McCord 177.

2. The affidavit of a prisoner upon an application for a postponement of his cause, stating that at the next term he can prove good character by witnesses from another State where he resided, which he cannot prove here, being a stranger; that he can prove the property charged to be stolen to be the property of another person than the owner stated in the indictment, and that he can prove an *alibi*, which he cannot now show, because of his recent arrest, is sufficient. *Bledsoe* v. *Commonwealth*, 6 Rand. 673.

3. Want of diligence in preparing for a defence is a good ground for not granting a continuance in a criminal case as well as in a civil. *Commonwealth* v. *Gross*, 1 Ashm. 281. See 1 Dall. 9; Wallace 5.

4. Where the accused is committed so short a time before the sitting of the Court, that he cannot procure an attendance of his witnesses; held that he is entitled to a continuance. *State* v. *Lewis*, 1 Bay 1.

5. Though one charged with a crime is entitled to compulsory process for his witnesses before an indictment is found, yet his failure to exercise this privilege is not such a negligence as will take from him the right to a continuance, but it will authorize the Court to impose reasonable terms on granting the continuance. *United States* v. *Moore*, J. B. Wallace 23.

6. A court may require, under particular circumstances, that the affidavit of a witness which sets forth his testimony, shall be produced as the ground work of a continuance, and may overlook the affidavit of the prisoner, setting forth the materiality of the evidence, and specifying what he expects to show, and showing due diligence. *Mendum* v. *Com.*, 6 Rand. 704.

7. Absence of a witness who lives beyond the jurisdiction of the Court, is no ground for continuing the trial of an indictment. *Commonwealth* v. *Millard*, 1 Mass. 6; *State* v. *Fyles*, 1 Const. Rep. 234.

8. The trial of an indictment will not be continued, so that the prosecutor may have time for a capias against a witness who has been duly summoned, and refused to attend, unless the prosecutor makes an affidavit that in his opinion he cannot safely try the cause without the attendance of the witness. *United States* v. *Frink*, 4 Day 471.

9. A motion for the continuance of a cause on the ground of the absence of a material witness was properly overruled, though the prisoner swears to the materiality of the testimony. *Mull's case*, 8 Gratt. 695.

10. Under the circumstances it is necessary for the prisoner to state who was the absent witness, and what he was expected to prove. *Ib.*

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11. In Georgia, a continuance will not be granted, in the Supreme Court, for the absence of counsel, when the original counsel is in the court. *Bullock* v. *the State*, 10 Geo. 46.

12. The mere absence of an attorney, without the consent of the client, is not a good ground for the continuance of a case. *Allen* v. *the State*, 10 Geo. 85.

13. The absence of counsel is not a satisfactory excuse for not proceeding to trial; excuses of this sort ought to be discountenanced. *Ib.*

14. It is the counsel's duty to attend, and a failure to do so is no ground for postponement, unless in case of necessity or misconception. *Ib.*

15. The rule applies to those who are attorneys in fact as well as at law. *Ib.*

16. The Courts are scrupulous about granting continuances on account of the absence of counsel. *Ib.*

17. Illness of counsel, where there is but one, or the leading counsel, where there is more than one, is a good cause for the continuance of a cause, especially where the sickness is so sudden that another cannot, under the circumstances, render justice to the case. *Ib.*

18. The affidavit of continuance should be complete, satisfactory and clear, as to the material allegation necessary for a continuance. *Ib.*

19. The affidavit should contain a statement that there are no other witnesses present by whom the party can satisfactorily prove the same state of facts, and that the attendance of the absent witness is expected at the next term. *Ib.*

20. It should appear that the facts expected to be proved would be material evidence in the case. *Ib.*

21. To entitle the accused to the indulgence of the Court, he should be guilty of no laches, but show an exercise of diligence on his part. *Ib.*

22. It should appear that the absent witnesses reside within the jurisdiction of the court, otherwise there would be no cause for delay. Secus in New York. *Ib.*

23. In the applications of rules for the continuance of criminal causes, the Court must be left free, to some extent, to act in such a manner as to secure both a speedy and a fair trial. *Ib.*

24. *Quere.* Whether the Court suspects that the object of the party in asking a continuance, is delay merely, the Court has a right to travel out of the written affidavit. *Ib.*

25. Although a party charged with a crime may have cumpulsory process for his witnesses, even before indictment found, still the failure to use it is not such negligence as will deprive him of a continuance when the witnesses are absent. *Ib.*

26. On the trial of an indictment, where it appeared that B. had been subpœnaed, but was unable to attend, on account of illness, and that his attendance could be procured at the next term, that the affidavit was not made for delay, &c., and the motion was refused; held that the continuance should have been granted. *Gross* v. *the State*, 2 Carter (Ind.) 135.

27. In Indiana, an adjourned term of the Randolph Circuit Court was held within three months from the time fixed for the regular term, at which term the accused was indicted; no objection was made to the regularity of the proceedings; held that the presumption was that the adjournment was according to law. *Porter* v. *the State*, 2 Carter (Ind.) 435.

28. In Virginia, where upon the trial of an indictment for felony, the prisoner's counsel moved an instruction to the jury, in effect that the evidence adduced for the prosecution did not show that the crime charged in the indictment was consummated, and that therefore they ought to find a verdict for the prisoner; the Court, with the consent of the prisoner and the Commonwealth's attorney, adjourned the questions arising on the motion to the General Court, discharged the jury, and continued the cause until the next term; it was held upon the construction of the statute (1 Rev. Code c. 69, § 14), that it was correct to adjourn the questions to that Court, and that the Court ought to decide them. *Nix's case*, 11 Leigh 636.

29. An affidavit for a coutinuance must be full, satisfactory and direct, as to material allegations requisite for

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a continuance. *Knight* v. *the State*, 5 Humph. 599.

30. The admission, by consent, of an affidavit for a continuance, on the ground of the absence of a material witness, in evidence is an admission of the facts which the affidavit alleges can be shown by the witness, and they cannot be contradicted. *Willis* v. *the People*, 1 Scam. 399.

31 In Virginia, where a person is charged with felony, having been indicted at the first term of the Circuit Court after his examination, and the case was continued at that term for the want of time to try it, and at the second term the case was continued on the motion of the prisoner, upon the ground of the absence of a material witness for him, at each of the three succeeding terms the case was continued again for want of time to try it; held, that upon the expiration of the last of the five terms, he was entitled under the statute (1 Rev. Code, ch. 169, s. 28), to be forever discharged of the crime charged. *Green's case*, 1 Robinson 731.

32. As to when the absence of a witness is not good cause for a continuance. *Moore's case*, 9 Leigh 639.

33. Where a prisoner was indicted for felony, and made affidavit that he had four material witnesses who were absent and resident in other states, without naming them, or stating that he had made any effort to procure their attendance, or that he had expected to be able to procure their attendance, and therefore prayed for a continuance; held that it was not a proper case for granting a continuance. *Hurd's case*, 5 Leigh 715.

34. It is not a sufficient ground for a continuance, that the witness summoned to prove a particular fact was not *in attendance*, unless it appears from the affidavit that the fact could not be proved by any other person whose attendance could have been procured. *Freleigh* v. *State*, 8 Mo. Rep. 606.

35. It is the province of the Court in which the trial takes place, to judge of the truth or sufficiency of the causes assigned for a motion for a continuance or removal of trial. *State* v. *Hildreth*, 9 Iredell 429.

36. Where an indictment, charging the defendant with having in his possession counterfeit bank-notes, was found on the first day of the term, and, on the second day thereof, the defendant being arraigned, moved for a continuance on an affidavit made by him, stating that he could not safely go to trial for the want of the evidence of A. and B., of Massac county, Illinois—that he expected to prove and could prove by them and each of them, that he was an honest and upright man in all his dealings—that he expected to prove by them how he came into possession of the counterfeit money named in the indictment—that it was passed to him in an honest transaction so far as he was concerned—that he never knew or judged said money to be counterfeit until he was arrested on said charge—that he knew of no witness within the jurisdiction of the Court by whom he could prove the same facts—that he could obtain their testimony by the next term; and that the affidavit was not made for delay, &c., and the Court overruled the motion; it was held that the Court erred in refusing to grant the continuance. *Spence* v. *State*, 8 Blackf. Rep. 281.

37. Where the injured party is to be used as a witness by the government in an indictment for an offence for which there is at the same time a civil action pending, the court will continue the criminal case, otherwise not. *Com.* v. *Elliott*, 2 Mass. 372.

38. Where the prisoner had been indicted for the space of four months, and then moved for a further continuance, for the purpose of obtaining a witness who resided out of the State, there having been no special effort made to procure the attendance of the witness, a further continuance was refused by the Court. *Commonwealth* v. *Millard*, 1 Mass. 6.

39. Where the attorney for the State, who moved for the continuance of the trial of a prisoner until the next regular term of the court, and the motion was granted, afterward it appearing that a material witness on behalf of the State was in the last stages of con-

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sumption, the case was moved for trial at an adjourned term of the Court, when the prisoner's counsel applied to the Court for a continuance, on the ground that material witnesses for the prisoner were absent, which application the Court denied; held that it was an error to bring on the case before the term to which it was at first continued, and that the denial of the motion on the part of the prisoner to continue the case, was also an error. *McKay* v. *the State*, 12 Mo. 492.

40. In case of granting continuances, it must be a most arbitrary and oppressive exercise of power on the part of the presiding judge to authorize a Court of Error to interfere. *Sealy* v. *the State*, 1 Kelly 213.

41. Where a clear error has been committed in refusing a continuance, without the correction of which a manifest injury will be done, a Court of Error will interfere. *McDaniel* v. *State*, 8 S. & M. 401.

42. When, at the conclusion of a trial, the Court is convinced, after hearing all the proof, that the continuance should have been granted, it should allow a new trial; and if it refuses a new trial, the party excepting should embody all the testimony in his bill of exceptions, that the Court above may see the bearing of the whole case, and thus judge of the ground of the application. *Ib.*

43. Where, after a criminal case has been twice tried and the jury were unable to agree, the Court appointed a special term for the trial, and on the affidavit and request of the accused the case was continued over the regular term of the court to another special term without any order being entered at the regular term; held, after a verdict of guilty, that this was not an error of which the accused could avail himself. *McKinney* v. *the People*, 2 Gilman 540.

II. Miscellaneous.

44. The continuance of a cause is discretionary within the primary Court, and is not revisable on error. *Lindsay* v. *the State*, 15 Ala. 43.

45. In Virginia, where the record of a case adjourned by a Circuit Court to the General Court, does not show that such adjournment was with the consent of the accused, it will be error. *Young's case*, 9 Leigh 636.

46. In Virginia, where the examining Court refuses to grant the prisoner a continuance of the case, it is no ground for arresting judgment in the Circuit Court. If available there at all, it should be taken advantage of by a plea in abatement, or motion to quash the indictment. *Morris' case*, 9 Leigh 636.

47. On the application of a prisoner to remove or continue his case, the discretion to do either rests with the judge of the Superior Court, and cannot be reviewed in this tribunal. *State* v. *Duncan*, 6 Iredell's R. 98.

48. The continuances of a warrant need not be stated on the face of the proceedings. *The State* v. *Conoly*, 6 Iredell's R. 243.

49. When the trial of a criminal case is to be postponed, a motion for that purpose must be addressed to the discretion of the Court. *Green* v. *the State*, 13 Mo. 382.

50. In Virginia, if a person has been proceeded against to outlawry, it will not be permitted to adjourn a question in his case to the General Court without his consent. *Commonwealth* v. *Pearce*, 6 Gratt. R. 66.

CONVICTION.

I. When a Conviction is Valid.
II. Conviction, when not Sustainable.

I. When a Conviction is Valid.

1. The *confession* referred to in the second section of the act on which a magistrate is authorized to convict a disorderly person, means a plea of guilty, or some acknowledgment equivalent thereto; not an admission argumentatively deduced by the magistrate. *Bennac* v. *the People*, 4 Barb. 164.

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2. Where there is a conviction under 1 R. S. 638, a record of conviction stating generally the nature and circumstances of the offence must be made up by the magistrate and signed by him, and filed in the county clerk's office, before the warrant of commitment can be issued. *Ib.*

3. An indictment defective in not charging facts necessary to constitute a felony, may yet be sufficient to authorize a jury to convict, and the Court to award sentence as for a misdemeanor. *Commonwealth* v. *Squire*, 1 Met. 258.

4. A conviction before a justice of the peace will be sustained by a record when it shows that the defendant, on being asked whether he was guilty or not of the offence alleged against him, fraudulently and wilfully stood mute, and that after due examination of witnesses and a full hearing of the case, he was adjudged to be guilty, and was sentenced to imprisonment. *Ellenwood* v. *Commonwealth*, 10 Met. 222.

5. It is necessary that the record should show that the grand jury acted upon and returned as a true bill the indictment or count upon which the defendant was convicted, and a mere recital to an entry made afterwards *nunc pro tunc* is insufficient to show this. *Hite* v. *State*, 9 Yerg. 198.

6. Where the evidence is applicable to either count in an indictment, and there be a general verdict of guilty, the conviction will be good. *Bennett* v. *State*, 8 Humph. 118.

7. Under Revised Statutes of Massachusetts, c. 137, § 11, it was held that a person indicted for rape, may be convicted of an assault and battery, the latter offence being necessarily charged substantially in an indictment for rape. *Commonwealth* v. *Drum*, 19 Pick. 479.

8. On the trial of an indictment for rape, if there is not sufficient evidence to convict the defendant either of the rape charged, or of an assault with an intent to commit a rape, still, under the provisions of the Revised Statutes, c. 137, § 11, he can be convicted of an assault and battery. *Ib.*

9. An indictment for rape necessarily charges, substantially and formally, an assault and battery upon the person of the female alleged to have been ravished. *Ib.*

10. Under the code of criminal procedure, upon an indictment for a felony, the accused may be convicted of a misdemeanor where both offences belong to the same generic class, where the commission of the higher may involve the commission of the lower offence, and where the indictment for the higher offence contains all the necessary substantive allegations necessary to let in proof of the misdemeanor. *Cameron* v. *State*, 8 Eng. 712.

11. Where the statute peremptorily prescribes the form of a summary conviction, it must be followed exactly, but it is otherwise where the statute is merely directory. In the latter case a conviction can be sustained, if it contain everything required by the form given, notwithstanding more may be added than is necessary. *Com.* v. *Hardy*, 1 Ashm. 410.

12. Where there is no statute form, and the proceedings are according to the course of the Common Law, it is necessary that every positive ingredient in the offence should be repeated in the proof on the record, and cannot be supplied by reference to the charge. *Ib.*

13. Where the proceedings on a conviction are at Common Law, and where the justice is bound to send up as part of his record, the evidence before him, his conclusions upon the evidence will be sustained, if the evidence be such as could be left to a jury on a trial in court. *Ib.*

14. If an indictment contain some good and some bad counts, a general conviction under it will be sustained. *West* v. *State*, 2 Ala. 212.

15. It is well settled, that where an accusation includes an offence of inferior degree, the jury may discharge the defendant of the higher crime and convict him of the less atrocious. *Swiney* v. *State*, 8 S. & Marsh. R. 576.

16. In Mississippi, upon a conviction of larceny of property of the value of under twenty dollars, there is an unlimited discretion as to the length of the imprisonment, provided it be not less than two years in the penitentiary. *Ib.*

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17. In every case where one being charged with a criminal offence, is brought before a justice on a warrant, he must be examined concerning the offence charged, and has a right to have witnesses sworn and examined on his part, and to have the assistance of counsel; a conviction, however, will not be quashed, or a judgment set aside, after trial had, for the neglect of duty by the justice in these particulars. *Son* v. *People*, 12 Wend. Rep. 344.

18. A conviction in a Court of Special Sessions, based upon the verdict of a jury, will not be quashed because the verdict was against evidence. *Ib.*

19. In order to make a conviction before a Court of Special Sessions valid, the Court need not inform the prisoner of his right to be tried by a jury, or that he should expressly waive such right. *People* v. *Goodwin*, 5 Wend. Reports 251.

20. The statute of Mass. of 1805, c. 88, in authorizing a conviction of part of an indictment for felony, restrains the conviction to cases where the part of which the prisoner is found guilty constitutes of itself a felony. *Commonwealth* v. *Newell*, 7 Mass. Rep. 245.

21. Where a defendant is put on his trial, on an accusation which includes an offence of an inferior degree, the jury may acquit of the higher offence, and convict of the lesser, although there may be no count in the indictment, specifically charging that particular offence. *Carpenter* v. *People*, 4 Scam. Rep. 197.

22. If the proof fails to establish all the allegations of the indictment, so as to have a conviction of the offence presented, but at the same time shows that the defendant is guilty of a substantial offence, necessarily contained in the terms of the indictment, the jury may find him guilty of the minor offence. *Ib.*

23. Where an indictment is found for producing an abortion of a quick child, which, by the Revised Statutes, is a felony, the accused may be convicted, though it turn out that the child was not quick, and the offence therefore a mere misdemeanor. *People* v. *Jackson*, 3 Hill's Rep. 92.

24. The provision in 2 R. S. 702, § 27, has not changed the Common Law respecting the right to convict of a lesser offence, on an indictment for a greater one. *Ib.*

25. The English doctrine that, where there is an indictment for a felony, the prisoner cannot be convicted of a misdemeanor, proceeds upon peculiar reasons which have no foundation in the criminal law of New York. *Ib.*

26. Under an indictment for murder, the prisoner may be convicted of manslaughter. Per Cowen, J. *Ib.*

27. So, the prisoner may be convicted of simple larceny, under an indictment for burglary or robbery. Per Cowen, J. *Ib.*

28. Whenever the defendant is charged with the major offence, and the evidence does not support it—that the jury may convict of any minor offence, which is included in the major, and to which the testimony applies upon the familiar maxim, that omne majus continet in se minus. *Johnson* v. *State*, 14 Geo. Rep. 55.

29. A slave may be convicted of murder for the homicide of another slave. *Seaborn* v. *State*, 20 Ala. Rep. 15.

30. The statute requiring that not more than twenty, nor less than ten days, shall elapse between the time of sentence and execution, is directory merely; and if more than twenty days are allowed, the judgment of conviction is not thereby vitiated. *Ib.*

31. On the trial of a prisoner for a capital offence, the jury being unable to agree, were discharged, and the prisoner having been put on trial before a new jury, was convicted of manslaughter; held upon a motion to arrest judgment, that the conviction was good. *Commonwealth* v. *Purchase*, 2 Pick. 521.

32. In prosecutions for assault with intent to commit murder, where the proof shows that it would have been murder had death ensued, that itself will be a sufficient ground for the jury to infer the existence of the actual intention to murder, as every one must be taken to intend the necessary consequences of his own act; it is not, therefore, necessary that the jury should be satisfied from the evidence

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that the defendant had a positive intention in his mind to commit murder at the time of the assault, in order to convict him, as seems to have been held in Cruse's case, 8 Car. & P. 541. *Cole* v. *State*, 5 Eng. 318.

33. The fact, that a prosecution was carried on without the aid of any prosecuting attorney, or by one who, with the assent of the Court, prosecuted without competent authority, is not material after verdict—the party convicted can take no advantage of it. *Tesh* v. *Commonwealth*, 4 Dana's Rep. 522.

34. Where the breaking and entering, and actual stealing are charged in one count, there is but one offence charged, and there can be but one penalty adjudged. But where they are averred in distinct counts, as distinct, substantive offences, not alleged to have been committed at the same time, and as one continued act; if, in other respects, they are such offences as may be joined in the same indictment, the defendant may be convicted on both, and a judgment rendered founded on both. *Joslyn* v. *Commonwealth*, 6 Metc. 236.

35. A prisoner may be convicted on his own confession, when proved by legal testimony, although it is uncorroborated by any other evidence, provided the corpus delicti be proved. *State* v. *Guild*, 5 Halsted 163.

36. Corroborating circumstances, used in reference to a confession, are such as serve to strengthen it, to render it more probable; such, in short, as may serve to impress a jury with a belief of its truth. *Ib.*

37. A boy of the age of twelve years and five months, may be convicted on his own confessions of the crime of murder, and executed. The capacity to commit a crime, necessarily supposes the capacity to confess it. *Ib.*

38. Where a forged note is passed to a sheriff by a debtor, against whom the sheriff has an execution, and the question is submitted to a jury to decide whether the note was given for "ease and favor," and the transaction consequently void, within the statute, and they convict the prisoner charged with forgery, the conviction will be held good. *People* v. *Badgley*, 16 Wend. 53.

39. Where in an indictment for receiving stolen goods, the charge was, that the accused had feloniously received, of an ill-disposed person, to the jurors known, by the name of Deman Boyce, a cow, the property of, &c., which had then lately before been stolen by the said ill-disposed person, with knowledge of the felony, and the finding of the jury was, that the accused was guilty of receiving the cow alleged in the indictment as stolen property, knowing her to be stolen, without finding by whom the property was stolen, the conviction was held good, and a judgment rendered upon the verdict was affirmed. *The People* v. *Caswell*, 21 Wend. R. 86.

40. Where a party is convicted of a misdemeanor, and that offence is sufficiently alleged in the indictment, the conviction will be sustained, if otherwise valid, notwithstanding there is a charge in the indictment of facts characterizing a higher crime. *People* v. *Lohman*, 2 Barb. 216.

41. A person having been indicted for highway robbery, and duly tried, and the case submitted to the jury, who, not being able to agree, were discharged, without the prisoner's consent, and a new jury having been impanelled, who found the prisoner guilty; held, on the prisoner's motion for arrest of judgment, on the ground that no conviction could be legally had after the first panel of jurors were discharged, without the prisoner's consent, that the conviction was legal. *Commonwealth* v. *Bowden*, 9 Mass. 494.

42. A person tried for felony must be present when the verdict is received. *People* v. *Perkins*, 1 Wend. 91.

43. Indictment for assault, with intent kill; party may be convicted of assault and battery, or assault alone. *Stewart* v. *State of Ohio*, 5 Ohio R. 242; *State* v. *Stedman*, 7 Porter, 495; *Cameron* v. *State*, 8 Eng. 712.

44. In proceedings under the 11th section of the New York act, "declaring the powers of the Courts of General Sessions of the Peace," &c., the record of conviction before the justices ought to contain sufficient to show

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that the justices had jurisdiction. The value of the thing stolen ought to be mentioned, and that the person convicted had not given bail within forty-eight hours after being committed, or had consented to a trial before the expiration of that time. *Powers* v. *People*, 4 Johnson's Rep. 292.

45. On criminal trials, the jury must be satisfied of the guilt of the prisoner beyond a reasonable doubt, or he will be entitled to an acquittal. *Hiler* v. *the State*, 4 Blackf. 552.

46. A defendant in a civil or criminal prosecution, cannot assign for error a decision, order, or judgment of a court which is manifestly in his favor. *McQuoid* v. *People*, 3 Gilman's R. 76.

47. The jury are bound to acquit the defendant, if they entertain any reasonable doubt of his guilt; but a bare possibility of innocence will not warrant an acquittal. *Pate* v. *People*, 3 Gilman 644.

48. Where an indictment for rape contained all the specifications of a charge of incest; to wit, that the defendant unlawfully had carnal knowledge of the body of his daughter; it was held it was competent for the jury (under Rev. Stats., ch. 137, § 11), if they should find that fact, but should not find that it was done by force and against her will, as further alleged in the indictment, to return a verdict accordingly. *Commonwealth* v. *Goodhue*, 2 Metcalf 193.

II. Conviction, when not Sustainable.

49. Where the corpus delicti is not proved aliunde the confession of a prisoner not made in open court and not corroborated by circumstances, will not be sufficient to convict him. *Robinson* v. *the State*, 12 Miss. 592.

50. A conviction cannot take place after the repeal of a violated law unless the repealing act contains a provision for that purpose. *Taylor* v. *State*, 7 Blackf. 93.

51. On an indictment with intent to commit murder, the jury were not authorized to find the defendant guilty of an assault with intent to commit a bodily injury. *Carpenter* v. *People*, 4 Scam. 197.

52. Where the defendant was indicted and convicted under a statute to which no penalty was annexed by the Legislature; on motion in arrest of judgment, the Court discharged him, and arrested all further proceedings. *State* v. *Ashley*, Dudley's Rep. 188.

53. On an indictment charging two persons with the commission of a joint offence, both cannot be convicted upon proof that each one committed an act constituting an offence similar to the act charged in the indictment. *Stephens* v. *State*, 14 Ohio Rep. 386.

54. Where the circumstances proved, implicate two persons equally, having no necessary connection with each other in reference to the crime committed, it is held that neither can be convicted. This rule, however, does not apply if it is shown that the two persons have a common purpose for the commission of the deed, and if the guilt of the one is consistent with the guilt of the other. *Kirby* v. *State*, 3 Humphrey's Rep. 289.

55. Where a warrant charges the defendant with retailing merely, he cannot be convicted, upon an appeal, of keeping a tippling-house—a different offence. *Robinson* v. *Com.*, 6 Kentucky 288.

56. The felony of which the defendant was convicted in the county of New York, was committed on board of a steamboat while on her passage from the city of New York to Norwich, in the State of Connecticut, at the time in Long Island Sound, opposite to the county of Suffolk, near to the shore, between Sands' Point and Huntington. Held that the place where the offence was committed was not within the State of New York; and therefore that the conviction was illegal for want of jurisdiction in the court in which it took place. *Manley* v. *the People*, 3 Seldon's Rep. 295.

57. Where at first the proper attorney signs an indictment of one count, found by the grand jury a true bill, and afterwards two additional counts are added to the indictment by an attor-

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ney, pro tempore, alleging different offences and not signed by such attorney; held that a conviction could not be sustained on either of the additional counts. *Hite* v. *State*, 9 Yerger 198.

58. Where the act creating the offence was in force at the time of the finding of the indictment, but it was repealed and consequently ceased to exist before the conviction of the parties; held that no conviction could be had without a provision therefor in the repealed act. *Mayers* v. *the State*, 2 English's Rep. 68.

59. Where upon a complaint of larceny made to a Justice of the Peace, the goods alleged to have been stolen are described in a schedule annexed to the complaint and not in the body of the complaint, the complaint will be bad. *Cumming's case*, 3 Greenleaf 51.

DISINTERRING THE DEAD.

I. Disinterring the dead: offence of, defined.
II. Indictment. Trial and Evidence.

I. Disinterring the Dead; Offence of, Defined.

1. The offence of disinterring the dead does not consist merely in the removal of a dead body, but in its removal without the consent of such deceased person, obtained in his or her life-time, or of the near relatives of the deceased, since his or her death. *Tate* v. *State*, 6 Blackf. 110.

2. The Common Law on the subject of disinterring the dead has been superseded by the statute of 1814, chap. 175. And an indictment therefor must now conclude contra formam statuti. *Com.* v. *Cooley*, 10 Pick. 37.

3. At Common Law it was criminal to dig up and remove a dead body; but that would not now be an offence in Massachusetts, since the statute makes a provision for the removal of a dead body under a license. *Ib.*

4. It is an indictable offence to cast a dead body into a river, without the rites of Christian sepulture. *Kanavan's case*, 1 Greenleaf R. 226.

5. It is not necessary, to constitute the offence of disinterring a dead body, that all the parties to it should be actually present aiding and abetting in the commission of the fact. If, with the intention of giving assistance, a person be near enough to afford it, should it be needed, he is in construction of law present aiding and abetting. *Tate* v. *State*, 6 Blackf. 110.

6. The removal of a dead body is not an offence within the true meaning of the statute of 1830, ch. 57, unless it is removed with the intent to use it, or dispose of it for the purpose of dissection. *Commonwealth* v. *Slack*, 19 Pickering R. 304.

II. Indictment—Trial and Evidence.

7. An indictment having alleged that the burying-ground belonged to the First Congregational Parish in Greenfield, it was objected that no evidence was offered on the part of the government in support of the allegation. But the Court were of opinion that the allegation was unnecessary, and that it did not become material by having been introduced into the indictment. *Commonwealth* v. *Cooley*, 10 Pickering's R. 37.

8. Where a count in an indictment is for removing and taking from its grave a certain other deceased child of said Burke, "that yet had no name given to it," without the consent, &c.; it was held good. *Tate* v. *the State*, 6 Blackford's R. 110.

9. Where the testimony tended to prove the co-operation of, and in the offence of disinterring the dead, it is the province of the jury, and not of the Court, to weigh it and determine whether they were guilty or not. *Tate* v. *State*, 6 Blackf. 110.

10. Where the evidence reported proves that the defendant was guilty of digging up, &c., the body, so that his case is within the first section of the statute of 1814, chap. 175, whereas he is charged only in the second section with receiving, concealing and

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disposing of it; which is founded upon the act of digging up, &c., being done by another, and the testimony had a tendency to prove that the breaking up the grave and removing the body were by M. and P., who appear to have been employed by the defendant; but it was not decisively proved that they did the act; held that the evidence went no further than to show, that the body having been dug up and removed from the grave, outside the burying-ground, where it was covered by leaves, was taken from this place of concealment by the defendant's order, and under his control was carried off, and that the case was very clearly within the second section of the statute. *Kanavan's case*, 1 Greenleaf R. 226.

11. The subject of burying-grounds, and the burial of the dead, and all regulations upon that subject, were vested in the Board of Health, by the act of June 20th, 1816, and these powers were transferred to the city government of Boston, by the act incorporating the city, and are recognized in the act of 1849. *Commonwealth* v. *Fahey*, 5th Cushing's R. 408.

DUELLING.

I. Statutes concerning Duelling.
II. What constitutes the Offence under the Statutes.
III. Of the Indictment, &c.
IV. Evidence on the Trial.

I. Statutes Concerning Duelling.

1. In South Carolina, the true construction of the words in the statute of 1812, against duelling, "If any person resident in or being a citizen of this State shall send, give, or accept a challenge to fight a duel within this State," is, "if any person," &c., "shall within this State send, or give, or accept a challenge to fight a duel." *Cunningham* v. *State*, 2 Speers 246.

2. In South Carolina, the act of 1812, against sending a challenge, is constitutional. *The State* v. *Dupont*, 2 McCord, 334.

3. An act to suppress duelling, passed November 5th, 1816 (sess. 40, ch. 1), which declares that any person who has been convicted of challenging another to fight a duel, &c., "shall be incapable of holding or being elected to any post of profit, trust, or emolument, civil or military, in the State of New York," is constitutional, and a conviction and judgment of disqualification, under it, are, therefore, legal and valid. *Barker* v. *the People*, 3 Cowen 686.

4. In Alabama, the statute of 1807, punishing the offence of sending a challenge to fight a duel, is, as to that offence, repealed by the act of 1819. *Smith* v. *the State*, 1 Stewart's R. 506.

II. What Constitutes the Offence Under the Statutes.

5. Since the statute of 1819, the mere giving a challenge to fight a duel is not punishable in the State of Alabama, either by statute or Common Law, unless a combat takes place. *Smith* v. *the State*, 1 Stewart 506.

6. In South Carolina a challenge to fight a duel, under the act of 1812, may be given verbally, and whether the words used amount to a serious challenge to fight or are the mere ebullition of passion, is a question to be left to the jury. *State* v. *Strickland*, 2 Nott & McCord 181; *State* v. *Perkins*, 6 Blackf. 20.

7. On an indictment for carrying a challenge to a duel in the county of Suffolk, in the Commonwealth of Massachusetts, when the duel was fought in Rhode Island, and it did not appear that there had been any trial for the offence in Rhode Island, nor what were the laws of that State with regard to the offence; it was held that so far as concerned the trial, Rhode Island was a foreign State, and that sending the challenge was of itself a substantive offence under the statute. *Commonwealth* v. *Boott*, Thacher's Crim. Cas. 390.

8. Any agreement to fight with

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loaded pistols, and actually fighting in pursuance, constitutes a duel under the act; and it does not depend upon the time when the agreement was made, but upon the fact of the agreement. *Herriott* ads. *State*, 1 McMullan 126.

9. A challenge to fight a duel *out* of the State is indictable, for its tendency is to rouse the passions and produce an immediate breach of the peace. *State* v. *Farrier*, 1 Hawks 487.

10. Where a challenge was delivered in South Carolina to fight a duel in Georgia, it was held a breach of the law of the former State against duels, and was indictable there. *State* v. *Taylor*, 3 Brevard 243; vide *State* v. *Taylor*, 1 Const. R. 106.

11. No particular form of words is essential to constitute a challenge to fight a duel; whether a challenge to fight in single combat with deadly weapons was intended, or whether it was the mere effusion of passion or folly, or the idle boast of a braggart, not intended at the time to lead to any result, or to be understood by the other party as a challenge to fight a duel, are questions for the jury. *Ivey* v. *State*, 12 Ala. 276.

III. Of the Indictment, &c.

12. Under the South Carolina act, an indictment against a person for carrying a challenge need not aver that the challenger was a citizen or resident of this State. *Cunningham* v. *State*, 2 Speers 246.

13. Where an indictment lies at Common Law, charging that the defendant "did fight a duel with pistols," it will be bad on demurrer. *Lambert's case*, 9 Leigh 603.

14. In Virginia, where an indictment lies for aiding and abetting in fighting a duel, it must charge with clearness and certainty that a duel was fought. *Dudley's case*, 6 Leigh 613.

15. Where there is an averment that the prisoner gave the prosecutor a challenge to fight in single combat, it is equivalent to an averment that he challenged him to fight. *Ivey* v. *State*, 12 Ala. 276.

16. The place where a contemplated duel is to be fought forms no part of the definition of the offence of challenging to fight a duel, and need not be averred in the indictment shown on the trial. *Ib.*

17. In an indictment for sending a challenge it is not necessary to set out a copy of the challenge; and if an attempt be made to set out in the indictment a copy, and it varies slightly from the original, as by the addition or omission of a letter, noways altering the sense, *semble* such variance is not fatal, and after verdict it is cured by the act of 1811. *State* v. *Farrier*, 1 Hawks 487.

18. In an indictment for sending a challenge, in the form of a letter, to fight a duel, it is not necessary to set out the words of the letter, nor the substance thereof. *Brown* v. *Commonwealth*, 2 Virg. Cas. 516.

19. An indictment under the act to suppress duelling, may contain a copy of the alleged challenge, and though it may seem to be merely a demand of satisfaction, nothing more. Yet, if the indictment allege that it was intended and understood as a challenge to fight with deadly weapons, or even if it goes farther, and charges that the intent was to fight, &c., to wit: with pistols, it will be good on its face, for the true intent and meaning of the supposed challenge may be shown upon the trial, by proof written or oral. *Com.* v. *Pope*, 3 Dana R. 418.

20. An indictment for sending a written challenge to fight a duel, does not lie under the act of March, 1797, "for the punishment of certain inferior crimes and misdemeanors." *State* v. *S. S.*, 1 Tyler 180.

IV. Evidence on the Trial.

21. In an indictment for bearing a challenge to fight a duel, it must appear from the evidence that the offence of which the prisoner is convicted, was committed within the State, or within

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the jurisdiction of the Court. *Gordon* v. *State*, 4 Mo. Rep. 375.

22. A., in a letter to B., uses expressions supposed to amount to a challenge to fight a duel, and by a postscript refers B. to C. (the bearer of the letter), to learn whether any further arrangements were necessary. On an indictment, in such case, it was held that B. might give testimony of the conversation between C. and himself. *State* v. *Taylor*, 1 Const. R. 106.

23. The declarations of the second in a duel, are competent as evidence against the principal. *The State* v. *Dupont*, 2 McCord 334.

24. The note sent by one party to the other, and parol testimony in explanation, are competent as evidence, and the jury are to decide whether there has been a challenge within the terms of the statute. *Com.* v. *Hart*, 6 J. J. Marsh. 119.

25. Upon the trial of an indictment for "giving, sending and delivering a challenge" to a duel as a second, proof of a custom which requires a second to deliver a challenge, was held incompetent. *Com.* v. *Boott*, Thacher's Crim. Cas. 390.

26. Upon the trial of an indictment for carrying a challenge to a duel as a second, evidence to prove that the defendant was a friend of the principal in a previous difficulty with another person, was held inadmissible. *Ib.*

27. Upon the trial of an indictment for carrying a challenge to a duel, the confessions and statements of the principal, which have a tendency to establish his guilt and were made in the absence of the second, were held to be admissible. *Com.* v. *Boott*, Thacher's Crim. Cas. 390.

28. In Mass., on the trial of an indictment under the act of 1804, c. 123, for sending a challenge to a duel fought in Rhode Island, evidence of an allegation that the duel was not fought in the Commonwealth, was necessary. *Commonwealth* v. *Hooper*, Thacher's Crim. Cas. 400.

29 Upon the trial of an indictment for sending a challenge to a duel, it was held sufficient for the government to show that a written challenge had been sent, without producing the challenge. *Ib.*

30. In cases where challenges are sent, the government is not to be presumed to have the original challenge in its possession. *Ib.*

31. The circumstances attending a fight with pistols, and the intention of the parties, are questions of fact to be left to the jury. *Herriott* v. *State*, 1 McMullen 126.

EMBEZZLEMENT.

I. Who may be guilty of the offence of embezzlement; Servant, Agent, &c. What may be the subject of Embezzlement.
II. When an indictment lies for Embezzlement. What the indictment should charge.

I. Who may be guilty of the offence of Embezzlement; Servant, Agent, &c. What may be the subject of Embezzlement.

1. Where an officer, such as a constable, was employed to collect certain demands without suit, if the debtors would pay, and by procuring and serving process before a justice of the peace, if they would not; held that he was not a servant of the creditor within the meaning of the statute respecting embezzlement. *People* v. *Allen*, 5 Denio 76.

2. Where a bar-keeper in an inn entrusted to carry letters to and from the post-office, fraudulently converts to his own use a letter inclosing money, given to him to carry to the post-office, he is guilty of embezzlement, and to convict him it is not necessary to prove that he broke open the letter or fled after the commission of the offence, or to show the dissent of his employer; it is enough that there be a fraudulent conversion; and that being shown, a felonious intent is established. *The People* v. *Dalton*, 15 Wendell's R. 581. Vide *People* v. *Sherman*, 10 Wend. 299.

3. Where an auctioneer receives money on the sale of his employer's

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goods, and does not pay it over, but misapplies it; held he is not such an agent or servant as is intended by the Rev. Sts. c. 126, § 29; whether he receives the goods for sale in the usual mode, or receives them on an agreement to pay a certain sum therefor, within a specified time after the sale, the money received by an auctioneer for goods sold by him, in both these cases, is his own money and not another's. *Com.* v. *Stearns*, 2 Met. 343.

4. Where there are several persons indicted for feloniously receiving embezzled goods, knowing them to have been embezzled, all who are shown to have been confederates in the transaction may be convicted, though the receiving was at different times and places, and though all were not present. *People* v. *Stein*, 1 Parker's Crim. R. 202.

5. Where a person is employed to collect bills for the proprietor of a newspaper establishment, and converts to his own use the money which he collects for them, he is not such an agent or servant as is intended by the Rev. Sts. c. 126, § 29, which prescribes the punishment of embezzlement by agents and servants. *Com.* v. *Libby*, 11 Metcalf's R. 64.

6. Under the 8th section of the act passed February the 9th, 1811, entitled, "an act to amend an act entitled an act for regulating the navigation of James River above the falls of said river," it is held not necessary that the party charged with embezzlement under such act should be the captain of the boat, in order to bring his offence within the act. *Smith* v. *Commonwealth*, 4 Grattan 532.

7. Under the R. S., chapter 156, section 7, it is an offence punishable in this State, if a person to whom property is entrusted, to be by him carried for hire, and delivered in another State, shall, before such delivery, fraudulently convert the same to his own use, and it is immaterial whether the *act* of conversion be in this State or in another. *State* v. *Haskell*, 33 Me. Rep. 127.

8. By the terms "the money or property of another," the embezzlement of which by any agent, clerk, or servant, without the consent of his employer, is made larceny by the Rev. Sts. c. 126, § 29, is intended the money or property of any person, except such agent, clerk or servant who embezzles it. *Com.* v. *Stearns*, 2 Metcalf's R. 343.

II. When an Indictment lies for Embezzlement—What the Indictment should Charge.

9. An indictment charging that the defendant, as agent of a private company, embezzled certain goods, &c., is bad, the term *agent* not being found in the 42d section, 3d art. of the act concerning crimes and punishments. Nor would such an indictment be good under the 40th sec., that section being intended to apply only to agents of *incorporated* companies. *Hamnel* v. *State*, 5 Mo. Rep. 260.

10. In an indictment under the act of March 3d, 1825, for embezzling a letter containing a bank-note, the particular office held by the party accused need not be alleged, nor the bank-note set forth. *United States* v. *Clark*, Crabbe 584.

11. Where an indictment charges a larceny or embezzlement of the printed sheets of a certain publication, it is not supported by evidence that those sheets were delivered to the defendant by the owner to be bound, and that the defendant, after he had folded, stitched, bound and trimmed them, embezzled and fraudulently converted them to his own use. In such case the indictment should allege a larceny or embezzlement of books. *Com.* v. *Merrifield*, 4 Met. R. 468.

12. An indictment for embezzlement may be found against a clerk or servant, for converting to his own use the money, goods, &c., of his master or employer, as well as for converting to his own use the money, goods, &c., of any other person, which shall have come into his possession, or under his care, by virtue of his employment: the words any other person, in the statute, mean any person other, than he who is guilty of the embezzlement. *The People* v. *Hennessy*, 15 Wend. R. 147.

13. An indictment founded upon a

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statute, must state all the facts and circumstances which constitute the statute offence, so as to bring the defendant perfectly within the provisions of the statute. *The People* v. *Allen*, 5 Denio's R. 76.

14. Accordingly, an indictment for embezzlement, laid under the statute concerning the offence (2 R. S. 678, § 59), must allege that the defendant was a clerk or servant of some person (or an officer or agent of a corporation), and that the property he is charged with embezzling came to his possession or under his care by virtue of such employment. *Ib.*

15. A count alleging that the defendant received the property as the agent of an individual, is bad. *Ib.*

16. So, also, it is defective if it state that the defendant received the property as the agent of an individual named, though the count afterwards proceed to charge that it came to the defendant's possession and under his care as such servant as aforesaid, and that while he was such servant, he converted it, the construction being that such servant meant such a servant as an agent may be. *Ib.*

17. Where an indictment lies for having feloniously received certain goods and chattels which had been embezzled, knowing them to have been embezzled, it is not necessary to allege that the person embezzling was the clerk or servant of the owner of the goods and chattels. *The People* v. *Stein*, 1 Parker's Crim. R. 202.

ESCAPE.

I. Breaking Jail with intent to Escape, punishable; Statute respecting.
II. Indictment for an Escape; Justification, &c.

I. Breaking Jail with intent to Escape, punishable—Statute respecting.

1. In Massachusetts, where a conditional sentence is awarded against a convict under the Rev. Sts., c. 139, by which he is ordered to pay a fine within a limited time, and in default of payment to be imprisoned, and he is committed to jail to be detained until such sentence is complied with; held, that he is imprisoned for a fixed term, by way of punishment, within the true intent of the Rev. Statutes, c. 143, § 51; and when he forcibly breaks jail with intent to escape therefrom before the time limited for the payment of the fine has elapsed, he is liable to punishment for such breach or attempt. *The Commonwealth* v. *Briggs*, 5 Metc. 559.

2. The act of 1812 merely furnishes a remedy by which a fine assessed against a party committed to custody, may be recovered of the sheriff, &c., or their sureties in case of escape; but in addition to this proceeding the party guilty of a breach of official duty might be indicted, if the facts of the case were such as constituted an offence at Common Law, consequently the provisions of the penal code which provide for the punishment of escapes, are merely substitutes for the Common Law, and do not abrogate the act of 1812. *Hodges* v. *State*, 8 Ala. 55.

3. The provision in the Rev. Sts., c. 143, § 21, for the punishment of prisoners who forcibly break prison with intent to escape, or by force or violence attempt to escape therefrom, although no escape be effected, does not relate to prisoners who are held in custody for trial or for not obtaining bail for appearance, but only to convicts who are sentenced to a term of imprisonment as a punishment, and confined under the sentence. *Commonwealth* v. *Homer*, 5 Met. 555.

4. In Arkansas it is no violation of § 7, art. 3d div. 5, chap. 44 of the Rev. Stats., p. 269, prohibiting the conveying to any person lawfully imprisoned, any instrument, arms or other thing calculated to aid his escape—for a person to convey to such prisoner an instrument of writing informing him that he has a friend, and can be released from confinement. *Hughes* v. *State*, 1 Eng. 132.

5. The design of that statute was to

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prohibit the conveying to a prisoner any substantial thing which might be used or handled by him in facilitating or effecting his escape. *Ib.*

II. Indictment for an Escape—Justification, &c.

6. In an indictment for an escape from the Penitentiary, the original conviction and sentence to the prison may be proven by a transcript of the judgment without the indictment—it appearing by the record entry that defendant was sentenced for the crime alleged in the indictment for the escape. *Sandford* v. *State*, 6 Eng. 328.

7. Where an indictment for escape charges that the defendant was convicted of larceny in the Johnson Circuit Court, sentenced to the Penitentiary and escaped therefrom; held that the fact that the accused was the same person that had been convicted of larceny in the Johnson Circuit Court, was a material and traversable averment in the indictment; and by pleading the general issue, he did not admit his identity in respect to that conviction. *State* v. *Murphy*, 5 Eng. 74.

8. The offence could only be committed by a convict; and to fix that character upon defendant, it devolved upon the State to prove his conviction by the record and his personal identity aliunde. *State* v. *Murphy*, 5 Eng. 74.

9. Circumstantial evidence of identity in such case would be sufficient; direct proof is not required. *Ib.*

10. It is not a valid objection to an indictment for an escape, that the defendant, who, although not formally appointed and qualified as a constable, had assumed to act as such, was charged therein with negligence as a lawful constable. *State* v. *Maberry*, 3 Strob. 144.

11. In an indictment for an escape, it is sufficient to set out that the prisoner did escape, and this may be expressed by other words besides exivit ad largum. *Ib.*

12. A prisoner is not guilty of an escape where he puts himself at a place beyond the limits, in order to take the poor debtor's oath. *Commonwealth* v. *Alden*, 14 Mass. 388.

13. Where there is an informality in the commitment of a prisoner, it is no justification for breaking the prison to effect an escape. *The State* v. *Murray*, 3 Shep. 100.

14. Where a convict who was imprisoned, went by the permission and direction of the gaoler, about the land connected with the gaol, went also to market and brought back provisions for the gaol and its inmates, cooked food for the prisoners in the kitchen of the dwelling-house attached to the gaol, went to the adjacent barn and there fed and milked the cow, and thence without the knowledge of the gaoler he departed, leaving the State; it was held, that the conduct of the gaoler did not justify or excuse the departure of the convict, which amounted to a criminal escape (one judge dissenting). *Riley* v. *State*, 16 Conn. Rep. 47.

15. Though an intent to escape is necessary to constitute the offence of escape, yet where the case after a trial and conviction was carried upon a bill of exceptions, in which the separate circumstances of the departure were detailed, but no question as to intent appeared to have been made on the trial, it was held that such question did not arise on the record in the Court above. *Riley* v. *State*, 16 Conn. 47.

16. Whenever a person charged with a criminal offence, is put upon his trial, he is by operation of law committed to the custody of the sheriff without either a general or special order for the pupose. *Hodges* v. *State*, 8 Ala. Rep. 55.

EVIDENCE.

I. Parol and written evidence. Documentary proof, and secondary evidence.
II. Circumstantial evidence. When circumstantial evidence to be explained by the accused.
III. Evidence derived from the accused's conduct and admissions.

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IV. Sufficiency of evidence. Evidence respecting insanity. Evidence invalidated by variance in the statement of witness.
V. Evidence, when conclusive. When introduced to contradict a witness. When to support the testimony of a witness. Evidence from a record of conviction of a witness. Charging the jury on the weight of evidence.
VI. Presumptive evidence. Evidence rebutting presumptions. Burden of proof.
VII. Evidence respecting character.
VIII. Dying declarations in cases of murder. Declarations in other cases.
IX. Confessions and admissions, when proper evidence.
X. Testimony of experts and physicians.
XI. Competency and admissibility of evidence in cases of murder, &c.
XII. Miscellaneous.

I. Parol and written Evidence—Documentary proof, and Secondary Evidence.

1. Parol evidence of what was sworn before the Coroner's inquest and reduced to writing by him, cannot be received. *State* v. *Zellers*, 2 Halst. Rep. 220.

2. Parol evidence may be given of the contents of a writing, the absence of which is not accounted for, if the object of such evidence is not to prove such facts as the writing would prove if produced, but only a collateral matter, as its identity with or diversity from another writing. *West* v. *State*, 2 Zabriskie 212.

3. The magistrate before whom one charged with a criminal offence is brought for examination, being required by the statute to reduce the testimony to writing, the legal presumption is that he has done his duty, and parol proof of what a deceased witness swore on such examination is inadmissible, until this presumption is rebutted, or the absence of the written evidence otherwise accounted for. *Davis* v. *the State*, 17 Ala. 415.

4. Mere notice to produce a paper, does not justify the adverse party in introducing it in evidence. *The State* v. *Wisdom*, 8 Port. 511.

5. The contents of a letter written by the accused cannot be testified to by a witness for the prosecution, except when it is shown that the letter is destroyed, or is in the possession of the accused. *Commonwealth* v. *Thompson*, Thacher's Crim. Cas. 28.

6. In North Carolina, parol proof, by a magistrate, of the declarations of an accused before him, is inadmissible, his examination being required by statute to be recorded within three days after it is taken. *The State* v. *Grove*, Martin 43.

7. The possession, by a prisoner, of an unanswered letter, found in his pocket when he is arrested, is not, of itself, evidence of the contents, and it cannot be read in evidence against him on the trial. *People* v. *Green*, 1 Parker's Crim. R. 11.

8. The maxim, qui tacet, consentire videtur, does not apply to such a case; nor is it generally applicable except to verbal conversations, and to certain communications which are in writing in mercantile transactions. It cannot be applied to facts detailed in a letter which a party is not bound or interested to answer. *Ib.*

9. Where a written instrument contains both legal and illegal evidence, the Court cannot be required to expunge that which is illegal; if the Court points out to the jury the illegal testimony, and designates it in such a way that the jury can identify it, it is all that can be required. *Johnson* v. *State*, 17 Ala. 618.

10. In order that the papers and letters of an insolvent debtor, which are produced by his assignee, may be admitted as evidence, as coming from the possession of the insolvent, it must be proven that the assignee received them from the messenger, and that the latter took possession of them under his warrant as papers relating to the estate of the insolvent. *Com.* v. *Eastman*, 1 Cush. 189.

11. In a case of murder, proof that a written paper, found near the body of the deceased, was given to the accused's son for the use of his father, is a sufficient reason for giving the paper to the jury, with instructions to disregard it, unless satisfied that it came from the prisoner's possession. *The State* v. *Arthur*, 2 Dev. 217.

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12. It is proper to show, by parol testimony, the existence and acts of a corporation in another State. *Com.* v. *Read*, Thach. Crim. Cases 180.

13. The Court will presume that a confession made before a magistrate was reduced to writing; but it must be shown that the defendant signed it, or admitted it to be correct, in order to exclude parol proof of the confession. *State* v. *Eaton*, 3 Harrington's Rep. 554.

14. Where the confirmatory witness in a case of rape testified that the principal witness, who was deaf and dumb, had, more than a year after the commission of the alleged offence, committed to her in writing the substance of what she had now testified, and that such confirmatory witness did not know where the writing was; it was held that the proof was insufficient to dispense with the production of the writing, and consequently that the evidence of its contents was inadmissible. *State* v. *De Wolf*, 8 Conn. 93.

15. Secondary evidence of papers in the possession of a party to a cause, is allowed, after notice, to produce the originals, in criminal as well as in civil cases. *The State* v. *Kimbrough*, 2 Dev. 431.

16. Where handwriting is to be proved by comparison, the standard employed for the purpose must be a genuine and original writing, and must first be proved by clear and undoubted evidence. Impressions of writings taken by means of a press, and duplicates made by a copying machine, are not originals, and cannot be employed as standards of comparison. *Com.* v. *Eastman*, 1 Cush. 189.

17. Upon an indictment for having in possession a counterfeit bank-note, it is not sufficient for witnesses to swear to the identity of the note, unless it has been constantly in their possession, or they have put a private artificial mark upon it before parting with it. *Com.* v. *Kinison*, 4 Mass. Rep. 646.

18. It is an indispensable rule of law, that evidence of an inferior nature, which supposes evidence of a higher in existence, and which may be had, shall not be admitted. *Ib.*

19. In Mississippi, the order in which a party shall introduce his evidence is at his own option, except to lay the foundation for introducing secondary evidence. *Byrd* v. *State*, 1 How. Miss. 247.

20. The rule which requires the production of the best evidence is applied to reject secondary evidence, which leaves that of a higher nature behind in the power of the party; but it is not applied to reject one of several eye-witnesses to the same facts, for the testimony of all is in the same degree. *U. States* v. *Gilbert*, 2 Sumner 19.

21. To prove handwriting, in general a witness must know it by having seen the person write, or having correponded with him; but in the case of ancient deeds or papers, so old that no living witness can be produced, the genuineness of handwriting may be proved by an expert, by comparison with papers whose genuineness is acknowledged. *West* v. *State*, 2 Zabri. 213.

22. If an instrument is to be proved, the original, if in the possession or control of the party, is to be produced; if the original be lost or destroyed, or in the possession of the opposite party, who refuses to produce it, an examined copy, if any such exists, and can be found, is the next best evidence, and must be produced. *U. States* v. *Britton*, 2 Mason's Rep. 464.

23. If no such copy exists, then the contents may be proved by parol evidence, by witnesses who have seen and read it, and can speak pointedly and clearly to its tenor and contents. *Ib.*

24. It may be difficult, in many cases, to find such witnesses, and especially when the instrument is long and intricate; but if the facts are made out distinctly, and the jury believe the testimony, the law gives entire credence to such proof, and deems it sufficient to justify a verdict in a civil or criminal cause. *Ib.*

25. Where, on the trial of an indictment for altering a bank-bill, the bank being out of the State, although within forty miles of the place of trial, the forgery was allowed to be proved by two witnesses, who had very

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frequently received and paid out bills purporting to be made by such bank, and one of whom had once carried a large number of such bills to the bank, which were all paid by the bank as genuine, but neither of whom had ever seen the president or cashier write. *Com.* v. *Carey*, 2 Pick. 47.

II. Circumstantial Evidence—When Circumstantial Evidence to be Explained by the Accused.

26. Circumstantial evidence has been admitted in every age of Common Law, and is to be acted on after it has generated full conviction; everything calculated to elucidate the transaction should be received, since the conclusion depends on a number of links which alone are weak, but taken together are strong and able to bring to a conclusion. *McCann* v. *State*, 13 S. & M. 147.

27. It is no error in the Court to neglect to charge a jury on all or any of the approved rules of law as to weighing circumstantial testimony. That is a matter in the discretion of the Court, and no error is committed unless they give instructions which may mislead. *State* v. *Roe*, 12 Vt. 93.

28. Where an indictment is found for a capital offence, and is sustained solely by circumstantial evidence, it should be so strong as to exclude every supposition inconsistent with the accused's guilt. *Sumner* v. *State*, 5 Blackf. 579.

29. In such case, in order to justify a verdict of guilty, it need not be proved that the accused had a motive to commit the crime alleged, nor that the evidence should produce an absolute certainty upon the minds of the jury. *Ib.*

30. Where an indictment is sustained solely by circumstantial evidence, although the jury believe from the evidence that it was possible that some other person than the accused committed the crime, it does not necessarily follow that there should be a verdict of acquittal. *Ib.*

31. Where the jury in making up their minds from circumstantial evidence, in a capital case, have a rational doubt as to the existence of any one of the material circumstances attempted to be shown, that circumstance ought not to have any weight with them in making up their verdict. *Ib.*

32. Where the evidence against the accused is entirely circumstantial, his conduct, situation, and locality, as affording him opportunities of knowing at what time the deceased left a certain place, on the morning of the murder, where she was last seen in life, whether or not it was unusual for him to be in that place at that particular time, are all circumstances which, though weak in themselves, are not so disconnected with the main inquiry as to warrant their exclusion. *Campbell* v. *State*, 23 Ala. 44.

33. In the application of circumstantial evidence, the utmost caution should be used; it is always insufficient to convict, or warrant a verdict, when assuming all to be proved which the evidence tends to prove; some other hypothesis may still be true. *Algheir* v. *State*, 25 Miss. 584.

34. Where, for instance, probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered, though not alone entitled to much weight, because the burden of proof lies on the accuser to make out the whole case by substantive evidence. *Com.* v. *Webster*, 5 Cush. 295.

35. But where pretty stringent proof of circumstances is produced, tending to support the charges, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is, that the proof, if produced, instead of rebutting, would tend to sustain the charge. *Ib.*

36. The rule which obliges a party to produce evidence which will contradict, or explain circumstantial evidence against him, requires him to do so only in cases when he is pressed by circumstantial proof, and has it in his power

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to destroy its apparent force. *People* v. *McWhorter*, 4 Barb. 438.

37. Before the absence of evidence can affect the party accused, it must appear that there is evidence that would clear up the matter in dispute, and that it is peculiarly within the knowledge of the accused. Then if he is pressed by the force of circumstantial evidence and does not produce the evidence he has within his power, it may afford a strong presumption against him. *Ib.*

38. A party accused is under no obligation, in order to avoid a presumption against him arising from circumstantial evidence, to produce as witnesses persons who may by possibility have knowledge on the subject. He need only produce those who are proved to have been so situated as to justify the conclusion that they must have knowledge which, if divulged would throw light on the subject. *Ib.*

III. Evidence derived from the Accused's Conduct and Admissions.

39. The offer of the accused to bribe the person who has him in custody to allow him to escape, and his attempts to escape, may be offered in evidence against him, though the offer and the attempts were made when the accused had been committed on a charge of a different offence from that for which he was tried, the charges for both offences depending on the same fact. *Dean* v. *Commonwealth*, 4 Gratt. 541.

40. Where property is stolen, and the person charged with the offence, shortly after its commission, points out the place where it is concealed, he must be deemed the thief, unless he can reconcile his knowledge with his innocence. *Hudson* v. *State*, 9 Yerg. 408.

41. When a prisoner's conduct shows satisfactory indications of guilt, it is not sufficient to sustain a conviction, unless there be also satisfactory evidence that a crime has been committed; as in case of alleged larceny, that the property has been feloniously taken and carried away. *Tyner* v. *State*, 5 Humphrey's Rep. 383.

42. On an indictment for bigamy, the admissions of the defendant as to a prior marriage may be given in evidence to prove the fact of such marriage. *Walverton* v. *State*, 16 Gris. O. Rep. 173.

43. Where, on a trial for murder, a witness testifies that he was some thirty or forty yards from the house where deceased was shot; upon hearing the report of the pistol he looked towards the house and saw a person that he took to be the prisoner, run out, who ran a few paces and turned and ran again into the house, and immediately ran out again, and ran to where witness stood. He ran slow and awkward, which induced witness to think that he was very drunk. When he came to witness he seemed greatly agitated and troubled, and at the moment of coming up to him exclaimed that he would not have done it for the world. Witness further testified, that one minute would probably cover the time from the firing until the prisoner uttered the exclamation; two certainly would. It was held that under these circumstances, the exclamation of the prisoner was competent evidence. *Mitchum* v. *State*, 2 Geo. 615.

44. Silence, indicating unusual seriousness, on the part of one charged as a participant, at or about the time of the commission of the crime, is a fact from which a guilty knowledge may be inferred, and evidence of it is therefore admissible. Such a fact, however, of itself, should weigh but little, and ought to be considered with great caution by the jury. *Johnson* v. *State*, 17 Ala. 618.

45. Where a party is indicted for stealing from the person of another, his admissions are not secondary evidence, and are not to be excluded on that ground, although the person from whom the property is alleged to have been stolen, is not examined as a witness. *Commonwealth* v. *Kenney*, 12 Metcalf's Rep. 235.

46. Where two watchmen took K. into custody, and carried him to a watch-house; and one of them there said that K. had been robbing a man: and R. soon came in, and pointed to K., and said, "that man has stolen my money:" while one of the watchmen

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was proceeding to lock up K., B. saw K. put something on a shelf in the watch-house, and B. thereupon took from the shelf a bag of money, and R. said it was his bag, and that it was all the money he had. K. was within hearing of all that was said after he was carried to the watch-house, and made no reply to any part of it; it was held, on the trial of an indictment against K. for stealing R.'s bag and money from his person, that the declarations of the watchman and of R., to which K. made no reply, were inadmissible as evidence of K.'s admission either of the fact of stealing, or that the bag and money were the property of R. *Ib.*

47. Where, upon the trial of an indictment for arson, the proof was that the accused had bank-notes, similar to those stolen from the house when the arson was committed, and that he gave contradictory accounts of the mode in which he got them, an instruction to the jury that these contradictions were evidence to show that he did not come honestly by them, is not erroneous. *The State* v. *Gillis*, 4 Dev. 606.

48. Conduct, showing satisfactory indications of guilt, is not sufficient to support conviction, unless there be also satisfactory proof that a fact has been committed; as in case of alleged larceny, that the property has been feloniously taken and removed. *Tyner* v. *the State*, 5 Humph. 383.

IV. Sufficiency of Evidence — Evidence respecting Insanity—Evidence Invalidated by Variance in the Statement of the Witness.

49. To sustain a defence on the ground of insanity, a comparison of the best authorities concludes that it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did understand them, that he did not know he was doing what was wrong. *Kelly* v. *State*, 3 Smed. & Marsh. 518.

50. The finding of a jury upon a preliminary issue, to the effect that the accused was *then sane*, cannot be taken into consideration upon the question of insanity alleged as a defence upon the trial of the indictment. *Freeman* v. *People*, 4 Denio 9.

51. And where the Court, on the trial of the indictment, refused to allow evidence to be given, that the accused was insane at any time after the finding of the verdict upon the preliminary issue, and excluded the opinions of medical witnesses, formed from an observation of the accused after that time, as to his insanity when the offence was committed; such ruling was held erroneous. *Ib.*

52. Where a party was tried for murder four months after the crime was alleged to have been committed; held that it was competent for the accused to prove by professional witnesses that he was insane at the time of the trial, with a view to establish the defence of insanity when the act was committed. *Ib.*

53. Where insanity is set up as a defence for the commission of crime, it should be established to the satisfaction of the jury, by clear and convincing proof. But if the jury entertain a reasonable doubt of the sanity of the prisoner, he shall be acquitted. *State* v. *Marler*, 2 Ala. 43.

54. On a question of insanity, witnesses, other than professional men, may state their opinion, in connection with the facts on which it is founded. *Clark* v. *State*, 12 Ohio Rep. 483.

55. A physician should also state the reasons of his opinion, and the facts on which it is based, and, if not sustained by them, it is entitled to little weight. *Ib.*

56. A witness who is not a medical man, is incompetent to express an opinion as to the particular species of fits with which any one is afflicted. *McLean* v. *State*, 16 Ala. 672.

57. Where insanity is set up as a defence to an indictment for murder, the subsequent as well as previous acts and declarations of the prisoner are admissible in evidence, to show his true mental condition at the moment of the homicide. *Ib.*

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58. Where insanity is set up as a defence to a criminal prosecution, it is competent for a witness, whose intimacy with the prisoner, and opportunity for observation have been such as to enable him to form a correct judgment of his mental condition, not only to depose to facts, but to give his opinion as to whether he was sane or not at the time of the commission of the offence. *Norris* v. *State*, 16 Ala. Rep. 776.

59. The test of insanity in criminal cases is, whether the accused, at the commission of the crime, was conscious that he was doing what he ought not to do. *State* v. *Spencer*, 1 Zabris. 197.

60. The burden of the proof of insanity is on the accused. To excuse crime, the jury ought to be satisfied of the insanity beyond reasonable doubt. *Ib.*

61. Where it is averred in an indictment for a riotous assault upon an officer in the lawful discharge of the duties of his office, that he was in the service of a legal precept, and had A. in his custody as a prisoner, to be examined on a charge of larceny; held that such averment is supported by proof, that the officer was in the service of a legal precept, and had A. in his custody as a prisoner, to be examined on a charge of larceny in another State, and of being a fugitive from justice. *Commonwealth* v. *Tracy*, 5 Metc. 536.

62. Where, in an indictment for bigamy, there was oral proof of the official character of the minister or magistrate before whom the marriage was solemnized; held that it was, prima facie, sufficient evidence of his authority. *Case of Damon, alias Flint*, 6 Greenleaf 148.

63. If an indictment for robbing, under the statute, charges that the robbery was *in* the highway, the State cannot give in evidence that it was *near* the highway. *State* v. *Cowan*, 7 Iredell 239.

64. On an indictment for open, gross lewdness, and lascivious behavior, evidence of lewdness *or such* behavior in secret, will not support the indictment. *Commonwealth* v. *Catlin*, 1 Mass. Rep. 8.

65. In an indictment for selling spirituous liquor, the allegation of a sale by the defendant for all the purposes of the indictment, or essential to its maintenance, may well be sustained by proof of a contract of sale by the defendant on the one part, and the complainant on the other, they being the only parties known to each other as participators in the sale. *Commonwealth* v. *Kimball*, 7 Met. 308.

66. An averment in an indictment for illegal voting, &c., that a meeting of the inhabitants of the town of A. was duly holden, is sustained by evidence that a meeting of the inhabitants of A., who were qualified to vote, was duly holden. *Commonwealth* v. *Shaw*, 7 Met. 52.

67. A slight variance as to time between the affidavit before the magistrate, and the testimony on the trial, of a witness who is an ignorant person, and whose attention may not have been called to the importance of exactness, is not sufficient to invalidate the truth of her evidence. *State* v. *McElmurray*, 3. Strob. 33.

68. Where a fact stated by a witness at the trial is not contradicted in her affidavit before the magistrate who issued the warrant, and the rest of the affidavit which sets out the material facts is in strict conformity with the testimony of the witness at the trial, the statement of that fact is not an inconsistency which will impair the evidence. *Ib.*

69. The affidavit made by a witness before a magistrate, may be read at the trial, either to support or invalidate his testimony. *State* v. *Lazarus*, 1 Mill's Rep. 12.

V. Evidence, when Conclusive—When introduced to contradict a Witness—When to support the Testimony of a Witness—Evidence from a Record of Conviction of a Witness—Charging Jury on the Weight of Evidence.

70. The answer of a witness on cross-examination, to an inquiry, the subject of which is purely collateral to

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the issue, is conclusive. *The People* v. *McGinnis*, 1 Parker's Crim. Rep. 387.

71. The record is *conclusive* evidence of the *conviction* of the principal, that it is prima facie evidence of his *guilt*, and that the burthen of proof is thereby cast upon the accessory, or principal in the second degree, to establish his innocence by some new and incontestible evidence. *Studstill* v. *State*, 7 Geo. Rep. 2.

72. An indictment for murder in the first degree, must charge the killing to have been "wilful, premeditated," &c.; and the evidence, sufficient to convict, must establish each of these incidents to the crime; the burthen of the proof of malice falling on the State, and never (as in England) to be presumed. The judge, after reviewing the evidence on these principles, concluded it insufficient to warrant the finding of the jury. *Bower* v. *State*, 5 Missouri 364.

73. Where one witness testified that another witness who testified on a previous trial of the same case, and on this trial also, swore differently on the two, it is incompetent to introduce the bill of exceptions taken in the former trial, to prove that the witness had contradicted himself. *The State* v. *Birney*, 35 Maine (5 Red.) 105.

74. The materiality of evidence, or its relevancy to the issue, is not always to be decided by the directness of its tendency to prove the issue; where a witness has been introduced and has sworn, it may become very material to ascertain whether confidence can be reposed in the veracity of his statements; testimony, therefore, to contradict him or to prove that his statements should not be believed, is not to be shut out as hearsay, or as contradicting that which is collateral or irrelative. *State* v. *Blake*, 25 Maine (12 Shep.) 350.

75. It is not collateral but relevant to the main issue to inquire into the motives influencing a witness in giving his testimony; and a party who examines a witness in regard to them, is not bound by his answers, but may contradict him. *The People* v. *Austin*, 1 Parker's Crim. Rep. 154.

76. A good foundation is laid for such contradiction, if the attention of the witness has been directed to the time, place and circumstances attending an alleged statement made by him; and it is not necessary that the name of the person to whom he may have made it should be mentioned, if it was not necessary to enable him to know to what remark his attention was directed. *Ib.*

77. On the trial of an indictment for adultery, if one act of adultery committed by the defendant with the woman named in the indictment, was proved by the testimony of a witness whose credibility the defendant attempted to impeach; held that other instances of improper familiarity between the defendant and the same woman not long before the act of adultery proved as above mentioned, might be offered in evidence to corroborate the testimony of the witness. *Com.* v. *Merriam*, 14 Pick. Rep. 418.

78. Where, on a criminal trial at the Oyer and Terminer, the accused called as a witness a woman, by whom he proved that she was living with the accused as his mistress and not his wife, so as to make her a competent witness in his behalf, and then proved by her facts considered material in the case, and no attempt was made on the part of the public prosecutor to impeach her testimony; it was held that the accused was not at liberty to introduce testimony to sustain her character for truth and veracity. *Colt* v. *the People*, 1 Parker's Crim. Rep. 611.

79. As a general rule, it is not competent, in support of the testimony of a witness, for the party producing him to prove that he has made declarations out of court corresponding with his testimony in court. The exceptions to this rule given. *The People* v. *Finnegan*, 1 Parker's Crim. Rep. 147.

80. And this rule applies to cases where an attempt is made, on a cross-examination, to throw doubts on the testimony of a witness, as well as to cases where other witnesses have been produced and examined to contradict the statement of the witness. *Ib.*

81. Where, on the trial of an indictment for an attempt to commit a rape, after the person injured had testified,

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and the accused had cross-examined her, and on such cross-examination had asked her many questions relative to the principal fact alleged in the indictment, many of which tended to discredit her testimony, but before any attempt to discredit her otherwise than by such cross-examination, the public prosecutor proposed a witness to prove that the person injured had previously told to her the same story which she had now testified in court; it was held that such testimony was admissible to show constancy in the declarations of the principal witness, and thus to confirm her testimony. *State* v. *De Wolf*, 8 Conn. 93.

82. Where a record of conviction of a witness for petit larceny is offered in evidence, for the purpose of discrediting such witness, it is not a good ground for rejecting such evidence that it related to a transaction which occurred more than twenty-five years before, though such evidence, unaccompanied by proof of subsequent bad character, is entitled to but little weight. *Lake* v. *People*, 1 Parker's Crim. Rep. 495.

83. When the testimony given by the State is prima facie evidence of the defendant's guilt, and there is no rebutting testimony, it is not erroneous to refuse to instruct the jury that the testimony offered by the State is not conclusive evidence of his guilt. *Swallow* v. *the State*, 22 Ala. 20.

84. The mother of the prisoner being introduced by him to prove an *alibi*, the Court charged the jury, "that the law regarded with suspicion the testimony of near relations, when testifying for each other; that it was the province of the jury to consider and decide on the weight due to her testimony; and as a general rule in deciding on the credit of the witnesses on both sides, they ought to look to the deportment of the witnesses—their capacity and opportunity to testify in relation to the transaction, and the relation in which the witness stood to the party;" held that this charge was not erroneous. *State* v. *Nash*, 8 Iredell 35.

85. The case of *State* v. *Ellington*, 7 Iredell 61, and *State* v. *Lytle*, 5 Iredell 61, cited and approved. *Ib.*

VI. Presumptive Evidence—Evidence Rebutting Presumptions—Burden of Proof.

86. Proof that the keeper of a grocery sold liquor, and that it was drunk upon the premises, is presumptive evidence of its having been drunk with his consent. *Casey* v. *the State*, 6 Miss. 646.

87. Where a bill of exceptions states enough to put the Court clearly in error, the Court, if consistent with the facts, should insert what is necessary to set itself right; and if it fails to do so no presumption can be indulged in support of its judgment. *Davis* v. *State*, 17 Ala. 415.

88. Where there is no evidence before the grand jury, or known to the prosecutor, when the indictment for murder was found, to show what instrument was employed to produce the mortal wound, it is proper to allege in the indictment that such wound was inflicted by some instrument to the jurors unknown; and under such an allegation it is competent for the public prosecutor to introduce evidence to raise a presumption that the wound was caused by a pistol ball, and to show for that purpose that the prisoner had pistols in his possession, and that a ball propelled by the explosion of a precussion cap would be likely to produce such a wound; or to prove that the prisoner had such pistols, for the purpose of satisfying the jury if possible, in connection with other evidence in the case, that the prisoner had taken the ramrod from the pistol and driven it into the head of the deceased. *Colt* v. *People*, 1 Parker's Crim. R. 611.

89. The treatise entitled, "The theory of presumptive proof; or, an inquiry into the nature of circumstantial evidence," which is found bound up with the first American edition of Phillips' Evidence, disproved and decided to be in opposition to the judicial decisions upon that subject, and the eleven cases published in the appendix of that work, for the purpose of supporting that theory by illustration; considered to be unauthenticated and unreliable. *People* v. *Videto*, 1 Parker Crim. 603.

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90. The nature of the presumptions considered, and violent presumptions, probable presumptions, and light or rash presumptions, considered and illustrated by examples and directions given as to their application, and as to the weight that should be severally given to them. *Ib.*

91. Presumptive circumstantial evidence is competent both in civil and criminal cases, and in prosecutions for some of the worst species of crimes, is often the most satisfactory and convincing that can be produced. The reasons given for this opinion, in a comparison between positive and circumstantial evidence. *The People* v. *Videto*, 1 Parker's Crim. R. 603.

92. A person is presumed to intend the ordinary consequences of his acts; and the burden of proof is upon a person charged with crime to rebut this presumption by evidence of a different intent. *The People* v. *Orcutt*, 1 Parker's Crim. R. 252.

93. Where the delay which has taken place in instituting a criminal prosecution is calculated to excite suspicion as to the truth of the charge, and to lead to an impression unfavorable to the principal witness, it is proper for the prosecutor to show any circumstance which will have a tendency to rebut these presumptions. *People* v. *Lohman*, 2 Barb. 216.

94. For the purpose of proving a bargain and sale, the declarations of the parties thereto at the time, are a part of the res gesta, and competent evidence for the accused to rebut the inference of guilt arising from the possession of stolen property. *Leggett* v. *State*, 15 Gris. O. Rep. 283.

95. W here it is proved that there was a conspiracy, and that one of the conspirators was in a situation in which he might have given aid to the perpetrator at the time of the murder, the presumption is that he was there to carry into effect the preconcerted crime, and it is for him to rebut the presumption by showing that he was there for a purpose unconnected with the conspiracy. *Com.* v. *Knapp*, 9 Pick. 496.

96. Where on the trial of an indictment, the jury were instructed that when the government had made out a prima facie case, the burden of proof was on the defendant to restore himself to that presumption of innocence in which he was at the commencement of the trial; it was held that the instruction was improper, and that the jury should have been instructed that the burden was on the Commonwealth to establish the guilt of the defendant; that he was to be presumed innocent, unless the whole evidence in the case satisfied them of his guilt. *The Com.* v. *Kimball*, 24 Pick. 366; but see the *Com.* v. *Danah*, 2 Met. 329.

97. Indictment for keeping a ferry without a license; held that the State was not bound to prove that the defendant had no license; it devolved upon the defendant to show his license. *Wheat* v. *the State*, 6 Mo. 455.

98. When the defence on an indictment for murder is, that the prisoner was under the age of presumed capacity, the onus of proof lies upon the prisoner; if the age can be ascertained by inspection; the Court and jury must decide. *State* v. *Arnold* 13 Iredell 184.

99. In criminal proceedings, the onus probandi rests upon the prosecutor, unless a different provision is expressly made by the statute. *U. S.* v. *Gooding*, 12 Wheaton's R. 460.

100. Where the jury were instructed, on the trial of an indictment for forgery, "that it was proved that the order came into the hands of the defendant unaltered, and came out of his hands altered, the burthen was on the defendant to prove that he did not alter it." It was held erroneous. *State* v. *Flye*, 26 Maine 312.

VII. Evidence respecting Character.

101. In criminal charges, the prisoner's character cannot be put in issue by the State, unless he opens the door by giving testimony to it; but it is not a conclusion of law, that from his silence the jury are to believe he is a man of bad character. *State* v. *O'Neal*, 7 Iredell's R. 251.

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102. Where no evidence of general character has been given, the subject of character is not one for the consideration of the jury. Per Beardsley, J. *The People* v. *Bodine*, 1 Denio 282.

103. The party impeaching a witness, should inquire of the attacking witness, whether he has the *means* of knowing the *general character* of the witness impeached. *The State* v. *O'Neal*, 4 Iredell 88.

104. He may answer that question without saying that he *knows* what a majority of the neighbors say of that witness. Such is not the only means of acquiring a knowledge of general character. *Ib.*

105. But the attacking witness cannot be asked by the party introducing him, simply, "*in what estimation* the witness impeached was held in his neighborhood." *Ib.*

106. Where a witness is impeached on the ground of bad character, evidence may be given of previous statements made by the witness, consistent with his testimony on the trial. *The State* v. *Dove*, 10 Iredell's R. 469.

107. Although an impeaching witness may be examined as to the general moral character of the witness impeached, and also as to his character for truth when on oath, and when not on oath, it is not necessary to put these questions in any particular order. *Ib.*

108. The case of the *State* v. *Benton*, 2 Dev. and Bat. 196; *State* v. *Ellington*, 7 Ire. 61, *State* v. *George*, 8 Ire. 324; and *State* v. *Boswell*, 2 Dev. 209, cited and approved. *Ib.*

109. Good character is evidence, but not strong, in favor of an accused in an indictment for perjury. *Schaller* v. *State*, 14 Mo. 502.

110. Where testimony is given to impeach the general character of a witness for truth, the inquiries are not confined to the character of the witness prior to the suit, but extend to the time of the examination of the witness. *The State* v. *Howard*, 9 N. Hamp. 485.

111. The proper inquiries are, what is the general reputation of the witness as to truth, and whether from such general reputation the person giving testimony would believe such witness under oath, as soon as men in general. *Ib.*

112. On cross examination, inquiries as to the means of knowledge of the character of the witness, the source of reports against him, how generally such reports have prevailed, and from whom, and when they heard them, are competent. *Ib.*

113. On the trial of a prisoner for a rape, proof of the good character of the female is admissible, by way of confirming her credibility before the jury. *Turney* v. *State*, 8 S. & M. 104.

114. Where a defendant has of his own accord put his character in issue, and evidence for the prosecution has been introduced; held that the examination may extend to particular facts. *The Com.* v. *Robinson*, Thacher's Crim. Cas. 230.

115. Where, upon the trial of an indictment, a material witness for the prisoner, on the cross examination by the counsel for the prosecution, acknowledged that he has been complained of and bound over upon a charge of passing counterfeit money; held that, in answer, the prisoner was called to give evidence of the witness' good character for truth. *Carter* v. *People*, 2 Hill's Rep. 317.

116. Where evidence touching the general character of the party is admitted, it ought manifestly to have reference to the nature of the charge against him; but this evidence of good character in relation to the particular crime charged, seems to be only admissible in cases where the guilt of the party accused is doubtful. The prosecutor may introduce opposing testimony, and the presumption arising from such evidence of general character, is said to be of little weight. *McDaniel* v. *State*, 8 Smedes & Marsh. 401.

117. In criminal cases, evidence of previous good character is proper for the consideration of the jury, not only where a doubt exists upon the other proof, but even to generate a doubt as to the guilt of the accused. *Felix* v. *State*, 18 Ala. Rep. 720.

118. It is in a case of doubtful facts or to rebut the legal presumption of guilt arising from the possession of

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stolen articles, that a good character proved in Court is of most effect. *State* v. *Ford*, 3 Strobh. 517.

119. Where the defendant put his character in issue, it was competent to the government to prove that it was not good, subsequent to the commission of the alleged offence, but his counsel contended that the inquiries should have been confined to the period anterior to the supposed commission of the offence charged. We are not aware of any rule to that effect. Evidence of a bad reputation subsequently acquired, may indeed be of little weight, but still it will have some bearing, as commonly the descent from virtue to crime is gradual. *Commonwealth* v. *Sackett*, 22 Pick. 394.

120. A witness called to sustain the character of an impeached witness, testifying that he has known him for a number of years, and that he knows his associates, but is not acquainted with his general character for truth and veracity, will be allowed to testify that *he would believe him on his oath*. *People* v. *Davis*, 21 Wend. 309.

121. It is not competent in a criminal prosecution to give evidence of the bad character of the prisoner, where no evidence in support of his character has been introduced by him; so held in this case, where on the trial of an indictment for having counterfeit bank-bills with the intent to pass them, the confession of the prisoner, that he had been a convict in a state prison, was given in evidence on the part of the prosecution. *People* v. *White*, 14 Wend. R. 111.

122. Where, upon the trial of an indictment, no proof is offered as to the general character of the accused, the law assumes that it is of ordinary fairness. *Ackley* v. *People*, 9 Barb. 609.

123. A prisoner on trial may offer evidence to show what his reputation is, and then the question is open to the prosecution and for the jury to determine, like other controverted facts. But if the prisoner elects to give no evidence on the subject, the jury are not at liberty to indulge in conjecture that his character is bad, in order to infer that he is guilty of the particular crime alleged. *Ib.*

124. On a trial for murder, evidence of the good or bad character of the deceased is not admissible, except in cases where the killing is attended by circumstances to create a doubt of its character. *Quesenberry* v. *State*, 3 Stewart's R. 308.

125. As where it appears that the slayor has been actuated in the commission of the offence by the principle of self-defence, or by some other fact that would excuse the offence. *Ib.*

126. So the rejection of evidence of the bad character of the slain person is not error where the record does not show a state of facts to warrant its admission. *Ib.*

127. Where the person injured and the principal witness on a trial for an attempt to commit a rape was deaf and dumb, and the public prosecutor offered evidence to show that her general character for truth was good, it was held that such evidence was admissible, though no impeachment of her character had been attempted. *State* v. *De Wolf*, 8 Conn. 93.

128. After the prisoner, in such prosecution, had attempted to throw discredit on the testimony of the principal witness by proving that she had given different statements of the transaction, and after she had sworn that she concealed the transaction more than a year, assigning as a reason for so doing, the threats and influence of the prisoner and fear of him, the public prosecutor offered to show by an instructor of the deaf and dumb, who had been her teacher, that the deaf and dumb generally have a sense of inferiority to other people, and as a class are easily intimidated; that they are credulous, sincere and submissive, and that from his acquaintance with the witness, he believes such to be her character; it was held that such evidence was inadmissible, as opening a door for inquiries in their nature interminable, without producing any satisfactory results. *Ib.*

129. There are cases of circumstantial evidence, where the testimony adduced for and against a prisoner is nearly balanced, in which a good character may be very important to a man's defence; a stranger, for instance, may be placed under circumstances tending

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to render him suspected of larceny, or other lesser crime. He may show that notwithstanding these suspicious circumstances, he is esteemed to be of perfectly good character for honesty in the community where he is known, and that may be sufficient to exonerate him. *Com.* v. *Webster*, 5 Cush. 295.

130. Where it is a question of great and atrocious criminality, the commission of the act so unusual, so out of the ordinary course of things, and beyond common experience, it is manifest that the offence so perpetrated, must have been influenced by motives not frequently operating upon the human mind; that evidence of character, and of a man's habitual conduct, under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail. It is, therefore, in smaller offences, in such as relate to the actions of daily and common life, as when one is charged with pilfering and stealing, that evidence of a high character for honesty will satisfy a jury that the accused is not likely to yield to so slight a temptation. In such case, where the evidence is doubtful, proof of character may be given with good effect. *Ib.*

131. But still, even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behoves one charged with an atrocious crime like murder, to prove a high character, and by strong evidence to make it counterbalance a strong amount of proof on the part of the prosecution. It is the privilege of the accused to put his character in question or not. If he does, and offers evidence of good character, then the prosecution may give evidence to rebut and counteract it; but it is not competent for the government to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character. *Ib.*

VIII. Dying Declaration in cases of Murder—Declarations in other cases.

132. As to dying declarations, when admissible, vide *King* v. *Commonwealth*, 1 Virginia Cases 78.

133. By the Common Law, the declarations of deceased individuals, in prosecutions for murder, made after the reception of the mortal wound, and under the declared apprehension of death, are admissible as evidence. *Woodside* v. *State*, 2 How. 655; vide *Campbell* v. *State*, 11 Geo. 353; *Nelson* v. *State*, 7 Humph. 542; *Smith* v. *State*, 9 Humph. 9; *Hill* v. *Commonwealth*, 2 Gratt. 594.

134. And in such case the proof of the deceased's expectation of death is not confined to his declarations; but the fact may be satisfactorily established by the circumstances of the case. *Hill* v. *Com.*, 2 Gratt. 594.

135. It is proper that the Court should first ascertain that the deceased expected to die, before his dying declarations are permitted to be given in evidence to the jury. *Ib.*

136. Where the dying declarations of one deceased, are made under the belief of impending death, they are competent proof to go to the jury, either to show who was the murderer, or to disclose the circumstances under which the crime was committed. *Moore* v. *State*, 12 Ala. 764.

137. Where dying declarations are made under the belief of impending death, and are inconsistent with each other, it is the duty of the jury to consider them, and to determine which, or whether either is to be believed; and if the charge of the Court takes this duty from them, or if the Court undertakes to determine these questions for the jury, it will be erroneous. *Ib.*

138. The dying declaration of a husband is competent against the wife, on her trial for murder, to prove her guilt. *Ib.*

139. Such declarations may be given in evidence, both to acquit and convict the prisoner. *Ib.*

140. The declaration of the 10th section of the bill of rights, that the accused shall be confronted by the witnesses against him, &c., does not do

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away with the common law principle that the declarations in extremis of the murdered person as to the murder, are admissible in evidence. *Woodside* v. *State*, 2 Howard 655.

141. Dying declarations are admitted as a matter of necessity, to identify the prisoner, and establish the circumstances of the res gestæ, or direct transactions from which the death results; when they relate to former and distinct transactions, they do not seem to come within the principle of necessity. *Quere*—therefore, whether the subject-matter of the declarations of the deceased, namely, that the prisoner had two or three times before tried to kill him, would have been admissible as testimony. *Nelson* v. *State*, 7 Humph. 542

142. A prima facie case of the moral consciousness required, should be exhibited to the Court in the first instance, as preliminary to the admission of the testimony. This done, the evidence should be received, and left for the jury to determine whether the deceased was really under the apprehension of death when the declarations were made, which they might infer either from circumstances, or the expressions used. *Campbell* v. *State*, 11 Geo. 353; *Nelson* v. *State*, 7 Humph. 542.

143. On a trial for the murder of a wife by her husband, the declarations of the deceased made in extremis as to the cause of her death, are competent evidence against the prisoner. *People* v. *Green*, 1 Denio 614.

144. And of this the judge is to determine alone, without the aid of the jury, for the jury shall not hear such declarations till the judge has determined that they are dying declarations; lest peradventure they may control their judgment, although upon hearing other proof they may become satisfied that they were not dying declarations. *Smith* v. *State*, 9 Humph. 9.

145. It is dying declarations, as such, that are admitted, not declarations which may be dying declarations or not, as the case may afterwards turn out. *Smith* v. *State*, 9 Humph. 9.

146. If a judge permit declarations of a deceased person to go before the jury as dying declarations, and the proof does not show satisfactorily that they were such, it is error. *Ib.*

147. On the trial of an indictment for murder, the declarations of the deceased touching the homicide, although he does not state at the time that he is conscious of impending death; if made under such circumstances as, in the judgment of the Court, will reasonably warrant such an inference, are admissible in evidence as dying declarations. *McLean* v. *State*, 16 Ala. 672.

148. Where the deceased, being asked "who shot him?" replied, "the prisoner;" the declaration is complete, and cannot be rejected, because from weakness and exhaustion he was unable to answer another question propounded to him immediately afterwards. *Ib.*

149. Dying declarations are admissible in evidence, whenever their subject-matter has reference to facts and circumstances which would constitute a part of the res gestæ. *Ib.*

150. Where a witness, being asked by the prisoner's counsel why she put a particular question to the deceased just before his death? answered that she did so "in consequence of what the prisoner had told her some two hours previous;" this will not authorize the prisoner to give in evidence his conversation with the witness at the time referred to. *Ib.*

151. The prisoner and the deceased having had a difficulty the evening before the homicide, the prisoner threatened, that between the setting of the sun on that evening and its rising on the next day, he would kill the deceased. On the next morning, the sun having just risen, the prisoner, armed with a gun, was on the road that led to the house of the deceased, and immediately before he shot the deceased, had a conversation with a witness who was examined upon the trial. Held, that if the witness, without objection on the part of the prosecution, is permitted to state that the prisoner in that conversation spoke of the difficulty of the evening before, the door is opened for the admission of the entire conversation, and it is error to exclude it, so long as the other portion is suffered to remain before the jury. *Ib.*

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152. In order to make the declarations of a deceased person evidence as "dying declarations," it is not necessary that the person should be *in articulo mortis* (in the very act of dying); it is sufficient if he be under the apprehension of impending dissolution, when all motive for concealment or falsehood is presumed to be absent, and the party is in a position as solemn as if an oath had been administered. *State* v. *Tilghman*, 11 Iredell 513.

153. A witness cannot be admitted to state that "he thought the deceased thought he would not die from his wounds." He cannot give his own opinion, but only depose to the state of the wounds of the deceased, and what he *then* and *there* said and did, from which the Court may decide what he thought of his condition. *Ib.*

154. If the deceased, at the time he made the declarations, was *in fact* in a condition to make them competent evidence, a hope of recovery at a subsequent time would not render them incompetent. *Ib.*

155. The admission of dying declarations as evidence, is not in opposition to that part of the Bill of Rights which says, that "in all criminal prosecutions every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony." *Ib.*

156. *Quere.* Whether declarations made by the deceased immediately after he received the wound, and before he had time to fabricate a story, and when the lis mota did not exist, may not be given in evidence as a part of the res gesta. *Hill* v. *Com.*, 2 Gratt. 594.

157. All that is necessary, to make the declaration part of the res gesta, is that it should be made recently after receiving the injury, and before he had time to make up a story, "or to devise anything for his own advantage." *Ib.*

158. The only satisfactory principle upon which the dying declarations of a person deceased can be admitted to establish the circumstances of his death, appears to be, that they were made at a time when, in the mind of the deceased, all expectation of recovery was yielded up, and supplanted by the conviction that he would certainly die by reason of the injury received, and under which he then languished. *Dunn* v. *State*, 2 Ark. 229.

159. And, therefore, to warrant the admission, it must be shown in the first place that the declaration was made under apprehension of impending death. *Ib.*

160. And this may be collected from the nature and circumstances of the case, although the declarant did not express such an apprehension; nor is it essential that the party should apprehend immediate dissolution. *Ib.*

161. It is sufficient if he apprehends it to be impending and certain; and this is always a question for the Court to determine upon consideration of all the surrounding circumstances. *Ib.*

162. After the introduction of the proper preliminary evidence, the prosecution is entitled to put in evidence such dying declarations, notwithstanding there may be other witnesses by whose testimony the same facts might be shown, which are sought to be established by dying declarations. *People* v. *Green*, 1 Parker's Crim. R. 302.

163. Where declarations are offered against a defendant, which were made by one most mortally wounded, with regard to the person who was the perpetrator of the injury, and the facts which attended it, prima facie evidence is submitted to the judge, that they were made under a consciousness of impending death, and then the evidence is received and left to the jury, to decide whether the deceased was really in such circumstances, or used such expressions, from which the apprehension in question was inferred. *Com.* v. *Murray*, 2 Ashmead 41; *Com.* v. *Williams*, 2 Ashmead 69; *People* v. *Green*, 1 Parker Crim. R. 11.

164. The consciousness of death is a matter that may be inferred by the judge from the nature of the wound, or state of illness, or other circumstances of the case, though the deceased might not have expressed any apprehensions of danger. *Ib.*

165. Where a person was killed, and evidence of the agent and the attendant facts rested on circumstantial testimony, it was held that declara-

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tions of the deceased, made on the day before his death, as to the object and purpose of a contemplated trip, which he did take, was competent on two grounds: 1. Because it was legally cotemporaneous with the main fact, the trip; and 2. Because it was explanatory of a conversation had in the presence of the accused. *Carroll* v. *the State*, 3 Humph. 315.

166. The dying declarations of a party are only admissible on a trial for homicide, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. *Lambert* v. *State*, 23 Miss. R. 323.

167. A preliminary fact, essential to be proved before their admission, is that they were made under a sense of impending dissolution. This preliminary proof, and the proof of the circumstances under which the declarations were made, are to be shown to the judge, who is the exclusive judge of their admissibility, in the same manner as the preliminary proof of documents, and the competency of witnesses, is always addressed to the Court. *Ib.*

168. If the declarant, by reason of infancy, or imbecility of mind, tender age, or a disbelief in a future state of accountability, would have been excluded as a witness while living, his dying declarations would, for like causes, be rejected by the Court. *Ib.*

169. An oath derives the value of its sanction from the religious sense of the party's accountability to his Maker, and the deep impression that he is soon to render him his final account; the danger of immediate and impending death, and the belief of the party therein, is equivalent to this sanction. *Ib.*

170. Where T. and L. were at variance with each other about a dividing line between their land, and L. killed T. and upon the trial of this cause, G. was proposed to be introduced as a witness to prove he had surveyed the land, and where the line ran, which was objected to by the counsel for the accused; but after H., the county surveyor, had been introduced by the accused, to prove that he had run the line between T. and L.; it was held that it was competent for the State to examine G., to prove the fact of a previous survey of the line by him, as a surveyor. *Ib.*

171. Where, in a case of murder by poisoning, the deceased, on the third day of her illness, stated to her female attendant that she expected to die, because she was poisoned; and also made a similar statement at a subsequent time, and at no time was of opinion that she might recover; her declarations, made after the third day of her illness, down to the time of her death, on the twelfth day of her illness, were received as evidence, although it did not appear that either of her attending physicians had informed her she was going to die; and although it appeared that one of her physicians, notwithstanding the cause of her illness, had spoken to her encouragingly of her prospect of recovery. *The People* v. *Grunzig*, Parker's Crim. R. 299.

172. Where, under the direction of the attending physician and in his presence, W. told the deceased, on the day before her death, that she could not live; whereupon, the deceased requested the physician to hear a communication that she wished to make, and with his consent she proceeded to give a history of the conduct of the accused during her illness, tending to show that he had several times, during such illness, administered arsenic to her; held that such communication was admissible, as her dying declaration. *People* v. *Green*, 1 Parker's Crim. R. 11.

173. Dying declarations of a person who has been killed, which were made in reference to the circumstances which caused his death, are to be received with the same degree of credit as the testimony of the deceased would have been, had he been examined on oath. *Green* v. *State*, 13 Mo. 382.

174. Where a person received a mortal wound, and was unable in consequence of the wound, for the greater part of the interval which elapsed before his death, to speak at all, and when able to speak only able to utter a short word or two, yet retaining his perfect senses and under-

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standing, and being under apprehensions of his approaching death, was asked, "Did A. strike you first?" to which he replied, "Yes, sir." "Did A. stab you?" to which he also replied, "Yes, sir." "Do you think you are going to die?" to which he again answered, "Yes, sir;" he was then asked a fourth question; but it not appearing what it was, or whether it had any relation to the subject, or what interval after the three first it was put. Held that these were such death-bed declarations, being distinct and competent in themselves, as were admissible in evidence on the trial of A. for the homicide. *Vass' case*, 3 Leigh 786.

175. But where it had appeared that the declarations were intended by the dying man to be connected with and qualified by other statements, and with them to form an entire complete narrative, and that, before the disclosure was fully made, it had been interrupted and the narrative left unfinished; held that such partial declarations would not have been admissible evidence. *Ib.*

176. The objection that the questions put were leading, is not strictly applicable in such a case. *Ib.*

177. Where, on the same day the mortal stroke had been given, a witness told the deceased that he thought his deposition ought to be taken, as in the opinion of the witness he must inevitably die before morning; the deceased replied he thought so, too; afterward the deceased exclaimed, "O, Lord, I shall die soon!" His declarations were reduced to writing, read over to him twice, and signed by him. The attending physician, on the evening previous, had held out to the deceased some hope of recovery, but told him his chance was bad. The deceased lived some ten days after making the declaration. Held that the declarations could be received under the circumstances. *McDaniel* v. *State*, 8 Smed. & Marsh. 401.

178. Where the declarations were made some eleven days before death, at a time when the surgeon did not think the case hopeless, and told the patient so; but the patient thought otherwise, the declarations were received. *McDaniel* v. *State*, 8 Smed. & Marsh. R. 401.

179. In the case of murder, the substance of the dying declarations of the deceased may be proved. *Ward* v. *State*, 8 Blackf. R. 101.

180. Where the prisoner was indicted for murder, in killing another in a quarrel respecting a division fence, and on the cross-examination of a government witness upon the trial, it appeared that the deceased once said that according to the survey of A., the fence stood upon the land of the accused; but that he did not believe that survey was correct, because B. afterwards made the survey, and according to that, the fence stood on deceased's land; held that B. might be offered as a witness to prove that he had made the survey as stated by deceased. *Lambeth* v. *State*, 23 Miss. (1 Cush.) 322.

181. In the trial of an indictment for murder, when the dying declaration of the deceased is, that "A. B. has shot me, or has killed me," the Court must presume, prima facie, that the deceased intended to state a fact of which he had knowledge, and not merely to express an opinion. The jury must judge of the weight of this as of other evidence, by the accompanying circumstances. If he merely meant to express his opinion or suspicion, as an inference from other facts, the jury should disregard it as evidence in itself. *State* v. *Arnold*, 13 Iredell's R. 184.

182. On the trial of an indictment for murder, the affidavit of the deceased, though not taken according to the act of 1715, is competent and proper evidence as a dying declaration. *Ib.*

183. The sixth article of the amendments to the Constitution of the United States, which provides that in all criminal prosecutions the accused shall be confronted with the witnesses against him, is not violated by the admission in evidence of the dying declarations of the deceased, on the trial of a prisoner charged with the homicide. *Campbell* v. *State*, 11 Geo. 353.

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184. When the dying declarations of a slave are offered, the danger of impending death is considered equivalent to the sanction of an oath, and slaves are presumed to have a sense of religious accountability. *Lewis* v. *State*, 9 Smedes & Marsh. 115.

185. Where the deceased, when first discovered after the wound was inflicted, exclaimed, "O, my people," but said nothing else, which indicated the apprehension of immediate death, this was not sufficient; it indicated alarm and suffering, but showed no sense of approaching dissolution. *Ib.*

186. It is the belief of the declarant that his wound is mortal, and that his account with time is to be speedily closed, that renders his declarations admissible. It matters not how this belief is manifested, whether by words or conduct, or by an accurate perception of his true situation; yet its existence must be shown in some way. *Ib.*

187. Where on an indictment for murder the dying declarations of the murdered man were offered in evidence, and the witness who proved the precise words used by the dying man was asked whether "the deceased did not so express himself as to convey the idea that it (what the deceased stated) was a mere opinion, and not a thing within the actual knowledge of the deceased;" it was held that inasmuch as the witness gave the exact words used by the deceased, it was for the jury to judge of their import, and that the witness could not answer the question; though it seems it would be otherwise if the witness were detailing merely the substance of what the deceased said, and not giving his exact words. *Nelms* v. *State*, 13 Smedes & Marshall's R. 500.

188. The awful situation of the party in prospect of immediate dissolution is supposed to be as powerful on the conscience as the obligation of an oath. Such evidence is only admissible under a rule of necessity, and constitutes the only case in which evidence is admissible against the accused without the opportunity of a cross-examination. *Ib.*

189. The declarations of a deceased person that he was poisoned by certain individuals, not made immediately previous to his death, but at a time when he despaired of his recovery, and felt assured his disease would prove fatal, are admissible as dying declarations. *State* v. *Poll*, 1 Hawk. 442.

190. When a common design is proven, the *act* of one in furtherance of that design is evidence against his associates, but the *declarations* of one of the parties can be received only against himself. *Ib.*

191. In case of homicide, declarations by one mortally wounded, and who is conscious of his condition, are admissible in evidence, both as to who was the perpetrator of the injury, and the facts which attended the transaction. *Campbell* v. *State*, 11 Geo. 353.

192. A copy of dying declarations taken down in writing by the examining magistrate, though such declarations would have been evidence had they been sworn to by the magistrate, is inadmissible. *Beets* v. *State*, 1 Meig. 106.

193. A written statement taken by a magistrate, is admissible as secondary evidence, if the magistrate swear that he cannot recollect the statement of the deceased. *Ib.*

194. If a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence. *Anthony* v. *State*, 1 Meig. 265.

195. The Bill of Rights cannot be construed to prevent declarations properly made in articulo mortis from being given in evidence against defendants in cases of homicide. *Ib.*

196. The declaration of a person wounded and bleeding, that the defendant had stabbed her, made immediately after the occurrence, though with such an interval of time as to allow her to go from her own room up stairs into another room, is competent to be put in evidence after her death, as a part of the res gestæ. *The Com.* v. *McPike*, 3 Cush. 181.

197. Upon the trial of one for murder, it is not competent to prove the declarations of a third person tending

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to the conclusion that he was guilty of the murder, and not the prisoner, as evidence in exculpation of the prisoner, if such third person examined as a witness, had implicated the prisoner by his testimony; it might have been received for the purpose of discrediting him, but was not competent testimony to establish the innocence of the prisoner by fixing the crime upon the declarant. *Smith* v. *State*, 9 Ala. Rep. 990.

198. Where, the evidence having closed in behalf of the State, the defendant proposed to prove by A. H., his son, that he (witness) said to his father, as the deceased approached the house where the homicide took place, "Yonder comes John Anderson, and he will kill you," the Court refused to admit the latter portion of the answer; held that such refusal was proper. *Hudgins* v. *State*, 2 Kelly's Rep. 178.

199. In a case of murder, a witness for the State, on his examination in chief, testified, that on the day upon which the crime was charged to have been committed, he met the accused a half mile from the house, and that he had blood upon his hands, and upon cross-examination the witness stated that the accused was coming from his own house at the time spoken of, and directed witness' attention to the condition of his hands: the Court thereupon refused, upon a question in behalf of the accused, for the purpose, to permit the witness to state what the accused said, when he showed the blood upon his hands. It was held that to have allowed the question to have been answered, would not have been short of allowing the defendant to make evidence for himself, and the statement was therefore properly rejected. *Scaggs* v. *State*, 8 Smedes & Marshall's Rep. 722.

200. Declarations are admitted in evidence as part of res gestæ, only upon the presumption they elucidate the facts with which they are connected, having been made without premeditation or artifice, and without a view to the consequences. *Ib.*

201. Declarations constituting a part of the res gestæ are admissible in evidence. *Kirby* v. *the State*, 7 Yerg. 259. *Evans* v. *Jones*, 8 Yerg. 461.

202. Where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the res gestæ, may be given in evidence against the others. *American Fur Company* v. *the United States*, 2 Peter's R. 358.

203. It is error to admit evidence of dying declarations without first finding that the deceased was conscious of his condition when making them. *Montgomery* v. *State*, 11 Stan. O. Rep. 424.

204. It is not error to allow a witness to state the substance of competent dying declarations, although he may not be able to give the precise words. *Ib.*

205. On the trial of an indictment for incest, alleged to have been committed by a father with his daughter, the declarations of the accused are competent upon the question of consanguinity. *The People* v. *Hariden*, 1 Parker's Crim. Rep. 344.

206. Where declarations were received in evidence as having been made in the presence of a person who was partially intoxicated, and not contradicted by him, it was properly submitted to the jury to ascertain whether the party was too much intoxicated to understand the statement when made. *The State* v. *Perkins*, 3 Hawks. 377.

207. Where a defendant was indicted for discharging a gun at a person and wounding him, and the person injured was a witness on the trial, and it appeared that the affray took place on the premises of the defendant; held that the defendant might prove the declarations of the witness, made while on his way to the place where the affray happened—the witness upon being inquired of on cross-examination having denied them—and whether such declarations and the acts of the witness, while going to the place, might not be proved without inquiry on cross-examination, as showing the intent with which he went there,—*quere*. *State* v. *Goodrich*, 19 Vermont R. 116.

208. On such indictment, evidence might be proper of previous threats

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made by the witness as to the defendant, and of previous affrays between them, if so connected with the affray in question as to have any tendency to show that the defendant, at the time, had just cause of alarm, and to fear serious injury to his person or property. But in a case which is so indefinitely stated upon the bill of exceptions as to leave it uncertain how far evidence offered was admissible, the presumption will not be, that there was error in the Court below in rejecting the evidence. *Ib.*

209. On a criminal prosecution, a witness for the Commonwealth testified, that having, in a conversation with the accused, expressed his entire conviction of a particular fact, the accused admitted the fact, which in its nature tended strongly to establish his guilt, but made an explanatory statement (which, if taken as true, would exculpate him), the accused then offered to show that he had previously, and under different circumstances, made the same declaration to another person; held that such proof was inadmissible. *Earhart's case*, 9 Leigh 671.

210. In a prosecution for a rape, the statements made by the female immediately after the transaction, may be given in evidence to corroborate her testimony given in Court. *Laughlin* v. *State*, 18 Ohio 99.

211. One man cannot be affected by the speeches of another until it is proved that they were engaged in a common enterprise; that being proved, the words of one are evidence against the other, but not conclusive. *Malone* v. *State*, 8 Ga. Rep. 408.

212. Declarations made by one of the party in pursuance of the common object, are evidence against the rest, who are as much responsible for all that is *said* and *done* by their associates in carrying into effect the concerted plan, as if it had been pronounced by their own voice or executed by their own hand. *Ib.*

213. Where the declarations of an accused are given in evidence, the jury ought to take the whole into consideration, and may reject those in his favor and believe those tending against him. *Green* v. *State*, 13 Mo. 382.

214. To make the action and declarations of a conspirator in furtherance of the common object, consistent evidence against a conspirator, it is sufficient that the conspiracy has been proved by a witness who is competent; the Court will not decide on his credibility. *Com.* v. *Crowinshield*, 10 Pick. Rep. 497.

215. The declaration of an accused cannot be given in evidence in his favor for the purpose of drawing out the reply of the witness to whom they were made, unless they form a part of a conversation put in evidence by the State. *Campbell* v. *the State*, 23 Ala. 44.

216. General rules as to what declarations of a party constitute part of the res gestæ stated, and cases illustrative of them referred to. *Cornelius* v. *State*, 7 Eng. 782.

217. In this case the defendant was indicted for larceny of a cow, belonging to one of his neighbors. The State proved by two witnesses, that on a certain night they secreted themselves near the cow-pen of defendant, having heard that the cow in question had been penned with his cattle on that evening, and that between midnight and day the defendant and his negro boy came to the pen with a torch-light, killed the cow, and were about to commence skinning her, when witness arrested defendant; the defendant then offered to prove that on the night the cow was killed, after his cattle were turned into the pen, and before the family and others at his house went to bed, he declared openly in his family, and in the presence of visitors, that he was going to kill the cow before day, and take her to the neighboring town to market; and declared, at the same time, that he received a message from the owner of the cow, which authorized him to kill the cow and pay for her—that these declarations were made to some three or four grown white persons, who were at his house at the time, as well as directions given to the negroes in reference to the matter. Held, that under all the circumstances, these declarations of defendant constituted part of the res gestæ, and were competent evidence to show the intention of defendant in killing the cow. *Ib.*

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218. The defendant further proposed to prove by S., that a short time before the cow was killed, she heard W., who was then living with defendant, tell him that he had been down to the residence of the owner of the cow, and that the owner had told him to tell defendant that the cow had been running about his (defendant's) place the winter before, and that if she returned he was at liberty to kill her; and that after receiving this message the defendant openly declared his intention of killing the cow. It was further shown that defendant had been unable to procure the attendance of W. as a witness. Held that S. was a competent witness to prove the delivery of the message to defendant—that it was immaterial whether the message was true or false, if defendant acted on it in good faith; and that a person who heard the message delivered to defendant, was as competent to prove its delivery to him as the person who delivered it. *Ib.*

219. The defendant proved by M., a resident of the neighboring town, that on the day before the cow was killed, he had engaged to deliver him beef on the next morning, and then proposed to prove by M. that he told him he had no beef of his own, but that there was one at his house belonging to one of his neighbors, which he would kill and pay for, and that he had permission from the owner to do so. Held, that under all the circumstances in proof, these declarations of defendant to M. should go to the jury as part of the res gestæ explaining the intention and motives of defendant in killing the cow. *Ib.*

220. It is sufficient to admit a witness to prove a conversation of the defendant, when he says he can state all that passed on the occasion when that conversation occurred, whether relative to that controversy or any other subject. It is not necessary for him to be able to state all the conversations of the defendant which he heard before or after the conversation offered to be given in evidence. *State* v. *Cowan*, 7 Iredell 239.

221. In a prosecution for rape, the declarations made by the injured female as to the transaction, immediately after the offence was committed, may be given in evidence to sustain her testimony given in court, but not as substantial testimony to prove the commission of the offence. *Johnson* v. *State*, 17 Ohio Rep. 593.

222. Where the husband and wife were jointly indicted for receiving stolen goods, the declarations of the wife, though criminating both, are admissible in evidence to prove her guilt, and the jury must take care that they do not operate to the prejudice of the husband. *Commonwealth* v. *Briggs*, 5 Pickering's Rep. 429.

223. The declarations of the defendant are admissible in evidence on the part of the prosecution, as accompanying, explaining and characterizing the acts charged. *State* v. *Huntley*, 3 Iredell 418.

224. It is a general rule that the declarations of a party accused of a crime made in his own favor after the time of the alleged commission of the crime, are not evidence for him. *State* v. *Hildreth*, 9 Iredell 440.

225. On the trial of a defendant who is indicted for knowingly having in his possession an instrument adapted and designed for coining or making counterfeit coin, with intent to use it, or cause or permit it to be used in coining or making such coin, it was held that he could not give in evidence his declarations to an artificer, at the time he employed him to make such instrument, as to the purposes for which he wished it to be made. *Commonwealth* v. *Kent*, 6 Metc. Rep. 221.

IX. Confessions and Admissions; when proper Evidence.

226. In a case where a slave, charged with crime, and threatened by a party armed with guns, that if he did not confess he would be hung, made a confession of his guilt, and shortly afterwards was taken before a magistrate, in the presence of some of the same persons, and was interrogated by the magistrate as to his guilt, without being previously cautioned by the magis-

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trate of the effect of his replies, and again made confession of his guilt; it was held that the last confessions of the accused were inadmissible as evidence against him. *Peter* v. *State*, 4 Smedes & Marshall's Rep. 31.

227. The general rule of law, upon the subject of confessions, is, that when made under the influence of a sufficient threat, or a sufficient promise, they are inadmissible as evidence. So it has been the common practice, when a prisoner has been once induced to confess upon a promise or a threat, to reject any subsequent confession of the same or like facts, though at a subsequent time. *Ib.*

228. But it has been further and frequently held, that notwithstanding such threat or promise may have been used, the confession is admissible, if made under such circumstances as to create a reasonable presumption that the threat or promise had no influence, or had ceased to have any influence, upon the mind of the party. *Ib.*

229. The presumption is, that the influence of the threats continues, and such presumption must be overcome. But such presumption may be removed by the length of time intervening between the threats and the examination, from proper warning of the consequences of such confession, or from any other circumstances that might reasonably be considered sufficient to dispel the fears induced by the threats. *Ib.* Vide *Com.* v. *Knapp*, 10 Pick. 477; *State* v. *Roberts*, 1. Dev. 259; *State* v. *Gould*, 5 Halsted 163.

230. There must be very clear and strong evidence of explicit warning by the magistrate, of the consequences of confession, after the fact is known of the existence of either the influence of hope or fear superinducing confession; and it should likewise be manifest, that the prisoner understood such warning, before his subsequent confession could be given in evidence. *Peter* v. *State*, 4 Smedes & Marsh. 31; vide *Van Buren* v. *State*, 24 Miss. 512.

231. Confessions should be received with great caution, for experience has shown that they often mislead, and sometimes convict an innocent person. *U. S.* v. *Nott*, 1 McLean's Rep. 499.

232. Under a charge of a highly criminal offence, the mind must always be agitated, and may be influenced by hopes or apprehensions, which it is difficult, if not impossible, sometimes to comprehend. *Ib.*

233. To make a confession, therefore, evidence, it must be made, so far as can be ascertained, in the absence of any excitement which creates a hope to obtain favor, or to avoid a threatened punishment. *Ib.*

234. But the Court, in such cases, must judge of the motives which induce the confession, from the confession itself, and the circumstances under which it was made. *Ib.*

235. Where, on an indictment for robbery on the high seas, the court instructed the jury that certain confessions of the prisoners, reduced to writing, and not produced on the trial, ought to be disregarded by the jury, although they came out upon direct interrogatories of the cross-examining counsel for the defence; it was held, if there was any error in this instruction, it was favorable to the prisoners, and that the suppression of the writings afforded no presumption of law, but of fact only, in the case. *U. S.* v. *Gibert*, 2 Sumner's Rep. 19.

236. Where the persons who made the confessions were not identified, but the proof was only that some did confess, not being named or identified, such confessions could not be applied to any particular prisoner as proof of his guilt, but might be considered by the jury, so far as they applied to the identification of the piratical vessel. *Ib.*

237. Where the confession of an accused is offered in evidence, the whole must be submitted to the jury; but the whole is not necessarily to be taken as true. *Brown's case*, 9 Leigh. 633.

238. Where a prisoner was charged with homicide, and was taken before a committing magistrate, and there sworn to tell the truth, and told, "if you do not tell the truth I will commit you;" held that a confession thus drawn out was inadmissible on the trial, as evidence against the prisoner. *Com.* v. *Harman*, 4 Barr 269.

239. And where a previous confes-

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sion is obtained by improper means, any subsequent confession given on its basis is inadmissible. *Ib.*

240. Where a confession was offered to be proved, the Court allowed the evidence thus offered to be interrupted for the purpose of showing that a previous confession by which it was induced, was obtained by improper means. *Ib.*

241. The confessions of a party freely and voluntarily made, are to be received against him as competent evidence. The difficulty in administering this part of the law, is not so much in regard to the rule, as in the application of the facts to the rule; in other words, in ascertaining from the facts and circumstances whether the confessions were free and voluntary, or whether they were procured by the influence of another, under a hope of favor or advantage if they were made, or fear of harm or disadvantage if they were withheld. *Com.* v. *Knapp*, 10 Pick. R. 477.

242. Admissions made to a clergyman are admissible as evidence in a criminal case, if not made to him in his professional character, in the course of discipline enjoined by his church. *People* v. *Gates*, 13 Wend. R. 311.

243. A verbal confession of guilt, made by a person accused of a crime, if induced by a delusive hope of impunity excited in his mind, will not be received in evidence; and a written examination of the accused made by a justice within a few hours after the verbal confession, will also be inadmissible, upon the presumption that the same inducement which operated upon his mind at the time he made the verbal confession, might have continued to operate at the time of the written examination. *State* v. *Guild*, 5 Halst. R. 163.

244. When once a confession under influence is obtained, a presumption arises that a subsequent confession of the same nature flows from the like influence, and such presumption ought to be overcome before the confession can be given in evidence. *Ib.*

245. A witness swore to certain confessions made by the prisoner. On his cross-examination he stated that they were through fear. Upon being interrogated by the Court (prisoner's counsel objecting) as to the nature of the threats, it turned out that the witness was mistaken—that he misapprehended the meaning of the term; held that the Court was right in prosecuting the inquiry which he did in order to ascertain whether in fact any threats were used; and we are equally clear that the statement, when made, did not constitute such a threat as would exclude the confessions. *Whaley* v. *State*, 11 Geo. 123.

246. Counsel for the State asked a witness what the defendant said about having committed similar crimes before. The question was objected to, but allowed to be propounded. The answer was, that he stated that it had been his misfortune for a considerable time, but that he had never been interfered with before. Held, that as the answer was legal, the judgment would not be reversed because it was elicited by an improper question. *Ib.*

247. In prosecution for concealing a horse-thief, it is not competent for the prosecution to prove the confessions of the alleged thief in the presence of the defendant, to establish the fact that a horse was stolen. *Morrison* v. *State*, 5 Ohio 438.

248. Where the confession of a defendant is offered in evidence in connection with some inducement held out to him to make it, if the confession is not so connected with the indictment as to be a consequence of it, it is to be regarded as voluntary, and of course admissible. *State* v. *Potter*, 18 Conn. R. 166.

249. Therefore, where the uncle of the accused said to him, on the 10th of February, while he was in jail, "This is a sorrowful thing; the people don't think you are guilty, but that you know something about it. The circumstances are very much against you." On the two succeeding days he said that other persons were associated with him in the commission of the crime. On the 17th of February the accused said to a witness, who had come to his cell at his request, that he was in such distress of mind that he could no longer eat, drink or sleep, or get rest of any

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kind; that he could no longer be guilty of accusing innocent blood—that he alone was guilty of the murder in question, and wished the witness to go and call the counsel for the prosecution. They came to the prisoner's cell, accordingly, and one of them inquired of him if he had sent for him; to which the accused replied that he had, and that he desired to say to him that he alone was guilty of the murder. On being questioned why he had accused others of a participation in the crime, he replied that he had hoped by accusing others he might escape the extreme penalty of the law. On being inquired of if any one had held out to him any such inducement, he replied that no one had, but still he had a hope. He then proceeded to detail the particulars of the murder. Held, that the inducement held out to him by his uncle on the 10th, had no efficiency in drawing out the confessions made on the 17th, and consequently they were voluntary and admissible. *Ib.*

250. Where an accomplice has a promise from the attorney-general, that he shall not be prosecuted if he will become State's evidence, and make a full disclosure, and upon such promise he makes a confession, but afterwards refuses to testify; held that he may be put upon his trial, and this same confession will be admissible in evidence against him. *Com.* v. *Knapp*, 10 Pick. 478.

251. On an indictment against a free white citizen, the State may give in evidence the confessions of a negro, even when extorted by the pain of punishment, provided they are proven by a white person, not as independent testimony, but as an inducement, and in illustration of what was said and done by the accused, he being present and giving his consent that the negro should tell all he knows. *Berry* v. *State*, 10 Ga. Rep. 511.

252. Where confessions are extorted by hope or fear, they cannot be given in evidence against the prisoner, or anybody else. *Ib.*

253. Where, after due warning of all the consequences, and sufficient time allowed for mature reflection, a prisoner makes a confession of his guilt to a private person having no control over the prisoner or the prosecution, although he may have influence and ability to aid him, such confession is properly allowed as evidence for the jury. *State* v. *Kirby*, 1 Strob. 155.

254. In an indictment, charging a father with living in adultery with his daughter, his confessions that she is so, are admissible in evidence. *Morgan* v. *State*, 11 Ala. R. 289.

255. Malice aforethought is expressed or to be implied from circumstances; intent to maim or disfigure, may likewise be implied from circumstances; and it is not necessary to prove antecedent grudges, threatenings, or an express design. Confessions before a justice of the peace may be admitted in evidence, although not reduced to writing. *State* v. *Irwin*, 1 Haywood's L. & E. 130.

256. The confessions of one not made in open court, or on examination before a magistrate, but to an individual, uncorroborated by circumstances, and without proof aliunde that a crime has been committed, will not warrant a conviction. *People* v. *Hennessey*, 15 Wend. 147.

257. A voluntary confession is entitled to but little weight, as it is but natural that one accused of crime should endeavor to palliate his guilt by excuses; and if a different statement should be afterwards made, under oath, when circumstances have changed the condition of the party, it will be with the jury to say whether they will disbelieve him on account of such discrepancies. *Keithler* v. *State*, 10 Smed. & Marsh. 192.

258. Evidence of confessions—what influence will exclude them. *State* v. *Bostick*, 4 Har. 563.

259. Where the accused confesses that he had assisted to get another man's son out of jail, who would aid him in escaping, together with the fact that this man had come to the jail where the accused was confined, such confession is competent evidence against him. *Campbell* v. *State*, 23 Ala. 44.

260. Where a prisoner makes confession, it will not be rejected as evidence merely because it was made in

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answer to a question which assumed his guilt; thus, when the officer who committed the prisoner on a charge of murder, asked him whether if it was to do over again he would do it? and the reply was: "Yes, sirree, Bob;" it was held that both question and answer were competent, as well as the fact that, in making the reply, the prisoner's manner was short. *Carrol* v. *the State*, 23 Ala. 28.

261. Though the examining magistrate before whom a prisoner charged with felony is brought, does not reduce the examination to writing, as it is his duty to do, yet evidence may be given of such prisoner's confessions at the time. *State* v. *Parish*, Bush. N. C. Rep. 239.

262. But to render such evidence admissible, it must appear that the committing magistrate did not take down the examination in writing, or that the same is lost. *Ib.*

263. Where a magistrate was called to testify to confessions of a prisoner brought before him on a charge of homicide, and stated that he inquired of the prisoner how the facts were, and the evidence being objected to by prisoner's counsel, the witness stated that the confessions offered were voluntarily made, whereupon the presiding judge allowed them to be given in evidence; held that the prisoner's counsel was not bound to apprize the solicitor for the State, nor the Court, of the grounds of his objection, and is not therefore precluded from insisting in this Court, on the objection, that there was no proof that the prisoner's examination was not reduced to writing. *Ib.*

264. Where a confession or admission by one under arrest in a criminal charge, is made to the officer having him in custody, and made the day after the party had been told by the officer to the effect, that "he could make him no promises, but if he made any disclosures that would be of benefit to the government, the officer would use his influence to have it go in his favor;" held that it is not admissible in evidence against such party, although the officer testifies that he thought the statement was voluntary, and would have been made if the inducements of the day before had not been held out; and although the judge instructed the jury, that if the statement was not made freely and voluntarily, or if it was induced by previous promises, they should exclude it altogether. *Com.* v. *Taylor*, 5 Cush. R. 505.

265. Where a justice of the peace took the confessions of an accused in writing, at the time they were made, it is erroneous to allow the justice to testify of these confessions from recollection when the non-production of the writing is not accounted for. *Peter* v. *the State*, 4 Smedes & Marsh. 31.

266. A confession in a criminal case, except when it is an admission by plea, is merely evidence to be passed upon by a jury. *The State* v. *Welsh*, 7 Port. 463.

267. Where an officer having accused in charge, told him he had better tell him all about the matter, and if he would he would not appear against him, and that the accused had better turn State's evidence, whereupon the accused made a full confession to the officer; held that the confession so obtained, could not be offered in evidence against the accused, and that the proper time of objection was before the officer had given his testimony, and not during the instruction of the jury. *Conley* v. *the State*, 12 Mo. 462.

268. It is no ground for the exclusion of a confession as evidence against a prisoner, that it was made to an officer who had the prisoner in custody, provided that it was not drawn out by improper advantages taken of the situation in which the prisoner was standing. *Commonwealth* v. *Mosler*, Barr 264.

269. It is well settled that confessions induced by the flattery of hope, or terror of punishment, are not admissible in evidence. But a mere observation to the accused by the person who had her in custody, "that in the long run it would be better for her to tell the truth about the matter, and not any lies," was held not to bring within the above rule a confession made by the accused afterwards, in a conversation with a third person. *Hawkins* v. *State*, 7 Mo. 190.

270. A slave's voluntary confessions

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of guilt are admissible evidence against him. The facts that he is a slave and ignorant, and to some extent unacquainted with the consequences which may attend the making of such confessions, do not affect the admissibility of the evidence, but should be considered by the jury in connection with the admissions in ascertaining the weight to be given to them. *Seaborn* v. *State*, 20 Ala. Rep. 15.

271. Where it is shown that a slave was arrested, tied and left by his master in charge of a third person, to whom he immediately after made a confession, proof that the master "had always been in the habit of tying his slaves when they were charged with any matter, and whipping them till they confessed the truth, and that he had frequently treated the prisoner in the same way," is competent, and should be considered by the Court in determining whether the confession was induced by the influence of hope or fear. *Spencer* v. *State*, 17 Ala. Rep. 192.

272. Indictment for murder. When the prisoner was first arrested, one of the two special constables who had him in charge, said to him, "Come, Jack, you might as well out with it," the magistrate interposed and warned him not to confess; some hours afterwards the prisoner made confessions to B.; who was in no position of authority over him, but with whom and in whose buggy, as a convenient mode of transportation, he was riding to jail, the two constables being near but not within hearing; held that the confessions to B. were admissible. *State* v. *Vaigneur*, 5 Richard. 391.

273. Where a confession is obtained by a promise to put an end to a prosecution, it is held that such confession is inadmissible as evidence. *Boyd* v. *State*, 2 Humph. R. 39.

274. The confessions or declarations of any accomplice or confidant, made when they were in the act of committing an offence, or when in its way of commission, can be received as evidence against all parties to the conspiracy. *Hunter's case*, 7 Grattan's R. 641.

275. But after the commission of the act is complete and over, declarations subsequently made by an accomplice are good evidence against him only unless made in the presence of his partners in the crime. *Ib.*

276. Where the inducements to the confession proceeded from some of the company assembled to apprehend the prisoner, and were made, if the witness is to be credited, in the hearing of the prosecutor and officer upon well settled principle; therefore the confession thus obtained was inadmissible. *Bryant* v. *State*, 9 Humph. 635.

277. A statement under oath, made by the prisoner upon his examination as an ordinary witness, before he was charged with the crime, is admissible as evidence against him. *State* v. *Vaigneur*, 5 Rich. 391.

278. Where a confession in itself inadmissible, leads to the ascertainment of a fact admissible in evidence, and material in the case, so *much* of such confession as relates *strictly* to the fact may be received in evidence. *Ib.*

279. Where a slave, after a whipping, had confessed her guilt, and subsequently when the overseer inquired why she had committed the act, confessed the crime; held that the answer to this question was not admissible evidence, as the question assumed the fact of her guilt as previously admitted by her. *Quere*,—should the subsequent confession of a slave, after a confession had been extorted, be evidence in any case. *State* v. *Clarissa*, 11 Ala Rep. 57.

280. No proof of the admission of one distinct substantive offence shall be received upon a trial for the commission of another; à fortiori, shall not statements of an intention to commit it. *Kinchelow* v. *State*, 5 Humph. Rep. 9.

281. Though a witness may testify that the confessions of the defendant were made under threats, still the court may inquire what these threats were, in order to ascertain their sufficiency in law to exclude the confessions. *Whaley* v. *State*, 11 Ga. R. 123.

282. The competency of confessions cannot be questioned, because they were made while the party was in legal imprisonment. *Stephen* v. *State*, 11 Ga. 225.

283. Where a person has committed

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an offence, he may be convicted upon his own voluntary confession, although it is totally uncorroborated by any other proof. *Ib.*

284. A confession, whether made upon an official examination, or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotion may be implied, is not admissible evidence. *Ib.*

285. Nothwithstanding doubts have been expressed by American writers, whether extrajudicial confessions uncorroborated by any other proof of the corpus delicti, are of themselves sufficient to convict the prisoner, yet the doctrine may be considered as having been satisfactorily established in England. Such was the opinion of the twelve judges on an indictment for robbery, where the person robbed did not appear at the trial. *Ib.*

286. Confessions of boys under twelve years old. *State* agst. *Aaron*, 1 South. Rep. 231.

287. Confession—what degree of influence will vitiate. *State* v. *Harman*, 3 Harring. 567.

288. On the trial of an indictment for bigamy, the confessions of the defendant, though supported by proof of cohabitation and reputation, are not sufficient to establish the first marriage; proof of actual marriage either by the record or the evidence of an eye-witness, is requisite. *Gahagan* v. *the People*, 1 Parker's Crim. Rep. 378.

289. The legal rule, that a prisoner's confessions are to be taken altogether, does not mean that the jury should give the same degree of credence to every part; on the contrary, they may well disregard such parts as are inconsistent with reason or other proof. *Bower* v. *State*, 5 Missouri S. C. Rep. 364.

290. Confessions or disclosures made under any threats, promises, or encouragement of any hope of favor, are inadmissible in criminal prosecutions. *State* v. *Phelps*, 11 Vermont 116; vide *Com.* v. *Chabbock*, 1 Mass. 144.

291. A confession made by a prisoner while in prison, is evidence against him, provided it be the prisoner's own act, not unduly obtained by promises or threats. *State* v. *Jefferson*, 6 Iredell 305.

292. Where a presentment for adultery is joint, the admission of one party is not evidence against the other. *Frost* v. *Commonwealth*, 9 Monroe 362.

293. On the trial of an indictment for murder, where it appeared that the accused was a witness before the Coroner's inquest, and examined as such, and that he was then under arrest made by a constable without process, and examined while under such arrest, though his arrest was unknown to the coroner, being a separate proceeding, it was held competent to prove what the accused testified to before the coroner's jury. *People* v. *McMahon*, 2 Parker's Crim. R. 663.

294. Where two brothers, F. and J., are indicted for a murder, and F. put upon his trial, a witness testified that P., a third brother, said to F., "J. has determined to make a confession, and we want your consent." F. said he thought it hard that J. should have the advantage of making a confession, since the thing was done for his benefit. P. said, "If J. is convicted, there will be no chance for him; but if you are convicted you may have some chance for procuring a pardon," and P. then asked the witness if he did not think so. The witness said he did not know, he was unwilling to hold out any improper encouragement. It was held that the assent would be evidence as to the guilt of F., that a hope of favor was held out to induce him to give his assent, and that all subsequent confessions at the same interview would be excluded as being made under the same influence. *Commonwealth* v. *Knapp*. 9 Pick. 496.

295. "A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and, therefore, it is rejected." *State* v. *Grant*, 22 Maine Rep. 171.

296. This rule appears to have been limited by subsequent cases, so that there must appear to be some fear of

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personal injury, or hope of personal benefit of a temporal nature, to exclude the confession, unless the collateral inducement be so strong as to make it reasonable to believe that it might have produced an untrue statement as a confession. *Ib.*

297. Confessions are admissible in evidence before the jury, though they be elicited by questions whether put to the prisoner by a magistrate, officer, or private person; and the form of the question is immaterial to its admissibility, though it assume the prisoner's guilt. *State* v. *Kirby*, 1 Strob. 378.

298. The necessity of the inquiry into the effect upon his mind of what may have been said in a preliminary conversation with a prisoner who subsequently makes a confession of his guilt, is sufficient to carry the whole matter before the jury, although the preliminary conversation may have been held in the presence of "one in authority." *Ib.*

299. The jailer was present, and to some extent participated with two others (private persons) in conversation with one in prison for a minor offence, but suspected of murder. In this conversation, (upon the effect of a confession, &c.,) the jailer neither offered nor sanctioned an inducements to the prisoner's hopes or fears. An hour or more afterwards (the jailer being absent) the prisoner made a confession of the murder to the two persons with whom he had held the preliminary conversation. *The Court*, conceding the jailer to be such a person in authority as is contemplated by the rule of law, *held*, that the confession was properly allowed to go to the jury. *Ib.*

300. On a criminal prosecution, it is no objection to proving a confession of the accused that it was made when he was under oath, if it appear that it was free and voluntary, and not made under the influence of fear or hope. *The People* v. *Hendrickson*, 1 Parker's Crim. R. 406.

301. What a person says when under examination as a witness in a legal proceeding, may be used in evidence against him; but the statements on oath of one accused cannot be given in evidence. *Ib.*

302. Where, on the trial of a prisoner for the murder of his wife, it appeared that he had been examined as a witness before the coroner's inquest on the evening subsequent to the death, and that he had not then been charged or accused of the crime, and that his statements then made under oath were free and voluntary; such statements were held to be admissible in evidence against him. *Ib.*

303. Where a magistrate, on the examination of a prisoner accused of robbing an individual of a watch on the previous night, and on whom the watch was found, told him "that unless he could account for the manner in which he became possessed of the watch, he should be obliged to commit him to be tried for stealing it." This did not amount to such a threat or influence as would prevent the introduction of the subsequent confession of the accused, especially as the magistrate repeatedly warned him not to commit himself by any confession. *State* v. *Cowan*, 7 Iredell 239.

304. A prisoner may be convicted upon his own voluntary and unbiassed confession, without any other evidence. *Ib.*; contra, *People* v. *Badgley*, 16 Wend. 53.

305. Testimony of the person's guilt, or participation in the commission of a crime or felony, wholly unconnected with that for which he is put upon his trial, cannot, as a general rule, be admitted. *Dunn* agt. *State*, 2 Arkansas R. 229.

306. But in cases where the scienter or the quo animo is requisite to and constitutes a necessary and essential part of the crime with which the prisoner is charged, and proof of such guilty knowledge or malicious intention is indispensable to establish his guilt in regard to the transaction in question, as in cases of forgery, murder, and the like, testimony of such acts, conduct, or declarations of the accused as tend to establish such knowledge or intent, is competent legal testimony to go to the jury, notwithstanding they may constitute in law a distinct crime. *Ib.* Vide *Thorp* v. *State*, 15 Ala. 749.

307. Thus, upon an indictment for murder, former grudges and antecedent measures may be proved to show the

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prisoner's motive against the deceased. *Ib.*

308. Testimony, however, of a distinct murder committed by the prisoner at a different time, or of some other felony or transaction committed upon or against a different person, and at a different time, in which the prisoner participated, cannot be admitted until proof has been given establishing, or tending to establish the offence with which he is charged, and showing some connection between the different transactions, or such defects, or circumstances, as will warrant a presumption that the latter grew out of, and was to some extent induced by, some circumstance connected with the former, in which case such circumstances connected with the former as are calculated to show the quo animo or motive by which the prisoner was actuated or influenced in regard to the subsequent transaction, are competent and legitimate testimony. *Ib.*

309. Words used by one man are not evidence against another, unless they are shown to be engaged in a common enterprise; but in such case they are evidence, though not conclusive. *Com.* v. *Eberle*, 3 Sergeant & Rawle's R. 9.

310. The rule is that evidence of one offence is not admissible for the purpose of proving the charge of another, but may be so connected with the proof of a relevant and material fact that its introduction cannot be avoided. *Com.* v. *Call*, 21 Pickering's R. 515.

311. Proof of any one crime cannot be introduced to support the charge of another. *Ib.*

312. All persons are considered by the code of Georgia capable of committing a crime, who are neither idiot, lunatic, nor insane, and who have arrived at the age of fourteen years, and before that age, if they know the distinction between good and evil; and if capable of committing crime, they are liable to be convicted upon their own confession. *Studstill* v. *State*, 7 Geo. 2.

X. Testimony of Experts and Physicians.

313. Persons skilled in the knowledge of hand-writings are competent to testify concerning them, although they never saw the parties write. *Hess* v. *State*, 5 O. Rep. 5.

314. On a criminal prosecution an expert in hand-writing may testify whether in his opinion anonymous letters written in a disguised hand, and calculated to divert suspicion from the accused, are in the accused's hand-writing, and may give his reasons for his opinion. *Commonwealth* v. *Webster*, 5 Cush. 295.

315. On a criminal prosecution, an expert in hand-writing having testified that in his opinion certain anonymous letters written in a disguised hand and calculated to divert suspicion from the accused, are in the accused's hand-writing, and that some parts of them could not have been made with a pen, cannot be interrogated whether those marks were made with a peculiar instrument found in the defendant's possession. *Ib.*

316. A party has no right to ask the opinion of a professional witness, upon any question except one of skill or science. *The People* v. *Bodine*, 1 Denio's Rep. 282.

317. Proof by comparison of hands, *i. e.*, the juxtaposition of two writings in order to ascertain whether both were written by the same hand, is inadmissible. *The People* v. *Spooner*, 1 Denio 343.

318. A witness who was clerk in Chancery, and who testified that he had been accustomed to examine signatures, as to their being genuine, cannot be permitted to give an opinion, as a person skilled in detecting forgeries, whether a signature is genuine or imitated. *Ib.*

319. It seems that the rule sometimes allowed to prevail, admitting experts to give an opinion whether a signature is genuine or imitated, is not well established upon authority, and that such testimony is incompetent. Per Bronson Ch. J. *Ib.*

320. It is an established rule in the law of evidence, that in matters of art

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and science the opinions of experts are evidence, touching questions in that particular art or science, and it is competent to give in evidence such opinions, when the professors of the science swear they are able to pronounce them in any particular case, although at the same time they say that precisely such a case had not before fallen under their observation or under their notice in the course of their reading. *State* v. *Clark*, 12 Iredell 151.

321. When an officer is in a bank whose business it has been for many years to examine papers with the view of detecting alterations, erasures and spurious signatures, he may be asked his opinion as to the fact whether alterations or erasures had been made in a certain paper. *Pate* v. *People*, 3 Gilman 644.

322. It is not proper to ask a witness his opinion as to the hand-writing of a party, who never saw him write before the difficulty in question arose. *Ib.*

323. A witness who is not skilled in the science or art touching which his opinion is asked, is not competent to give an opinion, he can only state facts, and the jury must draw conclusions. *Luning* v. *the State*, 1 Chand (Wis.) 178.

324. An expert having heard the whole evidence given in a case, is incompetent to give his opinion as to the effect of such evidence, but he may offer his opinion in a case hypothetically stated. *Ib.*

325. Evidence is admissible as to the genuineness of a bank-note, of the opinion, not only of cashiers and tellers of banks, but also of merchants, brokers and others who habitually receive and pass the notes of a bank for a long course of time, so as to become thoroughly acquainted with them, and able to judge between a true and a counterfeit bill, and have that knowledge, among other things, tested by the fact that no bill passed by the witness has been returned, though there has been ample time for it if any of them were not genuine. *State* v. *Cheek*, 13 Iredell 114.

326. The opinion of a physician upon a question not involving medical skill or science, is inadmissible as evidence. *Woodin* v. *the People*, 1 Parker's Crim. Rep. 464.

327. Where a party has called a witness and shown by him a conversation had with the opposite party, the party whose conversation has been proved cannot, on cross-examination, show by the witness a subsequent conversation between the party cross-examining and the witness, which occurred two or three hours after the first conversation, though such subsequent conversation related to the same subject as the first conversation, and in explanation of it. *People* v. *Green*, 1 Parker's Crim. R. 11.

328. And though the party calling the witness proves the fact that there was a subsequent conversation, that does not give the party cross-examining the witness a right to prove what was said at such subsequent conversation. *Ib.*

329. The opinion of medical men is good evidence to go to the jury, and their opinions may be asked upon supposititious cases similar to the one before the court. *State* v. *Powell*, 2 Halsted's Rep. 244.

330. An experienced physician, after having made a *post mortem* examination of the body of a female, may, as an expert, give his opinion as to whether she had been pregnant, and as to the cause of her death. *State* v. *Smith*, 32 Maine (2 Red.) 369.

331. Medical men are permitted to give their opinions in cases of alleged insanity, because they are supposed by their study and practice to know the symptoms of insanity, and to possess peculiar knowledge on that subject, without which the jury could not be able to decide the question correctly; but they should not be allowed to express such opinion except on all the testimony which is relied on to establish insanity. *Lake* v. *the People*, 1 Parker's Crim. Rep. 495.

332. A medical witness, while being examined as an expert on a question of insanity, may be asked his opinion as to a hypothetical statement of facts; he may also be interrogated as to what are the symptoms of insanity. But whether such facts exist, or such symptoms are proved, it belongs

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exclusively to the jury to decide. *Ib.*

333. On trials involving inquiries as to the sanity of prisoners, physicians should not be permitted to give their opinions on the case, or on the question of guilt, but only on the question of sanity. *People* v. *Thurston*, 2 Parker's Crim. R. 49.

334. A medical witness, called to give an opinion on the question of insanity, when that opinion is to be based upon facts testified to by other witnesses, must hear all the evidence tending to prove insanity, before he can be permitted to give an opinion. *Ib.*

335. The opinion of a physician upon a question which does not depend upon medical skill or science, is not admissible evidence. *Woodin* v. *People*, 1 Parker's Crim. R. 464.

336. Where, on a trial for rape, it appeared from the testimony of a physician that the prosecutrix for an alleged rape was of more than ordinary strength and health, and that the accused was sixty years of age, the following question, asked the same witness, was held to be incompetent: "From what you know of her health and strength, in your opinion could the defendant have carnal connection with her against her will, without resort to other means than the exercise of his ordinary physical power?" held that this was a question with respect to which the jury could judge equally well with the witness, and did not depend upon medical skill or science, and was not a case for an expert. *Ib.*

337. Held, also, that the question whether in the opinion of the witness a rape could be committed in cases where the female had borne children, and was of ordinary health and strength, without resort to other means than the exercise of ordinary physical powers, came within the same rule, and was incompetent, though the prosecutrix had previously testified that she had borne two children before the alleged rape, and that the ravishment was accomplished by means of the superior strength of the prisoner. *Ib.*

XI. Competency and Admissibility of Evidence in Cases of Murder, &c.

338. It is not competent on the trial of a white man for the murder of a slave to show that the slave was generally insolent and impudent to white persons, though not so at the time of his death, to the prisoner causing it. *Jolly* v. *State*, 13 S. & M. 223.

339. Evidence that the accused was charged with the commission of the offence for which he is indicted, is not competent against him where he denied the charge at the time. *Kendrick* v. *State*, 9 Humph. 722.

340. Three brothers, Nicholas, John, and William, were indicted for murder; Nicholas as accessory before the fact, John and William as principals. Upon the trial of John and William, it was held that the government, without having shown any conspiracy or confederacy between the said John and Nicholas his brother, might be allowed to present to the jury evidence of expressions of hostility towards the deceased, uttered to the said Nicholas in the presence of John, but not responded to or acquiesced in by him, as testimony, which, taken in connection with the friendly and fraternal relations existing between the said John and Nicholas, might go to show a motive on the part of John for committing the crime. *State* v. *Gordon*, 1 R. I. Rep. 179.

341. Where one was indicted for murder, he cannot give in evidence his own conversations, had after going half a mile from the place of the murder. *Gardner* v. *the People*, 3 Scam. 83.

342. Where a party was on trial for murder, and a witness was called by the accused, who testified on his cross-examination that the accused had become acquainted with a lady who had been stopping at the house of the father of the accused, and that she had become pregnant at that time; it was held that the prosecution could not prove further by the witness that he (the witness) knew the accused was charged with the seduction, and that he had heard of it a few days after the lady left. *People* v. *Thurston*. 2 Parker's Crim. R. 49.

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343. In a trial for murder, it is competent for the defendant to prove how he was employed at the time he met with the person he is charged to have killed, and what was his conduct a short time before the affray which resulted in the killing. *Stewart* v. *State*, 19 Ohio 302.

344. In such case it is competent for the defendant to prove that the person alleged to have been murdered, and others, had agreed to go to the house where the defendant boarded for the purpose of quarrelling with him, and that they had approached him with that intent at the time the affray commenced, which resulted in the homicide; and to prove the conversation of the parties in relation to such agreement, though the defendant had not been informed of the intent of the parties in approaching him. *Ib.*

345. It is competent for the defendant to ask a witness who had seen the transaction, whether, when the deceased rushed on him, there was time enough for him to escape and get out of the way, before the deceased rushed on him, or not. *Ib.*

346. In a case of murder, evidence was offered that the accused, on the same day the deceased was killed, and shortly before the killing, shot a third person; held that the evidence was competent under the circumstances of the case, though it pretended to prove a distinct felony committed by the accused; such shooting and the killing of the deceased appearing to be connected as parts of an entire transaction. *Heath's case*, 1 Robinson 735.

347. On an indictment for passing a forged bank-note, proof that the defendant uttered another forged note on the same bank, on the same day, is competent, in order to show a scienter. *The State* v. *Robinson*, 1 Harr. 507.

348. Where D., an accomplice, testified on the trial before the petit jury, witnesses were called to show circumstances tending to corroborate the testimony of D.; it was held that the evidence of such witnesses was competent. *States* v. *Walcott*, 21 Conn. 272.

349. An accomplice is a competent witness to prove the crime alleged, before the grand jury or the petit jury. *Ib.*

350. The testimony of an accomplice, without corroboration, the law considers as credible in some degree, and may be sufficiently so to produce conviction; which is a matter exclusively for the jury to determine. *Ib.*

351. If upon a strict examination new and substantive matter is sought to be examined into, such evidence ought to be opened. *State* v. *Zellers*, 2 Halst. 220.

352. Evidence to show that the prisoner was in possession of land, and that the deceased was coming to commit a trespass upon it, cannot be received in justification or excuse of the homicide committed, but so far as it goes to show the state of feeling of the parties towards each other at the time of the act committed, it may be received. *Ib.*

353. So, with the same view, evidence may be given of lawsuits existing between the parties, but the Court will not enter into an investigation of such legal proceedings to see whether the suits were malicious or not. *Ib.*

354. Nor will the Court inquire into the title of land on which the act was committed, to see whether it belonged to the prisoner or deceased. *Ib.*

355. The defendant was indicted for horse stealing, and his declarations were given in evidence against him; the defendant offered to prove that when engaged in horse trading, he was in the habit of drinking, and when in liquor, he was in the habit of telling inconsistent and false tales, as to the manner in which he obtained his horses. Held that such evidence of defendant's vicious habits of drunkenness and falsehood, was properly excluded. *Whitney* v. *State*, 8 Mo. 165.

356. A person was found murdered on the pine mountain: whilst on his way there, and the day before he was supposed to be killed, he stated that he was going there, and defendant (who was indicted for his murder) was to accompany him. The defendant was not present when this declaration was made. It was held that such statement of deceased was inadmissible. *Kirby* v. *State*, 9 Yerg. 383.

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357. Where a prisoner is on trial for the murder of his wife, evidence of conversation between the prisoner and his wife, and between the prisoner and his brother-in-law, tending to show an alienation of affection on his part in regard to his wife, was admissible on the question of motive. *People* v. *Hendrickson*, 1 Parker's Crim. Cas. 406.

358. It was also held that the will of the prisoner's father-in-law was properly received in evidence, for the purpose of showing that the pecuniary expectations which the prisoner might have entertained by reason of his alliance with the family, had been disappointed. *Ib.*

359. Any evidence giving an account of the acts of the accused on the day of the murder, is relevant and competent against him. *Campbell* v. *State*, 23 Ala. 44.

360. Where a person was slain, and the proof of the agent and the attendant facts, rested on circumstantial testimony, the fact that the accused was of a mild and pacific temper and habits, was held to be admissible, to aid the jury in ascertaining the probable grade of the offence. *Carroll* v. *State*, 3 Humph. 315.

361. Where a prisoner was on trial for murder, the evidence against him being circumstantial, it was shown that on the second morning after the murder, he was seen coming from the direction of a house where two women, mother and daughter, resided, the daughter being unmarried, yet having two children; that he had frequently been seen there before, at one time shaving and changing his clothes; that on the evening of the same day, witness went to the house and found the daughter alone washing a man's shirt, which had splashes or stains on the bosom, and the cuff of the right sleeve; that said splashes looked more like the stain from chestnut timber than anything else witness could compare them to; that no man lived in the house, and witness knew no man in that neighborhood who wore so fine a shirt. The witness was asked whether any one inquired of him if he knew what would take stains out of shirts, to which he answered that the young woman asked him such a question, and he gave his answer to it. The prisoner objected both to the question and answer, and also to shut out from the jury all that the witness had said about the shirt and the stain on it, but the Court refused to do so. The young woman was afterwards examined as a witness for the defence, and testified, on cross examination, that the prisoner stayed at their house on the second night after the murder; that he left a shirt with her to be washed, and that she washed it. Held that the evidence objected to by the prisoner was proper. *Campbell* v. *the State*, 23 Ala. 44.

362. Where evidence has been introduced by the defendant in a trial for murder, that the person alleged to have been murdered was seen alive afterwards; held that the Government cannot call witnesses to prove that about the time of the alleged murder, a person so strongly resembling the person alleged to have been murdered, as to have been mistaken for him, by persons well acquainted with the latter, was seen in the neighborhood where the murder was alleged to have taken place. *Com.* v. *Webster*, 5 Cush. 295.

363. In a case of murder, facts that occurred at or about the time of the fatal rencounter—such as, that the deceased was armed, that some twenty or thirty minutes before the difficulty he had fired off and reloaded two pistols, and put them in his pantaloons pockets, at his own house, which was two or three hundred yards off, and then started immediately for the public square; he had upon his person and in his pocket a loaded pistol or pistols, of the same kind and description as the one found at his side, on the ground where he fell, after being shot by the prisoner; held that they are competent evidence, without precedent proof that the prisoner had knowledge of them. *Reynolds* v. *State*, 1 Kelly 222.

364. On a trial for murder, charged to have been committed by a husband on his wife, the State has a right to prove a long course of ill treatment by the husband towards the wife. *State* v. *Rash*, 12 Iredell 382.

365. Proof of the declarations of the

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deceased wife, offered by the husband, that she had been guilty of adultery, was properly rejected by the Court, because it was irrelevant to the issue, and because it would have gone strongly to prove the malice charged on the husband. *Ib.*

366. Where the public prosecutor, on the trial of an indictment for the murder of the prisoner's wife, in the absence of direct evidence of the alleged murder, offered, with other presumptive evidence, testimony to show that for some months before, and down to the time of the alleged murder, an adulterous intercourse had been carried on between the prisoner and a Mrs. B.; it was held that such testimony was admissible, not to prove the corpus delicti, but to repel the presumption of innocence arising from the conjugal relation. *State* v. *Watkins*, 9 Conn. 47.

367. If, during the quarrel immediately preceding the fight between the prisoner and the person slain by him, the deceased charged that the prisoner had "for some time been mad at him," and stated facts to sustain his charge, but which were denied at the time by the prisoner, it is the duty of the Circuit Court, on the trial, to instruct the jury that the statement of the facts by the deceased is no evidence of their truthfulness, and that such statement should only be regarded by them as part of the res gestæ, to show under what circumstances the conflict between the parties commenced. *Haile* v. *State*, 1 Swan 248.

368. Where on the separate trial of G., who was jointly indicted with T. and J. for the crime of murder, the statements and threats of the latter against the deceased, made when G. was not present, were admitted in evidence, the testimony warranting the conclusion that they were all acting in concert in the prosecution of a common design; and, although temporarily separated, such separation being for the purpose of providing weapons, and making preparations to carry their design into execution; it was held proper evidence. *Gardner* v. *People*, 3 Scam. 84.

369. An accessory cannot take advantage of error in the record against the principal; and the attainder of the principal, while unreversed; is prima facie evidence against the accessory of the principal's guilt. *State* v. *Duncan*, 6 Iredell 236.

370. Evidence on the part of a prisoner indicted as an accessory in murder, that he was a man of violent passions, and often in the habit of using threatening language, intended to rebut the presumption arising from his threats against the deceased, is irrelevant and inadmissible. *Ib.*

371. Threats of other persons against the deceased, or admissions by them that they had killed him, are only hearsay, and cannot be received in evidence. *Ib.*

372. Where D. was indicted, and on trial for the murder of a slave, and it was proved that D. was acting in the capacity of overseer for B., and a witness on the part of the State was permitted, notwithstanding objections on the part of the prisoner, to testify as to the prisoner's general habit as overseer in punishing slaves upon the plantation of the owner of the slave killed; held by the Court of Errors of Mississippi, that such evidence was inadmissible, being calculated to prejudice the jury against the prisoner, and not being responsive to any charge made. *Dowling* v. *State*, 5 Smed. & Marsh. 664.

373. The uncorroborated testimony of an accomplice should be received with great caution, and the Court should always so instruct the Jury; but they are not to be instructed that, in point of law, a conviction cannot be obtained upon such testimony. *People* v. *Costello*, 1 Denio 83.

374. A. having been examined as a witness against B., before a committing Court, died before the trial of B. in the Circuit Court. It was proposed by the State's Attorney to show on the trial what A. had testified to before the committing Court. Held that this evidence was not in violation of the constitutional right of the defendant to meet witnesses against him face to face, for B. had met A. face to face before the committing Court, and had the right to cross-examine him, and also had in the Circuit Court the right to cross-examine those who proved what A. had testi-

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fied to. *Kendrick* v. *State*, 10 Humph. 479.

375. Where it is proposed to introduce the testimony of a deceased witness given on a former trial between the same parties, it was held that the exact words of such deceased witness need not be proved. It is sufficient if the substance of all he said on the examination and cross-examination, in relation to the subject-matter in controversy, be shown. *Ib.*

376. Where there is a dispute as to localities, a diagram which is drawn in accordance with the testimony of the witness, may be given to the jury, without having been first exhibited to the witness whose testimony it contradicts. *Bishop* v. *State*, 9 Geo. 121.

377. On an indictment, proof that the prisoner attempted to escape by the use of a false key, is competent. *Fanning* v. *State*, 14 Mo. 386.

378. On an indictment, proof of prior indictments for the same offence, which have been dismissed or suspended, is inadmissible. *Ib.*

379. On the trial of an indictment for advising the slaves of a certain person to escape from their master, it is erroneous to admit evidence to show that the prisoner was guilty of advising the slave of another person not named in the indictment, to abscond. *Cole* v. *Commonwealth*, 5 Gratt. 696.

380. It is competent on cross-examination, to ask a witness how he was employed during the time of the transaction he has detailed in his examination in chief. *Stewart* v. *State*, 19 Ohio 381.

381. Where the defendant was permitted, without objection, to ask a witness if he was not prejudiced against defendant, and he answered that he was, it was erroneous for the Court, against the objection of defendant, to permit the State to draw from the witness a statement of the reasons why he was so prejudiced; and the witness having, in giving his reasons for such prejudice, detailed matters prejudicial to the character of the defendant, the Court could not counteract the effect of erroneously admitting them, by telling the jury not to regard them as evidence. *Cornelius* v. *State*, 7 Eng. 782.

382. But, though it is not proper to ask a witness, in general terms, if he is not prejudiced against defendant, he may be interrogated as to any particular acts or expressions in reference to the accused, from which the Jury may infer unfriendly feeling or prejudice. *Ib.*

383. A declaration of a character proper for a slave to make, made by him in the presence and hearing of a white person from whom it naturally called for a response, is admissible evidence against such white person, if uncontradicted by him, as showing acquiescence in the truth of the statement. *Spencer* v. *the State*, 20 Ala. R. 24.

384. Where evidence is, prima facie, inadmissible, it is not necessary that the party objecting to it should specify the ground on which his objection is founded: a general objection is sufficient. *Davis* v. *State*, 17 Ala. 415.

385. On the trial of an indictment which charges the defendant with selling spirituous liquors without license, the docket and minutes of the county commissioners before their records are made up, are admissible in evidence for the government; and if no license appear on such docket or minutes, it is prima facie evidence that he had no license. *Com.* v. *Kimball*, 7 Met. 304.

386. Where two persons are concerned in the commission of a crime (as in gaming), one of them may be compelled, under sec. 72, ch. 52, Digest, to give evidence on the trial of an indictment against the other, because, by the provision of that statute, "the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offence," and thus he is protected from self accusation, and his common law and constitutional privilege secured to him. *State* v. *Quailes*, 8 Eng. R. 307.

387. Proof of strife and collision among the drivers while awaiting their turns, is competent evidence for the purpose of establishing the fact of obstruction. *The People* v. *Cunningham*, 1 Denio's R. 524.

388. Representations made by a sick person to a medical attendant, of the nature, symptoms, and effects of the malady under which he is laboring,

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are admissible as original evidence. *Johnson* v. *the State*, 17 Ala. 618.

389. The competency of evidence cannot always be decided, until all the evidence is in ; and the admission of incompetent evidence may be remedied by proper instructions to the jury. *Fitzgerald* v. *the State*, 14 Mo. 413.

390. The deposition of a witness, taken in a criminal case before the examining magistrate under the act of 1715, Rev. Stat. ch. 35, § 1, may be read in evidence on the trial of a prisoner, if the witness is then dead. *State* v. *Valentine*, 7 Iredell's R. 225.

391. The proof of the deposition is usually, but not necessarily, by the magistrate, or his clerk ; but, in this State at least, there being no statutory direction as to the mode of proof, the probate must be a matter of sound discretion in the presiding judge, keeping in view the general principles of evidence, alike necessary to the safety of the accused, and the due administration of the law. *Ib.*

392. Held in this case that, it appearing that the examining magistrate was necessarily absent in the discharge of high public duties, proof by the Clerk of the Superior Court, to which the deposition had been returned according to law, that he was present when the deposition was taken—that the examination was written down by the magistrate himself, and that the deposition returned to his office and offered in evidence, was in the proper hand-writing of that magistrate—was sufficient to authorize the reading of the deposition. *Ib.*

393. Although the conversion of property is not proof of an original felonious design in obtaining the possession of it : yet such conversion is a circumstance which, in connection with other facts, the jury may consider of, whereby to determine the intent with which the possession was obtained. *Long* v. *State*, 1 Swan's R. 287.

394. Medical or scientific books may be read to the jury, under the sanction of the Court, but the Court has it in its discretion to prohibit reading of such books, as a matter of evidence or authority. *Luning* v. *the State*, 1 Chand. (Wis.) 178.

395. The substitution of depositions for oral testimony, prevails in civil trials. They cannot be used against the accused in criminal trials, nor, it seems, in his favor, unless by his consent. *Dominges* v. *the State*, 7 Sm. & Marsh. 475.

396. The testimony of a witness, taken down in writing by a magistrate, cannot, on a trial in the same matter in the Court, be used as evidence in chief,—particularly when the witness is present : but may be used to show contradictory statements made by him. *State* v. *McLeod*, 1 Hawks 344.

397. Testimony that tends to prove the issue, is admissible for the consideration of the jury, although alone it might not warrant a verdict in accordance with it. *The State* v. *McAllister*, 11 Shep. 139.

398. Testimony which though irrelevant, may, with propriety, be allowed, under the expectation that it will be connected with the case by other testimony, is to be excluded from the case, unless so connected as to become relevant. *Ib.*

399. Where the plaintiff's witness in an action for slander, under the plea of justification, stated in reply to questions put to him by the plaintiff respecting the plaintiff's character, that some persons spoke well of him, and some spoke ill of him, and, being asked by the plaintiff, who spoke ill of him, said J. M. charged him with a specific offence ; it was held that it became, under the circumstances, important whether J. M. made the charge or not, and that the plaintiff had the right to show by J. M., that he did not make it. *McLarin* v. *the State*, 4 Humph. 381.

400. Hearsay evidence is not competent in a State prosecution for fornication. *Overstreet* v. *the State*, 3 Howard 328.

401. Where a party, at whose request a deposition in perpetuam was taken failed, in his application, to state that he was desirous to perpetuate the testimony of the witness, as prescribed by the Rev. Stats. of Massachusetts, c. 94. § 34, but no objection was made for that reason at the time of taking the deposition, and the notice of the magis trates to the deponent, and their certi

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ficate, showed that the deposition was taken in perpetuam; held that such deposition was not for that reason to be disallowed. *The Commonwealth* v. *Stone*, Thacher's Crim. Cas. 604.

402. An unrecorded deposition in perpetuam is admissible to sustain an indictment for perjury, against the deponent, at any time within the ninety days limited by the Rev. Stats. c. 94, § 37, for recording such depositions, but not after that time has passed. *Ib.*

403. The testimony of a witness, examined on a coroner's inquest, in the absence of the prisoner, though taken down in writing by the coroner, signed by the witness, and returned to the clerk, is not competent evidence against the prisoner, on a trial for murder, after the death of the witness. *The State* v. *Campbell*, 1 Richard. R. 124.

404. Discharge on a petition for freedom, founded on the illegal exportation of petitioner by his master, is evidence of his freedom, on an indictment for kidnapping him. *State* v. *Harten*, 4 Harr. 582.

405. The general reputation of a kidnapper is evidence of the intent with which defendant aided him in carrying off a free negro. *Ib.*

406. What a witness swore at the former trial of an indictment, who has since died, may be proved by a person who was present and heard his testimony; provided he can repeat the testimony as the witness gave it, and not merely what he conceives to be the substance of it. He may refresh his memory from notes taken at the time; or from a newspaper printed by him, containing the evidence as taken down by himself. *U. S.* v. *Wood*, 3 Wash. C. C. 440.

407. S. made an affidavit before a justice, that C. had assaulted and wounded him; and on the same day gave his deposition upon the same charge before magistrates, acting as a court of inquiry, in the absence of the accused; afterwards S. died, and C. was indicted for murdering him: held that the affidavit and deposition of S. aforesaid, not being dying declarations, having been taken ex parte, and upon an accusation for a less offence, could not be read in evidence by the State, on the trial for murder. *Collier* v. *State*, 8 Eng. 676.

408. Where several persons are shown to have been combined together for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and constituting a part of the res gestæ, may be given in evidence against the others. *The State* v. *Loper*, 4 Shep. 293.

409. On a criminal prosecution for forgery, in the Municipal Court, it was held that the record and judgment of the Police Court could not be given in evidence, unless the circumstances of the prisoner's examination there, were first shown by the magistrate or some person present. *The Com.* v. *French*, Thacher's Crim. Cas. 82.

410. In Virginia, under the statute of March 15, 1822, a white person, free negro, or mulatto, knowingly receiving stolen goods from a slave, free negro, or mulatto, is a principal felon, not an accessory, and so the record of conviction of the actual thief is not competent as evidence against him. *Smith's case*, 10 Leigh 635.

411. Testimony taken before the committing magistrate, is not admissible as evidence on the trial of the prisoner. *Oliver* v. *State*, 5 Howard's Rep. 14.

412. The evidence drawn out upon the examination, by a committing magistrate, of a prisoner under oath as to the subject-matter of his offence, is, it seems, incompetent. *Com.* v. *Harmon*, 4 Barr 269.

413. Where a solicitor for the State, as upon affidavit, asserts, upon the authority of A. B., a witness in the cause, who is present, any matter material to the issue, and afterwards A. B. testified differently; held that testimony may be received to show the diversity, for the purpose of discrediting A. B. *State* v. *McQueen*, 1 Jones' N. Car. 177.

414. Where, on a trial, the counsel for the defendant asks a witness a question which involves scientific opinion in a matter wherein he professes skill, if it be isolated and not connected with any other proposition, it is proper evidence to be received; but the statements of books of science not

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verified by his own experience, is of no more weight than the books themselves; the opinion given in such books are not competent evidence. *Luning* v. *the State*, 1 Chand. (Wis.) 264.

415. It is entirely a matter in the discretion of the Court, to hear or reject the reading of scientific books on the trial of a cause. *Ib.*

416. A letter written for the accused, by the witness, while in jail together, is incompetent evidence for the accused, either as original testimony of its contents or for the purpose of impeaching the witness. *Campbell* v. *State*, 23 Ala. 44.

417. Where one testifies on trial of an indictment for selling spirits without a license, that he sometimes tended the store for the defendant, his brother, as his clerk or agent; that his brother left him that afternoon in the general charge of the store; that he had sometimes sold rum for the defendant; that there was rum on tap, and also brandy; that he sold J. a quart of brandy that afternoon; held that the evidence was proper to be submitted to the jury as showing the witness to be the agent of the defendant for the sale of all articles in the store. *The State* v. *Foster*, 3 Foster (N. H.) 348.

418. A witness may be asked, and may state his opinion as to the time of day when an event took place, and he may state his opinion as to the length of time which elapsed between the occurring of two events. *Campbell* v. *the State*, 23 Ala. 44.

419. Where A. is charged with an assault upon B. with intent to kill, remarks or threats affecting A., made by B. to a third party before the assault, are not competent evidence in A.'s behalf, especially when it does not appear at what time they were communicated to him. *The State* v. *Jackson*, 17 Miss. (2 Bennett) 544.

420. Declarations of B. some months after the assault, in palliation of A.'s guilt, are not admissible in evidence. *Ib.*

421. Proof of B.'s general bad and dangerous character, is incompetent, he being unoffending when assaulted. *Ib.*

422. Proof of threats made by B. is incompetent, if time enough had elapsed for the blood to cool. *Ib.*

423. Against a free white person, negro testimony is not competent; it is competent, however, to show that certain acts were done in consequence of information received from a negro. *Grady* v. *the State*, 11 Ga. 253.

424. Where one accused was tried and convicted in one county, a new trial was granted and the venue changed to another county; in this last trial it is improper to submit as evidence to the jury, the affidavit made by the accused for the purpose of obtaining a change of venue, or the record of his former conviction and sentence. *Boles* v. *the State*, 24 Miss. 445

425. Where a miller, who had received barilla to grind, fraudulently retained part of it, returning a mixture of barilla and plaster of Paris; held that the Government was not bound to produce the truckman who carried the barilla to and from the mill, to prove that it was not adulterated in the transportation, although there was only circumstantial evidence that it was adulterated by the miller. *Com.* v. *James*, 1 Pick. R. 375.

426. Upon an indictment for a breach of a by-law in Boston, prohibiting persons having the care of a wagon, cart, &c., proof of the defendant's general character as a careful driver cannot be admitted. *Com.* v. *Worcester*, 3 Pick. R. 462.

427. On the defence of a criminal prosecution for a defect in a highway, established by the county commissioners, even proof by the commissioners' record, that there were irregularities in their preliminary proceedings, is not competent. *State* v. *Madison*, 33 Maine 228.

428. Where, in an action of *crim. con.*, a witness testifies that he saw the defendant at the plaintiff's house, in company with the wife of the latter, his opinion as to the purpose for which he was there, is not admissible as evidence. *Cox* v. *Whitfield*, 18 Ala. 738.

429. Where a prisoner is indicted for rape upon his ward, it was held that the entire record of his proceedings, as guardian, in the Probate Court, including his accounts and settlements,

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and appropriation of the ward's property, is admissible, to establish the continuing guardianship of the prisoner over the ward; and if the prisoner desire to exclude any portion of the record as irrelevant, he should move to exclude the irrelevant part, and not the whole record, in default of which the admission of the whole record will not be error, though the prisoner except to it at the time; Chief Justice Sharkey dissenting, and holding that the whole record was inadmissible, as calculated to prejudice the jury against the prisoner, inasmuch as it showed that he had squandered the property of his ward, besides having despoiled her of her virginity. *Tenney* v. *State*, 8 Smedes & Marsh. R. 104.

430. On a trial for a rape, where a witness was asked if he had not at a certain time authorized his wife to offer the victim of the outrage a home, and in what manner he had authorized it, and the record without setting forth the answer of the witness, stated in general terms that the witness proceeded to answer the question in the affirmative, and to state the reasons which he had stated to his wife; held that the record not disclosing what the testimony was which the witness gave, the Court could not decide as to its legality; Chief Justice Sharkey dissenting, and holding that, let the testimony be what it might, it was admissible, being a conversation between a man and his wife, not in the presence of the prisoner, and forming no part of the res gestæ. *Ib.*

431. Negro testimony—when admissible. *The State* v. *Cooper*, 3 Harrington R. 571.

432. Where it is shown that a crime has been committed, and the circumstances point to the accused as the guilty agent, facts tending to show a motive, although remote, are admissible in evidence. The jury, however, cannot be too cautious with respect to the importance they attach to this species of testimony. *Baalam* v. *State*, 17 Ala. 451.

433. There is a wide difference between presumptions of law and presumptions of fact. The law draws no presumption except from facts, which unexplained are conclusive of guilt, but presumptions of fact are to be drawn by the jury, and every fact that tends to prove the guilt or to prove a fact that is evidence of it, is admissible and proper for their consideration. *Ib.*

434. On the trial of an indictment against a white person, the State may give in evidence a conversation between the accused and a negro, in relation to the offence charged when the conversation on the part of the negro is merely given in evidence as an inducement, and in illustration of what was said by the white person. But this conversation must be proved by a white person, and not by a negro. *Hawkins* v. *State*, 7 Mo. 190.

435. The mere opinion of a witness with regard to the age of a person from his appearance, unaccompanied by the facts on which that opinion is founded, is inadmissible as evidence. *Morse* v. *State*, 6 Conn. 9.

436. Although a prisoner on his examination shall not have his examination, if given on oath, read against him, yet where a grand jury are investigating an offence with a view to discover the perpetrator, and the person who was subsequently indicted was examined before them on oath, and charged another with the commission of the offence, this examination may be given in evidence against the prisoner on the trial of his indictment. *State* v. *Broughton*, 7 Iredell 96.

437. Evidence of what a witness declared on a former occasion respecting the guilt of a prisoner on trial, is not admissible to prove the guilt of the prisoner. *Fanny* v. *State*, 6 Mo. 122.

438. Upon the examination of one charged with a criminal offence, the testimony of a witness was reduced to writing, *or so much thereof* as the committing magistrate *considered material*, the accused being present and cross-examining the witness. The witness died, and the minutes of the examination being lost, and not being found either in the office of the magistrate or in the court where the indictment was pending, held that as only so much of the testimony as the magistrate *deemed material* had been committed to writing, he could not be called on to prove the

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substance of the testimony thus reduced to writing without also proving what was omitted to be inserted. *Quere*, was there a sufficient predicate laid for the introduction of the secondary evidence without proving that the magistrate had returned the paper to the court where the indictment was found. *Sharp* v. *State*, 15 Ala. 749.

439. Where a person who is a witness to a particular transaction has made a memorandum at the time of certain facts for the purpose of perpetuating the memory of them, and can at any subsequent period swear that he had made the entry at the time for that purpose, and that he knows from that memorandum that the facts did exist, it will be good evidence, although the witness does not retain a distinct recollection of the facts themselves. *State* v. *Rawls*, 2 Nott. & M'Cord 331.

440. Where on an indictment for gaming the prosecutor was unable to testify to particular facts except from seeing them in an affidavit made by himself at the time that he had seen the offence committed, the evidence was held admissible. *Ib.*

441. A conversation of deceased with a third person, or acts of deceased which never came to the knowledge of the prisoner, cannot be received in evidence. *State* v. *Zellers*, 2 Halst. 220.

442. *Quere*, whether under the Georgia statute, which renders slave testimony incompetent against a free white citizen, those propositions be maintainable. *Studstill* v. *State*, 7 Geo. 2.

443. As between free white persons, however, the authorities all agree that the record of the conviction of the principal is evidence against the accessory, subject to be rebutted by showing satisfactorily that the principal was not guilty; and if the prisoner may in his defence resort to parol testimony to establish that, notwithstanding the record, the crime was not in fact committed, or that his principal was innocent, it follows necessarily that it may be offered on the part of the prosecution to show his guilt, and nothing can be better for this purpose than the free and voluntary confessions of the party. *Ib.*

444. In South Carolina, in the *State* v. *Sims* (2 Bailey's Rep. 20), the Court held that the record of the conviction of a slave before a court of magistrates and freeholders, as principal in the felony, might be given in evidence on the trial of an indictment against a free white man as accessory before the fact, and that the confessions of the slave of his own guilt as principal are admissible in evidence on the trial of a free white man as accessory before the fact. *Ib.*

445. One charged as an accomplice was proved to have been concerned in a commission of a felony. After this proof in corroboration of his testimony as an accomplice, it was held competent to prove any act or declaration of his which went to show that he and his associate did commit the felony. *State* v. *Ford*, 3 Strob. 517.

446. Proof of the declarations which show the inception in the mind of the prisoner of a scheme of villany, which is afterwards developed by an act done and for which he is on trial, is competent; remoteness of the time when such declarations were made, cannot in such case render them incompetent. *Ib.*

447. Testimony to prove "that some of the property which the defendant was charged with having obtained by means of threats from A., was afterwards found in a concealed state in the dwelling-house of said B.," was admissible, on the ground that it might have a tendency to corroborate the testimony of the witness by satisfying the jury that the defendant was conscious of having improperly obtained it. *State* v. *Bruce*, 11 Shepley 72.

448. Where a hearing is had before a magistrate upon the complaint of a town grand juror, charging a person with the commission of a crime, and the respondent is by the magistrate bound over for trial by the County Court, and an indictment is laid against him, and before a trial is had upon the indictment, a witness, who was sworn before the magistrate, dies; proof may be received on trial upon the indictment, to show what witness testified before the magistrate. *The State* v. *Hooker*, 17 Vt. 658.

449. Proof of what a deceased witness testified to on a preliminary ex-

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amination before a justice of the peace, touching the same charge for which the accused stands indicted, is admissible against him, although the examination was not reduced to writing. *Davis* v. *State*, 17 Ala. 354.

450. In such a case it is not necessary to prove the language used by the witness in giving his testimony, its substance is all that is required. *Ib.* Vide *State* v. *Hooker*, 17 Vt. 658.

451. But proof of what a deceased witness testified to on a former trial is not admissible, unless the point in issue is the same. *Davis* v. *State*, 17 Ala. 354.

452. The fact of the party being intoxicated, has indeed been holden to be a circumstance proper to be taken into consideration, where the sole question is, whether an act was premeditated, or done only with sudden heat and impulse. *Kelly* v. *State*, 3 Smed. & Marsh. 518.

453. Where the defendant's counsel asked a witness if he had not heard a negro slave confess that he had stolen the goods in question, and the Court refused to permit the witness to answer this question; held that this was clearly right. *Rhea* v. *State*, 10 Yerg. 258.

454. Evidence that the offence proved before the jury (and of which the jury found the defendant guilty), is another and different offence from that which was proved before the grand jury who found the bill, is admissible. *Spratt* v. *State*, 8 Mo. 247.

455. It is competent, in support of a prosecution, to show that the accused advised an accomplice to break jail, and make his escape. *People* v. *Rathbun*, 21 Wend. 509.

456. Evidence that the accused refused to escape and go beyond the reach of the process of this State, after being informed of the charge brought against him, although he was advised to do so, and it was certainly practicable to have made his escape, is inadmissible. *Ib.*

457. It is matter of discretion with the Court before whom a trial is had, whether they will or will not require counsel to disclose what they expect to show by a witness before he is examined, where the case is one of delicacy and importance, and the evidence is nicely balanced, and the scale is liable to be affected by slight circumstances; courts are vigilant in preventing any extraneous or irrelevant matter from being brought before the jury. *People* v. *White*, 14 Wend. 111.

458. In such cases counsel will be required to state the substance of what they expect to prove, in order that, if irrelevant or improper, the evidence may be rejected; when the lines of the case are more broadly marked, less caution is needed, as the rights of the parties may be sufficiently protected by the Court deciding upon the competency or relevancy of the evidence as it falls from the witness. *Ib.*

459. In this case, the Court of Oyer and Terminer were requested to direct the district attorney to state what he expected to prove by a witness who was about to relate a conversation with the accused, which request was overruled, and the witness stated the prisoner's confession, that he had been the inmate of a State prison. This Court held that this was precisely one of those cases in which the request of the prisoner's counsel should have been granted. *Ib.*

460. In prosecutions for having counterfeit notes in possession, proof that other counterfeits were found secreted in prisoner's house, and in possession of his wife, is admissible. *Hess* v. *State*, 5 O. 5.

461. On a trial for stealing a slave, counsel for the State proposed to read to the jury the following memorandum, written in pencil, in the pocket-book of the defendant, and taken from his custody—Wilkins, Paul Tower. These were the names of the owners of the slaves with whom the defendant was proven to be in communication. Defendant's counsel objected, on the ground that the entry was not shown to be in the hand-writing of the accused, but the Court overruled the objection, and the defendant, by his counsel, excepted; held that the testimony was properly admitted. *Whaley* v. *State*, 11 Ga. 123.

462. It is admissible for one of the witnesses, sworn on the trial, to state,

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that in consequence of what was said to him by a negro, that he was induced to change his position in watching for the defendant. *Ib.*

463. If flight is a circumstance, however slight, which tends to criminate the accused, then proof that the prisoner offered money in order to effect his escape, is admissible. *Ib.*

464. On a criminal prosecution for stealing a slave, evidence is not admissible of conversations held by the prisoner with other slaves, eighteen miles from the place where the offence is charged to have been committed. *State* v. *Wisdom*, 8 Porter 511.

465. Where the defendants are indicted for a riotous assault upon an officer while serving a legal precept on C., who was charged with larceny in another State, and with being a fugitive from justice; held that the defendants could not introduce evidence that B., who claimed the custody of C. as a fugitive slave, had declared, and that the officer knew B. had declared that A. had not committed larceny, and that the charge was made merely for the purpose of getting A. into custody, so that he could the more easily be carried home. *Com.* v. *Tracy*, 5 Metc. 536.

466. A memorandum of the testimony of the witnesses examined before the coroner, taken by a person who was present, is not competent evidence, if it be proved. *State* v. *McElmurray*, 3 Strob. 33.

467. In giving evidence of matters in aggravation, the distinction is, that where the aggravating matter is the immediate consequence of the offence, for which the defendant is on trial, it may be shown; but if it is a distinct crime, not necessarily connected with the offence charged in the indictment, it cannot be received. *Baker* v. *State*, 4 Ark. R. 56.

468. It is not competent for a prosecutor to prove a man guilty of one felony by proving him guilty of another; but where several felonies are connected together, and form part of one entire transaction, then the one is evidence to prove the character of the other. *Ib.*

469. Where it becomes necessary to prove a guilty knowledge on the part of the prisoner, evidence of other offences committed by him, though not charged in the indictment, is admissible for that purpose. *Ib.*

470. If it be material to show the intent with which the act charged was done, evidence may be given of a distinct offence, not laid in the indictment. *Ib.*

471. Thus, upon an indictment for maliciously shooting, if it be questionable whether the shooting was by accident or design, proof may be given that the prisoner at another time intentionally shot at the same person. *Ib.*

472. Where the prisoner was charged in the indictment, first, with maliciously stabbing and cutting R. S., with intent to murder; secondly, with intent to disable him; and thirdly, with intent to do him some grievous harm; the Court permitted evidence that the stabbing was done in attempting to make an arrest as constable. *Ib.*

473. Hence, upon an indictment for shooting at, and shooting A. B., evidence that A. B. was a constable then engaged in arresting the prisoner, in the discharge of his official duty, is competent, although there is no mention of his official character in the indictment. *Ib.*

474. The statute defining maiming to be unlawfully disabling a human being, by depriving him of the use of a limb or member, or rendering him lame, or defective in bodily vigor, it is implied that the act being unlawful in itself, evidences a malicious intent, and it is immaterial by what means, or with what instrument the injury is effected, or whether the party is deprived of the use of a limb or member, or rendered permanently lame, or whether his bodily vigor is merely affected by his strength, activity, or the like, being decreased. *Ib.*

XII. Miscellaneous.

475. The jury being charged in a criminal case, a motion was made that the witnesses in support of the prosecution should be sworn, and sent out of the hearing of the Court. A similar mo-

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tion was made as to the defendant's witnesses. The motions being allowed, the witnesses were sworn, and sent out. After they were all examined, a motion was made by the Solicitor-General that he have leave to introduce as a witness a person who had been in Court, and heard the examination of the other witnesses. The motion allowed; for, although by the Common Law, the Crown could claim as a matter of right, that the accused be examined in the absence of each other, yet no such right was allowed to the accused as to the witnesses against him. In this State no privilege is allowed to the State which is denied to the accused, and any rule as to the examination of witnesses, must work both ways. *State* v. *Sparrow*, 3 Humph. 487.

476. The Constitution having declared that every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony, this right is not forfeited if, either through inadvertence or design, he omit to call his witnesses when directed to do so. Such also is the rule as to the State. The Court can only propose a separation of the witnesses, it cannot compel either party to call in witnesses until the time comes when, according to the rules of the Court, the party may call on them to be examined. *Ib.*

477. It is true, the right thus secured must be claimed at the proper time and stage of the trial, and that is, as to the accused, when he is called on to make his defence, and offer his witnesses and proofs. *Ib.*

478. Witnesses who are present when other witnesses are sent out under the rule, cannot be examined, as a matter of right; and from the operation of this rule, attorneys-at-law are not excluded. *State* v. *Brookshire*, 2 Ala. Rep. 303.

479. If a witness sent out under the rule, return of his own accord, or if a witness should arrive pending the trial, and hear the testimony, or a part of it, his introduction as a witness will depend on the discretion of the Court. *Ib.*

480. Whether a bank-note offered in evidence on an indictment for counterfeiting, be subscribed H. or N. Biddle, is a question of fact, and the decision upon it cannot be raised in error, unless the note accompanies the record. *Quere*—If it can be alleged as error. *Hess.* v. *State*, 5 O. 5.

481. Where the Supreme Court of Tennessee had adjudged an act of the General Assembly unconstitutional, which established a county; it was held that a circuit judge had the authority on the trial of a cause, to declare to the jury his judicial knowledge of such decision of the Court in the specified case, and the result of such decision in establishing the boundaries of counties. *Cash* v. *State*, 10 Humph. 111.

482. On an indictment for spiriting away a witness, it seems not to be important to prove the materiality of his testimony. *The State* v. *Early*, 3 Harrington 562.

483. In an indictment under the statute, for an assault with intent to kill, the intent must be proved: and is not to be presumed from the act, as malice is. *The State* v. *Negro Bill* (a slave,) 3 Harrington 571.

484. On the trial of criminal cases, mathematical or metaphysical certainty, or direct and irrefragable evidence, is not required; all that the law requires is moral certainty, that is, that the jury, whether the evidence be positive or presumptive, should be satisfied of the accused's guilt; and in such case a mere vague conjecture or possibility of his innocence, or anything short of a reasonable doubt, will not warrant his acquittal. *Giles* v. *State*, 6 Ga. 276.

485. Material testimony of no witness can be excluded from the jury, unless the witness is interested in the event of the suit, or has been convicted of an infamous crime. Improper conduct in the witness, suppressions or alterations in his testimony, cannot take his testimony from the jury; they go to his credit, and that rests with the jury. *State* v. *Roe*, 12 Vt. Rep. 93.

486. Where the evidence is not stated in reservation of a question for the decision of the Supreme Court, and in the absence of any request to modify a charge, the charge will be considered as warranted by the facts, and its cor-

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rectness in point of law will alone be considered. *State* v. *Morea*, 2 Ala. 275.

487. It belongs to the jury to judge of the credibility of witnesses, and ascertain the truth of contested statements; yet this must be done by a deliberate examination of the weight of the respective characters of the witnesses, and the consistency and probability of their statements, and not by experiments, such as sending the constable out of the room, closing the door, and then talking, with a view to learn whether their voices could be heard out of doors, or running, with a view to ascertain whether their tracks would be longer or shorter than when walking, and the like. *Jim* v. *the State*, 4 Humph. 289.

488. A witness for the State was asked by the prisoner's counsel, whether he had not made certain statements to two persons who were named, or any other person, which he denied. The two persons thus named were examined, and testified that he had made the statement imputed, when another being called, and the same question propounded to him, on motion of the solicitor, he was not permitted to testify. The prisoner's counsel then proposed to call back the State's witness, and ask him whether he had not held the conversation imputed to him with the last witness, which the Court refused; held that the Court ruled correctly in refusing to permit the last witness to testify, and that not permitting the State's witness to be called back was a matter of discretion, and not revisable in this Court. *State* v. *Marler*, 2 Ala. 43.

489. Where a jury, after a case is submitted to them, and they have gone out, return, and make an inquiry of the Court as to a fact, it is within the discretion of the Court to admit testimony respecting the matter of such inquiry. *The Com.* v. *Ricketson*, 5 Met. 412.

490. To an exception for the rejection of evidence, it is sufficient answer that it was irrelevant. *The State* v. *Arnold*, 13 Iredell's N. C. R. 184.

491. Where evidence offered is irrelevant in law, and calculated to mislead or prejudice the minds of the jury, it would be error in the Court to receive it. *Ib.*

492. The Court may, in its discretion, permit witnesses to be recalled and examined at any time before the jury retire, in criminal as well as civil cases, in order to supply testimony that has been omitted by inadvertence or mistake. *Freleigh* v. *State*, 8 Mo. 606.

493. A motion for leave to introduce a witness after the examination of witnesses has been closed, is addressed to the sound discretion of the Court. *Vicaro* v. *Commonwealth*, 5 Dana 504.

494. Where a word is abbreviated in a written instrument, evidence may be offered to show its meaning, or what particular word it was intended to abbreviate. *Hite* v. *the State*, 9 Yerg. 357.

495. Where, on a trial before a Court of Special Sessions, the prisoner's counsel agreed that one of the depositions thus taken might be read, provided time was given him to procure testimony in order to show the witness' incompetency, from defect of religious belief, and a postponement for several days accordingly took place; held that the Court having afterwards heard such testimony, and decided in favor of the witness' competency, the prisoner could not recede from his agreement, and prevent the reading of the deposition. *Bebee* v. *People*, 5 Hill 32.

496. No artificial rules ought to be allowed to exclude any fact from the jury, however remotely relevant or from whatever source derived, which would assist them in coming to a satisfactory verdict. *Johnson* v. *the State*, 14 Ga. 55.

497. In the ordinary case of an alibi, where a party charged with a crime attempts to prove that he was in another place at the time, all the evidence tending to prove that he committed the offence, tends in the same degree to prove that he was at the place when it was committed; if, therefore, the proof of the alibi does not outweigh the proof that he was at the place when the offence was committed, it is not sufficient. *Com.* v. *Webster*, 5 Cush. 295.

498. If an immaterial fact is stated by a witness of his own accord, or as

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introductory merely to material testimony, or if the party who calls a witness is permitted without objection to question him as to immaterial facts, the irrelevant testimony must be regarded in the same manner as if it had come out on cross-examination. *Com.* v. *Buzzell*, 16 Pick. 153.

499. In a criminal case, the public prosecutor will not be permitted to use the testimony given by a witness at a previous trial of the same indictment, though he be absent from the State. *People* v. *Newman*, 5 Hill 295.

500. *Quere.* Whether even the death of the witness will warrant a resort to his former testimony by the public prosecutor. *Ib.*

501. The prosecution has no right, upon the trial of an indictment, to give in evidence an anonymous letter, written by a stranger, though a witness for the prosecution had spoken of it on the direct examination, and had been cross-examined concerning the circumstances under which it was received by the accused's counsel, its contents not having been disclosed on such examination. *People* v. *Costello*, 1 Denio 83.

502. When there is proof that a person conspired to commit a murder subsequently perpetrated, it is not in itself to be taken as *a legal presumption* of his having aided, but it is to be weighed as evidence tending to prove the fact. *Com.* v. *Knapp*, 9 Pick. 496.

503. According to a well-settled rule in criminal cases, if a prisoner's guilt be clearly made out by proper evidence, in such a way as to leave no doubt in the mind of a reasonable man, his conviction ought not to be set aside because some other evidence was received which ought not to have been. *State* v. *Ford*, 3 Strob. 517.

504. A deaf and dumb person capable of relating facts correctly by signs, may give evidence by signs, through the medium of an intepreter, though it appear that such person can read and write and communicate ideas imperfectly by writing. *State* v. *De Wolf*, 8 Conn. 93.

505. The rules of evidence are the same in criminal as in civil cases. *State* v. *Rawls*, 2 Nott & McCord, 331.

506. A grand juror, on the trial of an indictment, may be compelled to disclose what was given in evidence by a witness before the grand jury. *State* v. *Broughton*, 7 Iredell 96.

507. In a criminal prosecution, the only legitimate purpose for which the accused can introduce evidence to show hostile feelings towards him on the part of a witness for the State, is to impeach his credit, and where, after such witness had testified to commissions by the accused of the offence charged, at different times, it is proven that he did *a particular act* to entrap the accused, and thereby to procure additional evidence against him, it is not error in the Court to refuse to instruct the jury that they might consider it as a circumstance tending to show that the witness had no proof before that time that would convict the defendant. *Rassett* v. *State*, 16 Ala. 362.

508. The effect of the evidence is of course to be decided by the jury. *State* v. *Clark*, 12 Iredell 151.

509. The process of reasoning and drawing conclusions from facts and circumstances is the same, whether the case under consideration is a mere contest respecting the rights of property, or one involving the life of an individual, except that in criminal cases the defendant must be presumed to be innocent until the contrary is clearly established by proof which leaves no reasonable doubt on the mind. *The People* v. *Thayers*, 1 Parker's Crim. R. 596.

510. In order to obtain a venire de novo for the admission of improper evidence, it is not sufficient to state the matter rendering it probable that such evidence may have been received, but it is indispensable to state the evidence itself, otherwise the Court cannot see that the evidence was illegal, and judgment will be affirmed. *State* v. *Clark*, 12 Iredell 151.

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EXTORTION.

I. Extortion defined; Indictment; how the offence should be charged.
II. Competent evidence on the trial for extortion; Evidence necessary to convict.

I. Extortion Defined—Indictment: how the Offence should be Charged.

1. The exaction of a fee by an officer, before it is due, will be extortion by Common Law. *Com.* v. *Bagley*. 7 Pick. 276.

2. The Massachusetts statute of 1795, c. 41, regulating fees, does not repeal the Common Law in this respect. *Ib.*

3. A justice of the peace taking larger fees than the law allows, is not liable for extortion, unless he does it with the intention of oppressing. *Respublica* v. *Hammond*, 1 Yeates 71.

4. The Massachusetts statute of 1795, c. 41, does not, it seems, authorize the thirty cents taken by officers for levying executions in addition to the poundage; but where it is the custom to take it, the demand and receipt of it by the officer is not prima facie evidence of a corrupt intention. *Commonwealth* v. *Shea*, 1 Mass. 277.

5. Where a county treasurer exacts and receives from a tax-payer a fee as for a distress and sale of his goods for taxes, when none have actually been made, he is guilty of extortion. *State* v. *Burton*, 3 Ind. Rep. 93.

6. Where a cause is discontinued before a justice, by the laches of a plaintiff, the justice has no jurisdiction; and if he proceed in it, his proceedings are coram non judice, and invalid. *People* v. *Whealey*, 6 Cow. 661.

7. Where, upon such a trial, it appeared that the property of the debtor, sold on execution, was sufficient to pay the officer's fees, but that they were paid by the creditor; it was held that such fees were a charge to the debtor, and that the payment by the creditor was voluntary, and therefore the officer was not guilty of the offence charged. *Com.* v. *Dennie*, Thacher's Crim Cas. 165.

8. Where a defendant appeared before a justice, on a summons returnable at 10 A. M.; and waited till about 12 o'clock, when the justice informed him he (the justice) must tax the plaintiff with the costs, upon which the defendant departed; but the justice afterwards adjourned the cause to another day, and gave judgment as upon the summons with 3 or 4 dollars costs; and the defendant afterwards paid to the justice the amount of the note on which the suit was brought; and the justice exacted the costs, which the defendant refused to pay in full, but paid the justice 12½ cents; held that this was extortion in the justice, for which he might be indicted and punished criminally. *People* v. *Whealey*, 6 Cow. R. 661.

9. Held, also, that the motives of the justice, as whether corrupt, or whether he acted through a mistake of the law, were a proper question to be submitted to the jury. *Ib.*

10. Held, that he was right in receiving the money on the note, as the agent of the plaintiff, but the extortion lay in receiving the 12½ cents under the pretence of the judgment. *Ib.*

11. Extortion is the taking of money by an officer, by color of his office, either where none at all is due, or not so much due, or when it is not yet due. *Ib.*

12. Indictment cannot be found at Common Law against an officer, for taking illegal fees; the remedy is under the Pennsylvania statute of March 28, 1814, § 20. *Commonwealth* v. *Evans*, 13 S. & R 426.

13. When an indictment is laid for extortion, it must allege what was due, and what was received beyond the lawful fees. *Halsey* v. *State*, 1 South. 323.

14. Extortion may be charged generally, in an indictment by color of office. *People* v. *Whealey* 6 Cow. 661.

15. Where an indictment lies against a constable, for extortion, in Indiana, it need not be alleged what sum the defendant extorted. *The State* v. *Stotts*, 5 Blackf. 460.

16. Where an indictment for extortion charged a constable with having collected more than was due on an execution, it should set out the recital in the execution showing the judgment on which the execution issued, and the names of both parties to the execution

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should be stated. *Leary* v. *the State*, 6 Blackf. 403.

17. Where an indictment alleged that the defendant, as constable, travelled four miles to serve an execution, for which travel he was entitled as mileage to sixteen cents; that corruptly, &c., he extorted thirty-two cents for said mileage, whereas but sixteen cents were due, &c.; held that the indictment was good. *Emory* v. *State*, 6 Blackf. 107.

18. Where an indictment lies for extortion, the money may be alleged to have been extorted from a county. *The State* v. *Moore*, 1 Smith 316.

II. Competent Evidence on the trial for Extortion — Evidence necessary to Convict.

19. An execution for $110 43, is not competent evidence to support an indictment for extortion, which charges a constable with having collected more than was due on an execution for $64. *Leary* v. *the State*, 6 Blackf. 403.

20. Where upon the trial of a deputy sheriff for receiving extorsive fees in the service of a writ and execution, the indictment alleged that the writ upon which the execution was founded bore date the 20th day of a certain month; held that a writ dated the 10th day of the same month, offered as the foundation of the execution, was inadmissible, and that the variance was fatal. *Com.* v. *Devine*, Thacher Crim. Cas. 165.

21. In Mass., on the trial of an indictment of a deputy sheriff, for charging extorsive fees contrary to the act of 1795, c. 41, evidence of the construction put upon the statute by officers generally, is incompetent. *Ib.*

22. The receiving a negotiable promissory note by an officer for fees not due, will not sustain an indictment found under the statute for extortion. *Commonwealth* v. *Corey*, 2 Mass. 523; *Commonwealth* v. *Pease*, 16 Mass. 91.

23. Where upon the trial of a deputy sheriff for receiving extorsive fees, it was proved that the money was not paid, but that a note was given by the debtor which was unpaid; held that this would not warrant a conviction. *Com.* v. *Devine*, Thacher's Crim. Cas. 165.

24. Where, on a trial for extortion, it appeared that a writ was handed to the officer, upon which property was attached, and on the same day another writ was handed to the officer in substitution for the other, and that upon a settlement between the parties to the suit, the first writ was returned to the plaintiff, and the last was retained by the officer, and not produced at his trial, and that the fees of the officer for a service had been paid; it was held that the jury might presume that the writ, if produced, would show a legal service by the officer. *Leary* v. *State*, 6 Blackf. 403.

25. Where on such trial it appeared, also, that upon a settlement between the parties, it was agreed that the defendant in the suit should pay for the service, and the plaintiff paid the officer his fees, and received the note of the debtor therefor; it was held that the officer who was not a party to such settlement might lawfully demand his fees of the plaintiff, and that such payment was not voluntary in consequence of such agreement. *Ib.*

26. Where a deputy sheriff is on trial for receiving extorsive fees in the service of a writ, evidence must be first given of the existence of the writ and its delivery to the officer. *Ib.*

FELONY.

Felony defined—Statute respecting—Benefit of Clergy—Miscellaneous.

1. When a prisoner is confined in the county prison on a conviction of petit larceny, and breaks prison, it is a felony, for which he may be sentenced to imprisonment in the State Prison for a period not exceeding fourteen years. *People* v. *Duell*, 3 John's Rep. 449.

2. In Missouri, a felony is an offence for which a party on conviction *may* be imprisoned in the penitentiary, and not where, on conviction, he *must* be so imprisoned. *Johnston* v. *State*, 7 Mo. 183.

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3. It is a felony for one who elopes with another's wife, to take his goods, though with the consent and at the solicitation of the wife. *People* v. *Schuyler*, 6 Cow. 572.

4. An offence which is made felony by statute, whether it were a felony at Common Law or not, must be charged to have been committed feloniously. *State* v. *Murdoch*, 9 Mo. 730.

5. The act of malicious shooting, by the act of February 20th, 1817, is made a felony. *Trimble* v. *Commonwealth*, 2 Vir. Cas. 143.

6. In Indiana, a crime punishable by confinement in the penitentiary, is deemed a felony. *The State* v. *Smith*, 8 Blackf. 489.

7. The *uttering* a forged instrument, being punishable by imprisonment, is made a felony by the provisions of sec. 18, ch. 161, R. S. *People* v. *Brigham*, 2 Mich. 55.

8. Under the statute (1 Rev. Code, c. 154, sec. 1) of Virginia, it is felony to pass a counterfeit note of the Bank of the United States dated when that Bank was in existence, though at the time of passing the note, the charter of the bank had ceased to exist. *Buckland's case*, 8 Leigh 732.

9. Since the act of the 30th Sess., c. 173, § 1, it is not a felony in the State of New York to utter and publish a forged bank-note of another State for the payment of a sum less than one dollar; nor is a person possessing such a note with intent to utter it, liable to indictment under the act of the 31st Sess., c. 155, sec. 7. *People* v. *Wilson*, 6 John. 320.

10. Although the forging of a general indent of this State is not made a capital offence by the act of Assembly, which authorizes the issuing of the same, yet the forging of a receipt on the back of such indent, for the accruing annual interest which appears to be payable from the face of it, with an intent to give the said indent currency, and uttering the same in order to defraud, is felony without the benefit of clergy, under the statute of Geo. II. c. 25, made of force in this State. *State* v. *Washington*, 1 Bay's Rep. 120.

11. Contrivance to commit a felony, and executing the contrivance, cannot be punished as an offence distinct from the felony, because the contrivance is a part of the felony when committed pursuant to it. *Com.* v. *Kingsbury*, 5 Mass. 106.

12. An offence in regard to which the Court is invested with discretionary power to punish it, either by imprisonment in the State prison, or by fine, or by imprisonment in the county jail, is within the statutory definition of felony. If the offender, on conviction, be liable to imprisonment in the State prison, he is guilty of felony, though he be also liable to the infliction of a less severe punishment. *The People* v. *Vasteenburgh*, 1 Park. Crim. 39.

13. A violation of the seventh section of the act entitled "an act to prevent persons appearing disguised and armed," passed January 28, 1845, is held to be a felony; and the killing of a human being by persons engaged in the violation of that section, though the act be committed without any design to effect death, is murder. *Ib.*

14. To constitute a capital felony in the case of stealing, &c., slaves, the taking and conveying away of the slave must be from the *possession of the owner*. The felony is not created by our statutes when, before the taking or carrying away, the owner has lost the possession of the slave by the act of another, even though such act was procured to be done by the person charged with felony, for a felonious purpose. *State* v. *Martin*, 12 Iredell 157.

15. Neither the act of 1779, R. Stat. ch. 34, sec. 10, nor the act of 1848–9, ch. 35, constitutes a felony in such a case. *Ib.*

16. In South Carolina, forging an order for the delivery of goods, is felony within the meaning of the statute, though no precise words are necessary to constitute the offence, if it is calculated to deceive and defraud. But if the indictment states the offence to be against a *British* act of parliament made of force here, when, in fact, no such act had ever been made of force, instead of concluding against the act of the legislature of the State, it is a good ground to arrest the judgment. *State* v. *Holly*, 2 Bay 262.

17. On the trial of an indictment for passing a counterfeit check, or order,

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of a president of a branch of the United States on the cashier of the bank, payable to A., or order, and endorsed by A. to bearer, it was held that whether the charter of the Bank of the United States was constitutional or not, and whether the charter authorized the issue of such checks or orders or not, the counterfeiting or passing such counterfeits of such checks or orders, was felony within the meaning of the statute of Virginia (1 Rev. Code, c. 154, § 4). *Hendrick's case*, 8 Leigh 707.

18. When wild bees remain in the tree where they have hived, they are not the subject of felony, though the tree is on the land of another who has confined them in it. *Wallis* v. *Vease*, 3 Binn 546.

19. In South Carolina a slave cannot be guilty of committing a felony. *The State* v. *Wright*, 4 McCord 358.

20. An assault with intent to murder, is not a felony either at Common Law, or by statute of 1804, c. 123. *Com.* v. *Barlow*, 4 Mass. 439.

21. The breaking and entering a dwelling-house with intent to cut off an ear of an inhabitant, is not a felony. *Com.* v. *Newell and others*, 7 Mass. 245.

22. It is questionable whether a person ought ever to be convicted of a felony on the uncorroborated testimony of a prosecutor who claims the property in question, to which the defendant also claims title, where the transaction was not attended with any of the usual concomitants of larceny, as concealment, for example. The Court, upon conviction, ordered a new trial. *The State* v. *Kane*, 1 McCord 482.

23. On the trial of an indictment for horse stealing, it was held that to make out a case of felony, there must be a trespass in the original taking. *The State* v. *Braden*, 2 Overt. 68.

24. Where conviction of a felony does not work a forfeiture, it is held that a civil action is not merged in a felony. *Robinson* v. *Culp*, 1 Const. Rep. 231.

25. In Maine, the Rev. Stats. c. 167, § 4, by providing "that every person who shall counsel, hire, or otherwise procure a felony to be committed, which shall be committed in consequence thereof, may be indicted, and convicted of a substantive felony, whether the principal felon shall or shall not have been convicted, or shall or shall not be amenable to justice," does not do away with the Common Law distinction between principal and accessory, but preserves clearly the difference between the two. *The State* v. *Ricker*, 29 Maine (16 Shep.) 84.

26. A substantive felony, is one which depends upon itself, and does not depend upon another felony, which is established by the conviction of the one who committed it alone. *Ib.*

27. The act of burning a stack of hay, is not a felony either by Common Law, or by the acts of 1809, ch. 138, and 1845, ch. 181. *Black* v. *State*, 2 Maryland 376.

28. The indictment in this case, charged that the traverser feloniously, unlawfully, wilfully, and maliciously did burn a stack of hay, against the form of the act of Assembly, &c. The jury rendered a verdict that he did feloniously, unlawfully, wilfully, and maliciously burn said stack of hay. Held that as the offence charged is not a felony, no valid judgment could be pronounced on such an indictment and verdict. *Ib.*

29. The case of *Hess* v. *the State of Ohio*, 5 Ohio 13, overruled, and the case of *Commonwealth* v. *Newell and others*, 7 Mass. 245, which decides that an indictment for a felony cannot be sustained as an indictment for a misdemeanor, approved and adopted. *Ib.*

30. A party convicted of an infamous crime is at Common Law disqualified thereby as a witness, and by the Constitution of this State deprived of the elective franchise; and the traverser in this case having been convicted of an infamous crime, to wit, a felony, when, according to legal definition, the offence proved against him was not of that character; held that according to the principles of the law of pleading in criminal cases, no valid judgment can be pronounced against him. *Ib.*

31. Where, upon a conviction for a clergiable offence, the defendant prays the benefit of clergy, and the attorney-general or solicitor for the State objects, upon the ground that the pris-

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oner has before had the benefit of clergy allowed him; he must present this objection in the form of a counter-plea, in writing. *State* v. *Carroll*, 2 Iredell 257.

32. Where a prisoner prays the benefit of his clergy, a counter-plea may be filed in the name of the prosecutor, "for and in behalf of the State," if the same be adopted by the attorney-general, though it should properly be in the name of the attorney-general. *State* v. *Carroll*, 5 Iredell 139.

33. If the prisoner contends that the offence for which he now prays his clergy, was committed before his allowance of clergy for a former offence, he must avail himself of that defence by a plea of pardon, when brought up for judgment, or by a special replication to the counter-plea. *Ib.*

34. The act of assembly, in Virginia, which directs that on a change of venue, in a case of felony, the judge shall certify the recognizances, together with a copy of the record of the case, and all other papers which he may deem necessary for the trial, does not make it necessary that he should certify a copy of the record of the examining court. *Vance* v. *Com.*, 2 Virg. Cas. 162.

35. Previous to the act of 1804, a person might be tried in the District Court, for felony, although there had been no inquiry before a court of examination. *Com.* v. *Blakeley*, 1 Virg. Cas. 129. Aliter, since that act. *Anon.*, 1 Virg. Cas. 144.

36. It is held that a person guilty of a felony should be proceeded against criminally, before a civil action can be brought, because he should not be convicted of a felony, unless upon a direct charge of a crime. *Robinson* v. *Culp*, 1 Const. R. 231.

37. In all cases of felony, before the passing of sentence, the Court should demand from the accused what he has to say why judgment should not be pronounced against him; and the fact that the accused was present, and that such demand was made of him, ought to appear upon the record. *Safford* v. *the People*, 1 Parker's Crim. R. 474.

FORCIBLE ENTRY AND DETAINER.

I. The Offence of Forcible Entry and Detainer.
II. Statutes respecting; Warrant of Arrest, how Served; Evidence.
III. Of the Indictment, &c.
IV. Miscellaneous.

I. The Offence of Forcible Entry and Detainer.

1. At the Common Law, no trespass on chattels was an indictable offence, without a breach of the peace; that is, either the peace must be actually broken, or the act complained of must directly and manifestly tend to it, as being done in the presence of the owner, to his terror, or against his will. *The State* v. *Phipps*, 10 Iredell 17.

2. To constitute the offence, there must be a demonstration of force, as with weapons, or a multitude of people, so as to involve a breach of the peace, or directly tend to it, and be calculated to intimidate, or put in fear. *State* v. *Ray*, 10 Iredell 39.

3. In order to constitute forcible entry, the possession must be quiet, peaceable and actual, and the entry attended with actual force and intimidation; and unless such possession and such entry are shown, surety of the peace cannot be granted against future repetition. *The Com.* v. *Keeper of the Prison*, 1 Ashmead 140.

4. Every unlawful entry upon the possession of another, is, in the eye of the law, a forcible entry; but it must be an actual and not a mere constructive possession. Two persons cannot be in the actual possession of the same land at the same time; and wherever the unlawful entry of one necessarily dispossesses the other, an indictment for a forcible entry may be maintained; and although the possession may have been surreptitiously obtained, yet if it is maintained by force, the entry will be considered forcible. *Burt* v. *State*, 2 Constitutional R. 489.

5. Where A. had possession of a tenement consisting of a main building

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and a shed attached, and locked the door of the shed, in which he had some tools, &c., and leaving a tenant in possession, went away, intending to return, and afterwards, the tenant admitted B. into the peaceable possession of the main building; held that B. was not indictable for a forcible entry in breaking into the shed, and assuming possession of that. *State* v. *Pridgen*, 8 Iredell 84.

6. When the main body of the house ceased to be, in law, the dwelling-house of A., each room lost that character. *Ib.*

II. Statutes Respecting—Warrant of Arrest, how Served—Evidence.

7. The statute of New Jersey, entitled an act concerning forcible entries and detainers, has not abolished or repealed the Common Law upon the subject. *Cruiser* v. *the State*, 3 Har. 206.

8. The stat. 8 H. 6, which enables and authorizes justices of the peace, upon inquiry, to give restitution of possession to tenants of any estate of freehold of lands or tenements, entered upon with force or withheld by force, is operative in South Carolina. *State* v. *Speirin*, 1 Brev. R. 119.

9. In New Hampshire, the intention of the legislature was, that in case the person against whom the warrant issued was not arrested more than four days before the day of trial, a copy of the warrant should be left at his usual place of abode, and that in all cases he should have notice of the trial at least four days before the time appointed. *State* v. *Sawyer*, 5 N. Hamp. R. 398.

10. If the arrest be not made at least four days before the day of trial, a copy must in all cases be left, and a return of an arrest will not be deemed a good service of warrant unless it be also returned: either that the arrest was made four days before the day appointed for the trial, or that a copy was left the like number of days before that day. *Ib.*

11. Proof of actual possession is sufficient to sustain the allegation in the inquisition that the complainant was possessed in fee simple. *People* v. *Van Nostrand*, 9 Wend. 50.

12. The person who is to be entitled to a restitution of possession in case of a conviction on an indictment of forcible entry, cannot be a witness on the trial; and if the indictment has been found on his single testimony, it ought to be quashed. *State* v. *Fellows*, 2 Hay. 520.

13. On an indictment for a forcible entry and detainer, the title to the premises does not come in question; but it is enough for the complainant to recover if he shows himself to have been in peaceable possession before the accused's entry. *People* v. *Leonard*, 11 Johns. R. 504.

14. Peaceable possession is evidence of seizin to sustain the allegation in the indictment that the complainant was seized. *Ib.*

15. An indictment charging a forcible trespass for taking a slain deer, is not supported by evidence of the forcible taking of a deer-skin severed from the body of the deer. *State* v. *Hemphill*, 3 Dev. & Batt. N. C. Rep. 109.

16. An indictment for a forcible entry into the field of the prosecutor, cannot be supported by evidence that the defendant peaceably entered the field, but while there threw stones against the house of the prosecutor, situated adjoining the field, the prosecutor at the time being in the house and not in the field. *State* v. *Smith*, 2 Iredell 127.

17. In an indictment at Common Law for a forcible entry, it is sufficient to prove that the defendant entered with such force and violence as to exceed a bare trespass. *State* v. *Pollock & Humph.*, 4 N. C. Rep. 305.

18. The same circumstances of violence or terror which will constitute a forcible entry, will also constitute a forcible detainer. *Kline* v. *Rickert*, 8 Cow. 226.

19. Threats of bodily hurt to the previous possessor if he shall return, though he make no attempt to re-enter. *Ib.*

20. The accused, having entered peaceably, said to the former possessor, "it will not be well for you if you ever come upon the premises again, by day or night," it was left to the jury whether

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this was a threat of personal violence, and therefore a forcible detainer within the statute. They found it was, and on motion for a new trial it was refused. *Ib.*

21. Where a proprietor of a school employed a person as a steward and servant in the establishment, and assigned for his lodging-rooms a house situated within the curtilage, but not connected with the dwelling-house of the proprietor by any common roof or covering, and for which lodging-rooms the steward paid no rent; it was held that the house occupied by the steward was not in law his dwelling-house, but was the dwelling-house of the proprietor of the school, and that no indictment would lie against the proprietor for an entry and expulsion of the steward from such house, provided there was no injury to his person or other breach of the peace. *State* v. *Curtis*, 3 Dev. & Batt. 222.

22. To continue a forcible trespass, it is not necessary that actual force be used. *State* v. *Canfield*, 5 Iredell 207.

23. Acts which tend to a breach of the peace may amount to it. *Ib.*

24. Where three persons took a slave from another, an old and feeble man, in his presence and against his will, and he was restrained from insisting on his rights by a conviction that it would be useless, and for want of physical power to enforce them; held that this was a forcible trespass, for which the party was liable to indictment. *Ib.*

25. Where the prosecutrix was in the peaceable possession, with her family, of a dwelling-house and its appurtenances, and four persons entered the yard of the house, with hostile or unkind feelings and manners, against the will of the prosecutrix, to injure and to insult her, and refused to go away when she bid them, and they had a common purpose in so doing, and abetted each other; held that such acts and purposes rendered the parties liable to an indictment for a forcible trespass. *State* v. *Tolever*, 5 Iredell 452.

26. Every unlawful entry upon the possession of another is, in the eye of the law, a forcibly entry. But it must be an actual and not a mere constructive possession. Two persons cannot be in the actual possession of the same land at the same time; and wherever the unlawful entry of one necessarily dispossesses the other, an indictment for a forcible entry may be maintained; and although the possession may have been surreptitiously obtained, yet, if it is maintained by force, the entry will be considered forcible. *Burt* v. *State*, 3 Brev. 413.

27. The statute of 5 Rich. 2, c. 8, forbids any person to enter into any lands or tenements, except where entry is given, and in such case not with strong hand nor with multitude of people; so that where the entry is lawful, it must not be done with multitude of people; but where it is not lawful, it may not be done at all; and from the relative situation of the parties before, and the violence and force used after the entry, the jury have a right to find the defendant guilty of a forcible entry, although no person was present at the time to prove the fact. *Ib.*

28. Any person who is seized of land in fee for life, or possessed thereof for a term of years, and who is with strong hand and armed power turned out of possession, or held out of possession in the same manner, may have this process. *State* v. *Pearson*, 2 N. Hamp. R. 550.

29. It is of no importance whether the seizin be by right or by wrong, or whether the term for years be legal or not. But there is no doubt that the complaint must allege that the complainant was seized or possessed for a term of years. It is equally clear that the entry must be alleged to have been with a strong hand and armed power. *Ib.*

30. Where a party entering on land in possession of another, either by his behavior or speech gives those who are in possession just cause to fear that he will do them some bodily harm if they do not give way to him, his entry is esteemed forcible, whether he cause the terror by carrying with him such an unusual number of attendants, or by arming himself in such a manner as plainly to intimate a design to back his pretensions by force, or by actually threatening to kill, maim or beat those

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who continue in possession, or by making use of expressions plainly implying a purpose of using force against those who make resistance. *State* v. *Pollock*, 4 Iredell 305.

31. At Common Law, if a man had a right of entry in him, he was permitted to enter with force and arms where such force was necessary to regain his possession. *Harding's case*, 1 Greenlf. Rep. 22.

32. To constitute the offence of forcible entry or forcible detainer, there must be circumstances of terror—just cause of fear—from acts or words, fear of bodily harm—acts indicative of using force. *State* v. *Cargill*, 2 Brev. 445.

33. There must be some apparent violence offered, in deed or in word, to the person of another, or the party must be furnished with unusual offensive weapons, or attended by an unusual multitude of people, all of which circumstances would tend to excite terror in the owner and prevent him from claiming or maintaining his rights. But if a man, being in a house, refuse to open the door to one who comes to make an entry, this is no forcible detainer. So if A. be in possession of a house, or have a lease thereof at the will of B., and B. enters into the house and commands A. to go out and leave him in possession, and A. will not go out, this is not a forcible detainer. *Com.* v. *Dudley*, 10 Mass. Rep. 403.

34. A tenant at will cannot maintain forcible entry and detainer against a stranger for expelling the tenant. *Com.* v. *Bigelow*, 3 Pick. 31.

35. The forcible and unlawful entry into the messuage and ten acres of land in the peaceable possession of the lessee for years, is correctly laid, although from a clerical error the expulsion is stated as to the messuage only. *Com.* v. *Rogers*, 1 Serg. 124.

III. Of the Indictment, etc.

36. It is not necessary that a prosecutor should be endorsed upon an indictment for a trespass upon a sixteenth section. *State* v. *Brown*, 5 Eng. 104.

37. The design of sec. 87, chap. 52, Digest, was to require the prosecutor to endorse his name only in cases where the indictment is found upon the testimony of the party injured. The object being to prevent frivolous and vexatious prosecutions by taxing the prosecutor with costs on failure to convict. *Ib.*

38. The offence of forcible trespass must be charged as being done with a strong hand, "manu forti," which implies greater force than is expressed by the words "vi et armis." *The State* v. *Ray*, 10 Iredell's R. 39.

39. To make a forcible trespass indictable, some person must be in the house or on the premises to cause the acts complained of to amount to a breach of the public peace, or to have an immediate tendency to provoke it; some person who has a right to defend the possession, or to be provoked at its invasion. *The State* v. *Walker*, 10 Iredell's R. 234.

40. The indictment for forcible trespass must charge who was present at the time of the alleged trespass, and if, on the trial, it appears that such person was not present, the defendant must be acquitted. *Ib.*

41. The following was held a sufficient description of the premises, on an indictment for forcible entry and detainer: "A certain messuage and tract of land, situated in the township and county aforesaid and described as follows: all that piece of land containing seventy-six acres and one hundred and fifty perches, and the allowance of six per cent., it being part of a large tract, known as the Peter Jackson improvement, adjoining lands of David Henderson on the east." *Vanpool.* v. *the Com.*, 13 Penn. State R. (1 Harris) 391.

42. And such description, together with the allegation that the prosecutrix was seized of the premises in her demesne as of fee, will sustain a judgment of restitution. *Ib.*

43. When an indictment lies for a forcible trespass upon personal property, the trespass must be such as to involve a breach of the peace, or directly tend to it, as being done in the presence of the prosecutor to his ter-

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ror, &c. *The State* v. *Mills*, 2 Dev. 420.

44. It is necessary to allege an actual possession of the prosecutor; but an indictment which alleged his legal possession, and that the defendant with strong hand took it from the prosecutor, was held good. *Ib.*

45. When an indictment lies under the statute 21 Jac. 1, in North Carolina, it must specify the kind of term from which the party is expelled, in order to authorize a suit of restitution, and the term must be unexpired at the trial. *The State* v. *Butler*, 1 Tayl. 262.

46. An indictment for forcible entry and detainer will lie in the Superior Courts of North Carolina, and a writ of restitution may be awarded by them. *State* v. *Butler*, C. & N. 331.

47. The indictment must allege the continuance of the term when the writ is moved for, and that the party was possessed of a term for years. *Ib.*

48. The term messuage in an indictment sufficiently describes the premises. *Ib.*

49. Whether an indictment will lie at Common Law for a forcible detainer where the entry was peaceable,—*quere*. *State* v. *Ward*, 1 Jones N. C. 290.

50. Whether an indictment will lie at the Common Law for a forcible detainer after a peaceable entry,—*quere*, But it is certain that neither by the Common Law nor under the statutes can it be maintained, where the entry is both peaceable and lawful. *State* v. *Johnson & Rose*, 1 Dev. & Batt. 324.

51. An indictment for forcible entry is good at Common Law, when it charges that the defendant unlawfully and with strong hand did break and enter into a certain house of J. D., he the said J. D. being then and there in peaceable and quiet possession of the same. *State* v. *Whitfield*, 8 Iredell 315.

52. An indictment will lie upon a forcible detainer against a third person who intrudes himself on land or enters after judgment against a former intruder, and the sheriff who is in possession of the writ of restitution may turn him out of possession. *State* v. *Gilbert*, 2 Bay 355.

53. A forcible detainer is not indictable where the entry was peaceable and lawful. *State* v. *Godsey*, 13 Iredell's 348.

54. An indictment for a forcible entry and detainer under the statute (Sess. 11 ch. 6, 1 N. R. L. 98), must allege a seizin or possession within the purview of the act, or whether the estate of the relator be a freehold or a term of years, and on the traverse the averment as to his estate must be proved by the relator. *Brinkerhoff* v. *Nelson*, 13 Johns. R. 340.

55. When the name of the county is mentioned in the margin of the indictment, and it is stated that the dwelling-house on which the forcible trespass is alleged to have been committed was there situate and being, this must refer to the county mentioned in the margin. *State* v. *Camfield*, 5 Iredell 207.

56. An indictment for any forcible trespass upon a dwelling-house short of a violent taking or withholding of the possession of it, must charge that the proprietor was in the house or actually present at the time. *State* v. *Wiley* 4 Dev. & Batt. 192.

57. In an indictment for a forcible trespass for taking away goods, it is not absolutely requisite to use the words, against his will; it is sufficient to use words which necessarily convey the same meaning. *State* v. *Camfield*, 5 Iredell's 207.

58. An indictment for forcible trespass will lie at Common Law, if the facts charged amount to more than a bare trespass. *State* v. *Tolever*, 5 Iredell 452.

59. An indictment for forcible entry and detainer is in New Jersey good at Common Law. *Cruiser* v. *State*, 3 Harrison 206.

60. For a trespass, a mere civil injury, unaccompanied with actual force or violence, though alleged to have been committed with force and arms, an indictment will not lie. *Harding's case*, 1 Greenleaf 22.

61. That no seizin is alleged, does not apply to indictments for forcible entries at Common Law. *Ib.*

62. Indictments for forcible entry and detainer, should so certainly describe the lands trespassed upon as that the sheriff may be at no loss upon a writ of restitution, to restore the in-

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jured party to the possession. *Bickley* v. *Norris*, 2 Brevards 252.

63. The following description in the indictments, of the land into which the defendants entered, was held sufficient. A certain close of two acres of arable land situate in S. towship, in the county aforesaid, being part of a large tract of land, adjoining lands of A. D. and H. H. *Dean and others* v. *Commonwealth*, 3 Sergeant's R. 418.

64. On an application for process under the act relative to forcible entries and detainers, an affidavit that the complainant was lawfully and peaceably possessed of the premises in question, as tenant thereof, under the executors of A. B. deceased, who was the owner of the same, without alleging the nature of the estate by virtue of which such possession was held, is good within the provisions of the statute, upon objection taken after inquisition finding the complainant to be tenant at will. *People on relation of, &c.* v. *Reed*, 11 Wend. 157.

65. The complainant's interest should be truly set forth ; but if a lawful possession is averred, it is sufficient, unless the want of precision in the statement of the complainant's right is objected to, before the judge, previous to the taking of the inquisition. *Ib.*

66. Where the defendant has no notice of an inquisition of forcible entry and detainer, the omission is a fatal defect. *The State* v. *Stokes*, Coxe 392.

67. An inquisition of forcible entry and detainer, which purports to be taken on the oaths or affirmations of A. B. R., is defective, unless it avers that those who were affirmed were Quakers, or conscientiously scrupulous of taking an oath. *The State* v. *Putnam*, Coxe 260.

68. Indictments for forcible entries need not contain allegations of seizin. *Harding's case*, 1 Greenleaf, 22.

69. A forcible entry into a man's dwelling-house is an indictable offence at Common Law, though the force was alleged only in the formal words, vi et armi. *Ib.*

70. An indictment for forcible entry and detainer, is, in this State, good at Common Law. *Cruiser* v. *State*, 3 Harrison, 206.

IV. Miscellaneous.

71. Where an inquisition of forcible entry and detainer is found by jury, and the defendant puts in his plea in writing, denying the force offered, it is the general practice to certify the proceedings to the Superior Court. *The State* v. *Dillon*, 3 Hayw. 174.

72. In an indictment for forcible entry and detainer at Common Law, if the verdict is a general one, and the evidence fails to support either branch of the charge, there must be venue de novo. *State* v. *Ward*, 1 Jones N. Car. Rep. 290.

73. An inquisition for forcible entry and detainer, is not rendered defective by the dates being expressed in figures; this proceeding is, in some respects, like a civil suit. *Coenhoven* v. *the State*, Coxe 258.

74. On the trial of the traverse of an indictment for a forcible entry and detainer, the justice before whom it is tried, is authorized, by the 5th section of the act to prevent forcible entries, &c. Sess. 11, c. 6 (1 N. R. L. 98, 2 R. S. 509, § 13), to assess the costs and damages of the party complaining. Held that the justice cannot give to the party a gross sum independently of his costs, as compensation for the injury sustained, but that the damages awarded by the statute were intended only to reimburse the party prosecuting, after the trial of the traverse; the costs which he had been put to on that particular occasion, and that for other damages arising from the wrongful entry, he must resort to his action of trespass. *Fitch* v. *People*, 16 John. 141.

75. In New York, where a certiorari is issued to a justice of the peace to return the proceedings in case of forcible entry and detainer, and the justice dies without making a return, this Court will hear and decide the case on motion and affidavits. *Matter of Gilbert Shotwell*, 10 John. 306.

76. Proceedings under the statute of forcible entry and detainer, may be quashed in this Court for irregularity, and restitution awarded to the person aggrieved, on motion and affidavits. *Ib.*

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77. Where a justice, upon his own view, without any inquisition by a jury, directed or allowed a restitution of possession, it was held to be irregular. *Ib.*

78. Where the justice acts on his own view, he can only punish the one guilty of the force by fine and imprisonment; the justice cannot interfere with the possession without the intervention of a jury. *Ib.*

79. Where the proceedings of the justice are quashed on the ground of irregularity, it is of course to order a restitution. *Ib.*

80. In New York, a party peaceably in the actual possession of lands at the time of a forcible entry, or in the constructive possession thereof, at the time of a forcible holding out, has a right to proceed under the statute of forcible entries and detainers, although he is neither seized of a freehold nor possessed of a term of years in the premises. *People* v. *Van Nostrand*, 9 Wend. 50.

81. The accused is entitled to produce witnesses before the jury of inquiry, to cross-examine the complainant's witnesses, and to sum up the evidence to the jury. *People* v. *Reed*, 11 Wend. 157.

82. In New York, in an indictment under the act to prevent forcible entry and detainer (1 R. L. 96), the accused may be convicted of forcible detainer only. *Whiting* v. *Godfrey*, 1 Hall's R. 240.

83. In a prosecution of this nature, the title to the premises, as between the accused and the relator, cannot be inquired into, although the latter is bound to set forth his title so far as to show himself to be within the provisions of the act; that title may be controverted by the accused, but he cannot set up his own as a substantive matter of defence, because the question of title cannot be tried in this action. *Ib.*

84. In North Carolina, in a case of forcible entry and detainer, a magistrate has no right to award restitution unless the jury have found by their verdict that the complainant had some estate in the land, either a freehold or for a term of years. *State* v. *Anders*, 8 Iredell's 15.

85. Without such finding, the magistrate may bind over the defendant to the Court to answer to an indictment for the forcible entry, but without such finding he has no jurisdiction to oust the defendant of his possession and put the complainant in. If he does so, he is himself liable to an indictment for forcible entry. *Ib.*

86. From the finding of the jury that the defendant unlawfully, and with a strong hand, detained, it cannot be implied that the entry was also unlawful. *State* v. *Godsey*, 13 Iredell 348.

87. The title of the accused is not in question on the trial of an indictment for a forcible entry or detainer. *Kline* v. *Rickert*, 8 Cow. 226.

88. Under an indictment for a forcible entry and detainer, the jury may find the accused guilty of a forcible detainer only. *Ib.*

89. Arrest of judgment moved on two grounds: 1st. For that the indictment stated that the prosecutor was seized in his demesne as of fee without saying when he was seized, so that it might be he was seized at the time of the indictment found, and not at the time of the forcible entry. 2d. For that the indictment stated that he was seized in his demense as of fee, and his peaceable possession thereof, as aforesaid, continued until, &c., which is repugnant and inconsistent, inasmuch as he could not be both seized and possessed at the same time. *Respublica* v. *Shryber*, 1 Dallas R. 68. But the Court overrruled both objections. *Ib.*

90. In New York, where a justice proceeds under the third section of the act to prevent forcible entries and detainers, he need not previously go in person to view and record the force. It seems that the traverse to an indictment for a forcible entry and detainer need not be in writing. *Corless* v. *Anthony*, 4 John. 198.

91. On an indictment for a forcible entry and detainer, the jury may find the accused guilty of the detainer only. *Ib.*

92. A fine is required to be imposed against the party in a case of forcible entry and detainer, only when there is a conviction upon view, according to the first section of the act. *Ib.*

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93. In New Hampshire, the mode of proceeding is prescribed by the statute of Feb. 16, 1791 (1 N. H. Laws, 341), and although the proceedings are in the form of prosecutions for crimes, and in certain cases a fine may be imposed upon the respondent, yet still the proceeding must be viewed in some respects as a private remedy. *State* v. *Harvey*, 3 N. Hamp. R. 65.

94. So far as redress for a private wrong done by a husband and wife jointly, is sought by the process of forcible entry and detainer, the wife may be made a party. *Ib.*

95. Certiorari to remove the judgment and proceedings in a case of forcible entry and detainer from Luzerne County. The inquisition stated that Nathan Beach was possessed, in his demesne, as of fee, &c., and continued so seized and possessed until the defendant did enter, and him, the said Nathan Beach, thereof disseized, &c. *Com.* v. *Fitch*, 4 Dallas 212.

96. It was objected that the prosecutor is stated to have been only possessed of the premises, whereas the evidence proved him to have been seized. *Ib.*

97. But, by the Court, there is some informality in the expression, but surely stating that the prosecutor was disseized necessarily implies a previous seizure. *Ib.*

FORGERY.

I. What constitutes Forgery. Forging and counterfeiting bank-bills. Forging orders, and other papers.
II. Courts having jurisdiction of the offence.
III. Statutes respecting forgery. Construction of.
IV. Indictment for forgery, &c.
V. Evidence on the trial for forgery. Competency.
VI. Witnesses competent to testify in cases of forgery.
VII. Evidence necessary to support the charge of forgery.
VIII. Miscellaneous.

I. What constitutes Forgery—Forging and Counterfeiting Bank-bills—Forging Orders, and other papers.

1. Where there is a bank of the same name in two different cities, one of which is insolvent and the other sound, erasing the name of the city on a note of the former bank, and inserting the name of the former city, such an alteration amounts to forgery. *The State* v. *Robinson*, 1 Harr. 507.

2. Pasting the name of the latter city over the name of the former in such a way that the alteration may be detected by a close examination, is forgery. *Ib.*

3. Where there is an endorsement on a note, of a partial payment, in the hand-writing of the maker, without any signature, but made in the presence, with the concurrence and by the direction of the payee, it is a receipt, the alteration of which by the payee is forgery. *Kegg* v. *the State*, 10 O. 75.

4. Where an indictment charged that the defendant, contriving and intending to deceive one S. G. P., and to induce him to employ the defendant, and to pay him a large sum of money as wages, exhibited and delivered to the said S. G. P. a certain pretended certificate of good character; held that such a transaction, on the part of the defendant, did not constitute forgery. *The Com.* v. *Chandler*, Thacher's Crim. Cas. 187.

5. One may be guilty of forging the units and figures of a bank-bill. *State* v. *Howseal*, 2 Brevard 219.

6. Canal commissioners have full power and legal authority to draw drafts, and the counterfeiting of such drafts or checks is the commission of the crime of forgery, contemplated in the 73d section of the Criminal Code. *Crofts* v. *State*, 2 Scam. 442.

7. Equally so is the passing of counterfeit checks or drafts of the commissioners, with an intent to defraud any person, or body politic or corporate, knowing the same to be false and counterfeited, embraced in the 77th section of the same code. *Ib.*

8. Where a person takes base pieces of coin which are brought to him ready

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made, having the impression and appearance of real coin, though of different color, and brightens them so as to give them the resemblance of real coin, and render them fit for circulation, he is guilty of the charge of counterfeiting. He completes the offence, and subjects thereby to the penalties of the law, both himself and all who acted a part, and were present assisting in the transaction. *Rasnick* v. *Com.*, 2 Va. Cas. 356.

9. Where, to a bill of parcels of the following tenor, viz.: Mr. J. L. bought of E. & C——, the above charge to G. C.; the purchaser, J. L., added these words by order, E. C.; it was held that this addition to an acquittance or discharge, was a forgery within the statute. *Com.* v. *Ladd*, 15 Mass. 526.

10. Where a bail-bond has been altered in a material part, it can be the subject of a prosecution for forgery, notwithstanding some doubts may be raised as to the validity of the bond, arising from the recitals in the condition. *Com.* v. *Linton*, 2 Va. Cas. 476.

11. Severing the endorsement from a promissory note, leaving the note entire, is not a forgery, but only a misdemeanor. *State* v. *McLean*, 1 Ark. 311.

12. Separate from the intention to defraud in a case of forgery, the offence is not within the statute, nor would the indictment be good at Common Law; for, to utter and tender a counterfeit bill to one without the intention to defraud him, is not an offence either at Common Law, or under the statute of 1804. *Com.* v. *Goodenough*, Thacher's Crim. Cas. 132.

13. Forgery consists in falsely making a writing to the prejudice of another person's right, and with the intent to defraud. *Com.* v. *Whiting*, Thacher's Crim. Cas. 588.

14. To utter such a paper, knowing it to be false, and with the intent to defraud another, is an offence of equal magnitude with the original forgery, and is punished with like severity. *Ib.*

15. The offence of forgery consists in uttering as true any false, forged, or counterfeit bill or note issued by the order of the president and directors of any bank or corporation within this State, or any of the United States. *State* v. *Twitty*, 2 Hawks 449.

16. The offence of disposing and putting away forged bank-notes, was held to be complete, though the person to whom they were disposed of was an agent for the bank, to detect utterers, and applied to the prisoner to purchase forged bank-notes, and had them delivered to him as forged bank-notes, for the purpose of disposing of them. *State* v. *Wilkins*, 17 Vt. 151.

17. Where one has in his possession several forged bank-notes of different banks at one time, with intent to pass them, and thereby to defraud the person who shall take them, it constitutes but one offence. *State* v. *Benham*, 7 Conn. 414.

18. And if there be several informations, avowing that the several bills so held in possession, were held with intent to defraud the several banks, by which they were issued, as well as the person who should take them, this still constitutes but one offence charged. *Ib.*

19. The forging of any writing, by which a person might be prejudiced, is punishable as forgery at Common Law. *The Case of Ames et al.*, 2 Greenlf's R. 365.

20. Having a crucible in possession, for the purpose of counterfeiting, does not constitute an offence under the 31st section of the act for the punishment of high crimes and misdemeanors. *State* v. *Bowman*, 6 Vt. R. 594.

21. To counterfeit any writing of any private nature, with a fraudulent intent, and whereby another may be prejudiced, is forgery at Common Law. *Com.* v. *Chandler*, Thacher's Crim Cas. 187.

22. Fraud and deceit are the chief ingredients of forgery, whether by statute or at Common Law; it is not essential to the offence that any person should be actually injured, but there must be intent to deceive; it cannot, therefore, be material whether the fraud should be effected by using the name of a real or a fictitious person. *Ib.*

23. It is forgery to alter the words and figures of a bank bill. *State* v. *Waters*, 1 Const. Rep. 669.

24. The passing of counterfeit bills

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the currency of which is prohibited, does not constitute an offence against the statute of Connecticut. *Rex* v. *Humphrey*, 1 Root 53.

25. In a case of forgery, it is not necessary that the act should be done in whole or in part by the hand of the party charged; it is sufficient if he cause or procure it to be done. *State* v. *Shurtliff*, 18 Maine R. 368.

26. It does not lessen the turpitude of the offence of forgery that the party whom the defendant sought to defraud was made in part his involuntary agent in effecting his purpose. *Ib.*

27. The making of a false instrument, which is the subject of forgery, with a fraudulent intent, although in the name of a non-existing person, is as much a forgery as if it had been made in the name of a person known to exist, and to whom credit was due. *U. S.* v. *Turner*, 7 Peters 132.

28. Nor is it material whether a forged instrument be made in such a manner as that if in truth it were such as it is counterfeited for, it would be of validity or not. *Ib.*

29. Where the prisoner is charged with passing a counterfeit bank-bill, purporting to be a bill of a bank established within the United States; held that it is not a passing of a counterfeit promissory note, within the meaning of the eighteenth section of the statute of January 2d, 1828, entitled an Act for the Punishment of Certain Crimes by solitary imprisonment and confinement to hard labor. *State* v. *Ward*, 6 N. Hamp. R. 529.

30. A forgery of a railway pass was held to be forgery at Common Law. *Com* v. *Ayer*, 3 Cush. 150.

31. The section of the statute on which an indictment was predicated (R. S. sect. 31, p. 967), makes the offence to consist in the possession of counterfeit money, knowing it to be such, "at the time current or in circulation in this State," with intent to put or have the same put in circulation; held that it is not necessary to the completion of the offence that the person charged should have fixed in his mind upon any particular place where this circulation should, through his agency, commence. *Spence* v. *State*, 8 Blackf. 281.

32. A written instrument, to be the subject of indictment for forgery, must be good, if genuine, for the purpose intended. If invalid on its face, and it cannot be made good by averment, the offence of forgery cannot be predicated upon it. *People* v. *Harrison*, 8 Barb. 560.

33. The *alteration* of a receipt for money, by erasing the word "part," and inserting in lieu of it the words, "full up to date," constitutes the offence of forgery under our Statute Law; and the counts in an indictment, alleging that the defendant did feloniously make, forge, and counterfeit the receipt, would be supported by proof of such alteration. *State* v. *Floyd*, 5 Strob. 58.

34. Forgery is the alteration of a deed or writing in a material part, to the prejudice of another, as well as where the whole deed or writing is forged. *Ib.*

35. Forgery may be committed by altering the words and figures of a bank-bill. *Quere*,—If by simply altering the marginal emblems, or marks. *State* v. *Waters*, 2 Const. R. 669.

36. The possession of forged bills, purporting to be bills of the bank of A., no such bank in fact existing, with intent to pass them as genuine bills, is not an offence within the statute of March 15, 1805. *Commonwealth* v. *Marsh*, 2 Mass. 138.

37. In South Carolina, forging a £3 bill of the paper medium of the State, with two of the commissioners' names only to it, does not constitute a capital offence under the act of assembly, giving currency to such bills. *State* agt. *Jones*, 1 Bay's Rep. 207.

38. In Massachusetts, the possession *in this State* of ten counterfeit bank-bills, with intent to pass them *in another State*, is an offence within the statute of March 15, 1805. *Commonwealth* v. *Cone*, 2 Mass. 132.

39. Where certain coal was consigned to P., of New York, and carried there, and was claimed by another of the name of P., who resided in the same city, but was not the true assignee, and he, knowing this, obtained an advance of money on endorsing the permit for the delivery of the coal with his own proper name; this was held to be

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forgery, and not the merely obtaining of goods upon false pretences. *People* v. *Peacock*, 6 Cow. 72.

40. The forgery of a writing, purporting to contain a mere naked promise to pay a sum of money in labor, expressing no consideration, and not being connected with any consideration by agreement in the indictment, is not an indictable offence. *People* agt. *Shall*, 9 Cow. 778.

41. Forging any instrument or writing which, it appears on the face of the indictment, would have been invalid if genuine, is not an indictable offence. *Ib.*

42. Where a merchant entrusts his clerk with his blank endorsements, and one by false pretences obtains and uses them, such fraudulent use of them is not a forgery; nor is it such a fraud as will discharge the endorser against the endorsee. *Putnam* v. *Sullivan*, 4 Mass. 45.

43. Falsely putting a witness' name to a bond which is not required to have a subscribing witness, does not vitiate the bond, and is not forgery. *State* v. *Gherkin*, 7 Iredell's Rep. 206.

44. Falsely, wittingly, and corruptly rubbing out and erasing or obliterating a release or acquittance on the back of a note or bond, or elsewhere, does not, according to the law of North Carolina, amount to the crime of forgery. *State* v. *Thornburgh*, 6 Iredell 79.

45. Where a letter purports to have been written for the purpose of refuting imputations injurious to, and commending one to the favorable consideration of, and alludes to a subsisting partnership, apparently for the purpose of illustrating the good opinion thus expressed of his merits; held that the fabrication of such a letter, for such a purpose, though very discreditable, would not be a technical forgery, or other criminal offence, punishable by either the Common or Statute Law of *Kentucky*. *Jackson* v *Weisiger*, 2 B. Monr. 214.

46. The staking false money at gaming, is attempting to pass it; and losing it at gaming is a passing, within the meaning of the act. *State* v. *Buler*. 1 Brevard 482.

47. A forged warrant or order for the delivery of goods, is held to be within the act of 1736, although it be in the form of a request, and do not purport that the person whose name is forged had a right to make such an order, or that the person to whom it was directed, was bound to obey it. *State* v. *Holley*, 1 Brevard 35.

48. The presentation of a forged draft, or order for money, to the person to whom it purports to be directed for payment thereof, knowing, &c., although payment is refused, and the draft returned to the presenter, is an *uttering and publishing*, within the meaning of sec. 2, ch. 155, R. S. *People* v. *Brigham*, 2 Mich. Rep. 550.

49. A paper affirming that certain persons are solvent, and able to pay a note, to which their names appear as makers, is a written expression of opinion, and not such a writing as may be the subject of forgery under Act of 1836, defining the punishment of that offence. *State* v. *Givens*, 5 Ala. 747.

50. If the intention to defraud is manifest, forgery may be committed by using a *fictitious* as well as a real name. *Ib.*

51. *It seems* that the *uttering* in the State of New York, of a *counterfeit foreign bank-bill*, the circulation of which is made *illegal* by statute, would be considered an offence within the statute, if laid to have been passed with the intent *to defraud the bank*, though the indictment would be bad if laid to have been passed with *the intent to defraud the receiver* of the bill. *People* v. *Rathbone*, 21 Wend. 509.

52. Passing a counterfeit note in the name of a fictitious person, or on a bank which never existed, is forgery; it is not necessary that the note, if genuine, should be valid, if on its face it purports to be good. *U. S.* v. *Mitchell*, 1 Bald. 366.

53. The term forging has a fixed legal meaning. It is the fraudulent making, or alteration of *any* writing to the prejudice of another man's rights, or a false making, malo amino, of any written instrument, for the purpose of fraud or deceit. *Horne* v. *State*, 5 Ark. 349.

54. In order to be forgery, the in-

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strument charged to have been feloniously and falsely made, must *be* of a character, that if it were genuine, it would be evidence of the fact it recites. *State* v. *Smith*, 8 Yerg. 150.

55. Where, after notice of executing a writ of inquiry was served upon an attorney, he altered the figures indicating the day appointed for executing the writ, for the purpose of making the notice apparently irregular, and with intent to defraud; held not to be a forgery, either under the statute, or at Common Law. *People* v. *Cady*, 6 Hill's Rep. 490.

56. Where the Court charged the jury, "that if the note was fictitious, and prisoner knew it, and passed it in absolute payment of a debt, this would amount to a passing under the statute, although at the time of the payment he might have agreed to take it back, if it should prove not to be genuine." The charge was held good. *Perdue* v. *State*, 2 Humph. 494.

57. A county warrant is considered to be such an instrument or writing, as may be forged under the statute of Missouri, concerning Crimes and Punishments. *The State* v. *Fenley*, 18 Miss. (3 Bennett) 445.

58. Where the grantee framed a draft deed, correctly describing one acre of land, the premises to be conveyed, which was examined by the grantor, but the execution of it deferred, and the draft retained by the grantee, who afterwards fraudulently framed a new draft, embracing in the description the grantor's whole farm, and offered it for examination as the deed before examined, and the grantor executed and delivered the same, without examining it; held that this was a forgery. *The State* v. *Shutliff*, 6 Shep. 368.

59. Where an order is in the following form, "Mr. P.,—Sir, deliver my son one pair of walking shoes, and charge the same to me. Yours, I. F;" it is an order for the delivery of goods within the statute, though I. F. have no goods in the drawer's hands. *Commonwealth* v. *Fisher*, 17 Mass. 46.

60. Where one in the name of another, draws an order in these words, "Messrs. D. & D., please to let the bearer trade ten dollars out of your store, and oblige yours, &c;" held to be a forgery, within the meaning of the statute. *State* v. *Cooper*, 5 Conn. R. 260.

61. Where an order for the delivery of goods was accepted, and paid, and returned to the drawer, and the date of it afterwards altered by him, such alteration was holden not to be forgery at Common Law, although manifestly done with a fraudulent intent. To constitute forgery in such case, the act must have a tendency to effectuate the intended fraud. An order which has been satisfied by the delivery of the goods into the hands of the drawer, in legal acceptation, is no instrument, and an alteration of its date is no *false* making; it is what it purports to be. *People* v. *Fitch*, 1 Wend. 198.

62. In Virginia, on the trial of an indictment for forging a letter with the intent to defraud A. & A., the instrument alleged to have been forged, was in the following words:—"Nottowa, April 24, 1841: Gents.—Agreeable to Mr. Wm. J. Watkins' request I take the pleasure in making you acquainted with his name, and would say to you that he is very extensively engaged in the manufacturing of tobacco, and has made some large purchases, and says that he wishes to patronize you (on my recommendation); you may be assured that whatever he engages to do he will certainly perform. He says it is probable that he will want $1000 by the first of May, to meet his engagements, and if he apply for the amount, I have no doubt but you will accommodate him; the roads are in such a condition that it is impossible to get any produce to market; write me a few lines by Mr. Watkins, and say what the chance is for a rise of tobacco; your compliance with the above will very much oblige, your ob't servant, Joseph M. Foulkes. P. S. Mr. Watkins prefers giving a negotiable note, payable in Petersburgh Exchange Bank, where he can always have an opportunity to send at the shortest notice and draw. He is not a gentleman (of Ingraham's standing or character) of a low, mean degree, but one I am happy to inform you that is a perfect gentleman in every sense of the

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term; I am confident, as I have observed to him, that you will either let him have the money or endorse for him.—J. M. F." Held that this was not a writing that could be the subject of forgery, either at Common Law or under statute. *Foulke's case* 2 Rob. 836.

63. Forging the following paper, "Due *Jacob Finch* one dollar on settlement this day," &c., is deemed forging a note for the payment of money within the statute. *People* v. *Finch*, 5 Johns. Rep. 236.

64. Forging an order in the following words, "Pay to *John Low* or bearer, 1500 dollars in *N. Myers'* bills or yours," is not within the act to prevent forgery, it not being an order for the *payment of money or the delivery of goods*. *People* v. *Farrington*, 14 Johns. Rep. 347.

65. An acceptance of an order to deliver goods, as well as any other obligation to deliver goods, is a binding contract, and as such may be the subject of forgery. *Com.* v. *Ayer*, 3 Cush. 150.

66. Forging a paper in these words, "Mr. *Seward*, sir, let the bearer trade 13 dollars and 25 cents, and you will oblige," &c., was held to be forging an order for the delivery of goods within the meaning of the statute. *People* v. *Shaw*, 5 Johns. Rep. 236.

67. The *uttering and publishing* a promissory note with *forged endorsements* upon it, is an offence within the meaning of the statute against forgery, although the passing of the note is accompanied with communications which would exonerate the endorsers if the endorsements were genuine; if by possibility the endorsers *may* be injured, the offence is committed. *People* v. *Rathbun*, 21 Wend. 509.

68. The offence of *uttering and publishing* is not complete until the paper is transferred and comes to the hands or possession of some person other than the felon, his agent, or servant; thus, where a note with forged endorsements is sent by the felon per mail from one *county* to a person in *another county*, for the purpose of obtaining credit upon it, the offence is not consummated until the note is received by the party to whom it was sent, and the *proper place of trial* is the county to which the note was sent. *Ib.*

69. Forging a deed within the State of New York, for lands lying in the *Missouri Territory*, or in another State, is an indictable offence, and punishable under the acts to *prevent forgery*, and declaring the punishment of crimes. *People* v. *Flanders*, 18 Johns. Rep. 163.

70. Where the following order was made by J. S. H.:—"Mr. Bostick, charge J. S. Humphreys' account to us. —Terryman & Tannehill;" held that if this instrument were genuine, it constituted a valid undertaking by Terryman & Tannehill, to pay the debt of H. without the statement of a consideration, and fraudulent making of such instrument would be forgery. *State* v. *Humphreys*, 10 Humph. Rep. 442.

71. To make out a case of a forged order for the delivery of goods, within the first section of the seventh division of the Penal Code, it is not necessary that the person whose name is forged, should have goods in the hands of the drawee. *Haskins* v. *State*, 11 Ga. 92.

II. Courts having Jurisdiction of the Offence.

72. In Ohio the Common Pleas has jurisdiction to punish the offence of counterfeiting foreign coins circulating in this State as money. *Sutton* v. *State*, 9 Ohio 133.

73. The power which was vested in Congress by the Federal Constitution (art. 1, sec. 7), "to provide for the punishment of counterfeiting the current coin of the United States," can be exercised by the several States, concurrently with Congress. *Harlan* v. *People*, 1 Douglass 207.

74. In South Carolina the State courts have jurisdiction under the act of Assembly of 1785, of the offence of counterfeiting foreign coins made current by that act. By three judges. Nott dissenting. In an indictment for counterfeiting, the possession of coining instruments may be given in evidence against the prisoner to prove the scienter. *State* v. *Antonio*, 2 Const. Rep. S. C. 776.

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75. In South Carolina the State courts have jurisdiction, under the act of Assembly of 1785, of the offence of counterfeiting foreign coins, made current by that act. By three judges. Nott, J., dissenting. *State* v. *Antonio*, 311 Brevard's Rep. 562.

76. Where forgeries are committed under the laws of the United States, they must be tried in the district where committed. *United States* v. *Britton*, 2 Mason's R. 464.

77. The States have no jurisdiction whatever over the offence of counterfeiting money coined at the mint of the United States, or any of its branches. *Rouse* v. *State*, 4 Ga. Rep. 136.

78. *Quere.* Whether an indictment lies in the State courts, under State statutes, for counterfeiting any species of coin which is brought from foreign nations, or for passing counterfeit coin of any description. *Ib.*

79. In Massachusetts, the Courts have jurisdiction of the offence of having false money, counterfeited in the similitude of any gold or silver coin current by law or usage within the State, knowing the same to be false and counterfeit, and with intent to utter or pass the same as true. *Commonwealth* v. *Fuller*, 8 Metc. 313.

III. Statutes respecting Forgery—Construction of.

80. The Bank of the United States was duly authorized as a bank in Massachusetts, within the meaning of the statute of 1804, c. 120. *The Commonwealth* v. *Woodbury*, Thacher's Crim. Cas. 47.

81. The 2d section of the statute has reference to the bills of the banks of Massachusetts only, and those payable at the United States Bank therein. *The Commonwealth* v. *Arlin*, Thacher's Crim. Cas. 289.

82. A writing in the following words, to wit: "By the 25th day of December next, I promise date to pay to William H. Butler, or bearer, the sum of one hundred and interest from and two dollars for value received of him this February 23d, 1850, (signed) Stephen Burns," is a promissory note within the meaning of the 43d section of the 4th chapter of the penal code (Clay's Digest, 423 § 431), and will sustain an indictment for forgery. *Butler* v. *State*, 22 Ala. 43.

83. A statute which provides for the punishment of any person who shall falsely and fraudulently make, sign or print, or cause to be, any counterfeit note or bill of a bank, &c., is not inconsistent, and is in effect the same as if the words, in imitation of, were inserted after the word counterfeit. *The State* v. *Calvin*, R. M. Charlt. 151.

84. In Connecticut, aiding in the act of counterfeiting is within both the letter and reason of the statute of that State as much as assisting in making the implements. *State* v. *Stutson*, Kirby 52.

85. Where, in an indictment for the forgery of bank-notes, the notes are annexed to the indictment instead of being set forth in it; held that the irregularity is cured after verdict against the prisoner by the statute of jeofails. *Commonwealth* v. *Ervin*, 2 Virg. Cas. 337.

86. Where one obtains bank-notes by means of a counterfeit letter or privy token, it is not the obtaining of money or goods within the act of November 18, 1789. *Commonwealth* v. *Swinney*, 1 Vir. Cas. 146; but to obtain money by such counterfeit letter, is an offence within such act. *Ib.* 150.

87. In Virginia, the forgery of a power of attorney to secure certain moneys due an individual for military services, is not a criminal offence within the act of November 25, 1789 c. 19. *Commonwealth* v. *Proctor*, 1 Virg. Cas. 4.

88. Where an indictment is laid for a receipt for a promissory note, forging cannot be supported under the statute of South Carolina of 1801, although such forgery would be an offence at Common Law. *State* v. *Foster*, 3 McCord 442.

89. The South Carolina statute 1748, limiting the time for prosecutions for fines, &c., is no bar to an indictment for forgery under the law of 1801. *State* v. *Fields*, 2 Bailey 554.

90. The statute of Vermont, provid-

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ing against uttering, passing, or giving in payment, it would constitute an offence against the statute, provided the respondent had a knowledge that the money was counterfeit. *State* v. *Wilkins*, 17 Vt. 151.

91. Neither in that statute, nor in the revised statute, is it made a part of the description of the offence, that the counterfeit bill shall have been uttered, passed, or given in payment as and for a true bill. *Ib.*

92. Knowingly passing a counterfeit bank-note, for the sake of gain, to any other person, whether the latter knows it to be forged or not, is a crime under our act of 1819. (Rev. Stat. ch. 34, § 60.) *State* v. *Harris*, 5 Iredell, 287.

93. In the second section of the act of 1819 (Rev. Stat. ch. 34, § 60), making it indictable to pass a counterfeit bank-note "purporting to be a bill or note issued by order of the president and directors," &c., the legislature did not use the word "purporting" in its strict, technical sense, as meaning that those words should appear on the face of the counterfeit bill or note, but in its popular signification, to denote a bill or note presumed to have been issued by order of the president and directors of a bank; an indictment, therefore, which sets out the purport of the counterfeit note, as it really appears on its face, is sufficient. *Ib.*

94. If the imitation be so exact as to be sufficient to impose upon persons of ordinary observation, and the instrument be prima facie fitted to pass as a true one, the imitation is to be considered as within the meaning of the statute. *State* v. *Carr*, 5 N. Hamp. R. 367.

95. Although the bank may never have issued bills for the sum of twenty dollars, yet still the forged bill may have been in imitation of bills which had been issued by the bank, so far as to be calculated to deceive persons of ordinary observation. *Ib.*

96. The State of Vermont, which imposes a penalty for having in possession any mould, pattern, die, &c., adapted or designed for coining, was intended to reach every part of the apparatus of coining, however much more might be necessary to make that part effective; where, if it be shown that the respondent had in his possession one half of a mould, it would be sufficient, without proof that he also had the other half. *State* v. *Griffin*, 18 Vt. R. 198.

97. One may be indicted under the act of 1736, for uttering and publishing counterfeit bills of the branch bank of the United States, although the same offence is punishable by the laws of the Federal Government. *State* v. *Pitman*, 1 Brevard's R. 32.

98. In cases of forgery, a bank-bill of another State is clearly within the first section of the act of 1804, ch. 120. *Com.* v. *Riley*, Thacher's Crim. Cas. 67.

99. In Pennsylvania, the punishment of hard labor, &c., may be inflicted on a person convicted of uttering, publishing, and passing a bank-note of another State, with intent to defraud. *Lewis* v. *Com.*, 2 Serg. & Rawle's R. 551.

100. The prisoner was convicted of uttering and publishing as true, a forged bill, which offence, at the time of the conviction, was punishable with death. He appealed, and pending the appeal, an act was passed abolishing the punishment of death in such cases, and providing that in lieu thereof, "the person convicted" shall be whipped, imprisoned, and fined. Held that sentence of death could not be pronounced against the prisoner, but that judgment for the lesser punishment should be passed. *State* v. *Williams*, 2 Rich. 418.

101. Where the subject-matter of the supposed forgery was in the following words and figures, viz.: "Received, 23d October, 1841, five dollars," and the indictment further charges that the defendant "falsely, fraudulently, and feloniously did alter the said last-mentioned credit on the back of said writing obligatory, which was a credit of five dollars, paid by the said Jeremiah S. Evans to the said Samuel Martin, by drawing a black line, with ink, through the said credit for five dollars, on the writing obligatory aforesaid, and by obliterating the said credit of five dollars, so as aforesaid entered upon the said writing obligatory," with intent to prejudice the rights of the said Jeremiah S. Evans, and John G. Smith, &c. Held that these allegations did not

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make out a case of forging under the act of 1839. *State* v. *Martin*, 9 Humph. 55.

102. *Quere.* Whether or not the forgery of a receipt, or acquittance, in the proper sense of these terms, would amount to a forgery under the statute of 1839. *Ib.*

103. In Virginia, under the act of 1794, the false uttering of a false bank-note of another State or district, may be prosecuted as the false uttering of a "promissory note for the payment of money." *Com.* v. *Hensley*, 2 Virg. Cas. 149.

104. Where a defendant procured a counterfeit bank-bill to be passed by an ignorant boy as a true one, it was holden a sufficient passing within the statute of 1804, c. 120, s. 3. *Com.* v. *Hill*, 11 Mass. R. 136.

105. Where a prisoner was convicted on an indictment for forgery, under the statute of 1804, c. 120, § 4, for having in his possession, with an intent to pass the same as true, two counterfeit bills of the denomination of three dollars, in the similitude of bills issued by the Bank of North America, in Rhode Island; it appeared that the bank had never issued bills of that denomination; the Court held, that as the bills had the external appearance of bills issued by the bank, and purported to be signed by the president and cashier, they had the similitude intended by the statute. *Com.* v. *Smith*, 7 Pick. R. 137.

106. Where an indictment alleged that the defendant, with force and arms, at, &c., on, &c., had in his custody and possession a certain bank-bill or promissory note, payable to the bearer, signed in behalf of the President, Directors, and Company of the Hallowell and Augusta Bank, and having the said bill so as aforesaid, in his possession and custody, with force and arms tore or cut out a piece of the said bill, and thereby altered the same,—with intent, with said bill so altered, and with the piece so cut or torn out of the same bill, together with other pieces of similar bank-bills, altered, cut, and torn out, to form other bank-bills, with intent to utter and pass the same, and thereby to injure and defraud the said president, directors, and company, against the peace and form of the statute; held that the offence was not within the provision of the law against altering bills, which means such an alteration as will increase the apparent value of the bill. *Com.* v. *Hayward*, 10 Mass. R. 34.

107. Where the persons named in the counterfeit bill are not in fact the president and cashier, although so called; and the question arises, whether the party is liable to indictment for an attempt to pass it, under the 18th section of the act of 1816; it was held that the defendant was within the words, and true intent and meaning of the act. *United States* v. *Turner*, 7 Peter's R. 132.

108. The act of Congress of 27th June, 1798, to punish frauds committed on the bank of the United States, is in itself repugnant, and will not support an indictment, for knowingly uttering as true a false, forged, and counterfeit paper, purporting to be a bank bill of the United States, signed by the president and cashier. *United States* v. *Cantril*, 4 Cranch's R. 167.

109. The Common Law, relating to the crime of forgery, is not wholly superseded by the Revised Statutes. *Com.* v. *Ayer*, 3 Cush. R. 150.

110. In New Jersey, the 73d section of the act for the punishment of crimes, Elm. Dig. 115, applies to counterfeit as well as to genuine "blank and unfinished notes." *Stone* v. *State*, 1 Spen. R. 401.

111. In an indictment for forgery, under the statute of 1804, c. 120, § 4, which enacts, that if any person shall have in his possession, within this State, any counterfeit bank-bills, &c., for the purpose of rendering the same current as true, *or* with intent to pass the same, knowing the same to be counterfeit, &c. The statute is made in the alternative, and it is the guilty possession of the counterfeit note, with the guilty purpose of rendering the same current as true, *or* with intent to pass the same. *Hopkins* v. *Com.*, 3 Metc. 460.

112. Under the statute in Indiana, in force previously to 1843, a person convicted of the crime of forgery was not rendered infamous, and the provisions of the Rev. Stat. of 1843, are held to

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apply only to subsequent convictions of that crime. *Johnson* v. *the State*, 2 Carter (Ia.) 652.

113. The penitentiary code of Arkansas makes it felony for any person to counterfeit the lawful issue of any bank or corporation; and they are also held equally guilty if they counterfeit notes or bills "purporting to be of any bank or corporation." *Horne* v. *State*, 5 Ark. 349,

114. Pledging or depositing a counterfeit note, is not a payment or passing, in legal acceptation, or within the meaning of the act of assembly; and the words of the statute must not be extended beyond their *legal* import to make out the offence. *Gentry* v. *State*, 3 Yerg. 451.

115. The 73d section of the act of 1829, does not render a particular description of the offence of forgery unnecessary, and makes an indictment, charging in the words of the act, good. That section only intended to do away the necessity of charging and proving that some "particular person, corporation, or company, was intended to be defrauded." The intent to commit a fraud, by passing the counterfeit notes, must still be charged, though it may be charged generally, without specifying any "particular person, corporaion, or company intended to be defrauded." *Fergus* v. *State*, 6 Yerg. 345.

116. The criminality of the act made punishable by the 29th section of the act for the punishment of crimes, does not comprehend an intention to defraud or deceive any particular person; it consists in dealing in counterfeit bank paper as such; the section of the law mentioned being more peculiarly applicable to the wholesale dealer, who furnishes the spurious supply to the retailers, who put it into circulation as genuine. *Bennington* v. *State*, 2 Ohio 160.

117. Neither under the section making it punishable to attempt to pass a counterfeit bank-note, nor under the section here drawn in question, does the law provide punishment for a mere intention or purpose to commit a crime, without any act or movement towards it. *Ib.*

118. Under the 29th section, the crime consists, not in the intention or purpose to perpetrate a fraud, but in the criminal act of being engaged in dealing in counterfeit paper as such, of having the possession of the spurious paper, for sale, which places the means in the reach of others to procure it, and put it into circulation as genuine. *Ib.*

119. The 14th sect. of the 9th art. of the act concerning crimes and punishments (R. C., 1835, p. 214), providing that the jury may find the defendant guilty of any degree of the offence inferior to that charged in the indictment, does not change, in this respect, the rule of the Common Law, that the allegations and proof must correspond. If such inferior degree be included in the allegations in the indictment, then the statute applies; otherwise, the inferior degree is not so included, and is of a totally dissimilar nature from that charged in the indictment. *State* v. *Shoemaker*, 7 Mo. 177.

120. The 7th sect. of the 4th art. of the act concerning crimes and punishments, (R. C. 1855, p. 184,) providing that "Every person who shall counterfeit, &c., any gold or silver coin, at the time current within this State, by law or usage," &c., means that the genuine coin must be current in this State, at the time the counterfeit is made. If the genuine coin should, after the counterfeit has been made, go out of circulation, the attempt to pass the counterfeit would still be an offence, under the 21st sect. of said article. *Ib.*

IV. Indictment for Forgery, &c.

121. Where an indictment lies for passing counterfeit money, the name of the person to whom it was passed should be alleged, with certainty, when known, and if not known the fact should be alleged. *Buckley* v. *State*, 2 Greene (Iowa) 162.

122. In Arkansas, in an indictment under the statute against passing base or adulterated coin, it was held that there was no repugnancy in alleging that the defendant passed one piece of base and adulterated coin—the words "base" and "adulterated" meaning the

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same thing in common parlance. *Gabe* v. *State*, 1 Eng. 519.

123. Where a prisoner was committed for examination, and was examined and remanded by the examining court for trial, for "feloniously using and employing, as true, for his own benefit, a certain counterfeit note, well knowing the same to be counterfeit;" it was held that an indictment for "forging" the note, was not authorized by the examination, and must be quashed. *Page's case*, 9 Leigh 686.

124. Notwithstanding the offender is indictable in the courts of the United States, for the offence against the laws of the United States, he is likewise indictable in the courts of Virginia, for the offence against the laws of the State. *Hendrick's case*, 8 Leigh 707.

125. An indictment for passing a counterfeit note of a bank, is good and sufficient within the meaning of the statute (1 Rev. Code c. 154, § 4) of Virginia, though it does not aver that the bank is a chartered bank, or that there is any such bank, or that the note was passed, "to the prejudice of another's right," or "for the prisoner's own benefit, or for the benefit of another." *Murray's case*, 5 Leigh 720.

126. By setting forth a counterfeit bank-note in hæc verba, in an indictment for feloniously passing the same, held that the omission of an endorsement appearing to have been made on the note after it was passed, was not a variance. *Buckland's case*, 8 Leigh 732.

127. Where an indictment for passing a counterfeit note charged that the prisoner, on a particular day, at the county of M., and within the jurisdiction of the Court, being possessed of the note, feloniously did pass the same, well knowing it to be counterfeit at the time he passed it; it was held that the time and place of passing the note and the *scienter* were sufficiently set forth. *Ib.*

128. Where the tenor of a counterfeit bill is described in the indictment, although in the caption it is called a bank-bill, it will be sufficient under the first section of the act. *Com.* v. *Arlin*, Thach. Crim. Cas. 289.

129. As to what will constitute a good indictment for passing counterfeit money in Delaware. *The State* v. *Johnson*, 3 Harring. 561.

130. Where a party is charged with altering or forging a county warrant, it is enough to charge in the indictment that he falsely altered and forged the warrant, &c., intending to defraud, &c., setting forth the warrant in hæc verba, without charging, in the words of the statute, that it was an instrument or writing, being, or purporting to be, the act of another, whereby a pecuniary demand or obligation was, or purported to be, transferred, created, &c., or by which rights of property were, or purported to be, transferred, &c., or in any manner affected. Scott, J., dissenting. *State* v. *Fenley*, 18 Miss. 445.

131. Where, in an indictment for forgery, there is a variance between the count and the forged instrument, in the spelling of a name, it is unimportant, if the same sound is preserved. *State* v. *Bean*, 19 Vt. (4 Washb.) 530.

132. Where the allegations in an indictment for forgery improperly describe the meaning of the obligation of the contract forged, this defect is not cured by reciting the instrument in hæc verba: but a note in these words, "For value received, I promise to pay Mr. Frank Wilson, or order, the sum of $25 60, to be due the first day of January next, and interest," sufficiently indicates that it is made payable the first day of January next ensuing its date, and will sustain an averment to that effect in an indictment for forgery. *Ib.*

133. In Virginia, where an indictment founded on the statute of 1834–'5, c. 66, alleged that the prisoner "did knowingly have in his custody without lawful authority or excuse, one die or instrument for the purpose of producing and impressing the stamp and similitude of the current silver coin called a half-dollar," (giving no further description of the die or instrument,) is insufficient. *Scott's case*, 1 Robin. 695.

134. A prisoner committed for examination, was examined and remanded by the examining court, for trial for felony, in forging and uttering a promissory note purporting to be drawn by A. D., no intention to defraud A. D. or

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any other person being alleged; held that the examination was sufficient to justify an indictment for forging and uttering the note with intention to defraud A. D. *Bogart's case*, 10 Leigh 693.

135. Where an indictment alleges the counterfeiting of a note purporting to be a note of the P. & M. bank (that being the name of the bank given by the charter), and in describing the tenor of the note sets forth that it was a note of the president, directors, &c., of the P. & M. bank; held no variance or repugnancy between the purport and tenor. *State* v. *Calvin*, R. M. Charlt. 151.

136. Where the indictment did not set forth that the person intended to be defrauded was residing or being within some of the United States, yet it was held to be sufficient under the act of Assembly of 1836–'7, although not so under the act of Assembly of 1801. *The State* v. *Houseal*, 2 Brev. 219.

137. Where an indictment alleged that the note forged purported to have been made by one Nathaniel Durkie, and then described the tenor of the note, from which it did not appear that the note was made by Nathaniel Durkie, but by N. Durkie; held that this repugnancy was fatal to the indictment. *Ib.*

138. Where the examining court remand for trial a prisoner charged with forgery, it is held that the prisoner may be indicted in the Superior Court, not only for the forgery, but also for procuring the instrument to be forged, and for acting and assisting in the forgery. *Huffman* v. *Commonwealth*, 6 Rand. 685; and the same is the case where he is remanded for passing a forged note; he may be indicted for passing it, knowing it to be forged. *Ib.*

139. It is not an indictable offence to forge a Spanish head pistareen, since it is not a coin of Spain made current by law in the United States. *U. States* v. *Gardiner*, 10 Pet. 618.

140. In Virginia, an indictment for forgery need not set forth in the count the persons whom the prisoner procured to forge the instrument, or with whom he acted and who assisted in the forgery; a general description, in the words of the statute, is all that is required. *Huffman* v. *Commonwealth*, 6 Rand. 685.

141. Where an indictment is laid for aiding to pass forged paper, it must set forth that the accused knew it to be forged. *Anderson* v. *State*, 7 Ham. (Part 2d) 250.

142. Where an indictment for forging a writing describes the same by saying, "purporting to be signed by the president and directors," and sets forth the forged writing verbatim, upon the face of which it does not appear to have been by order of the president and directors, it is defective. *State* v. *Shawley*, 5 Hayw. 256.

143. It is an indictable offence to counterfeit an order or check drawn by the president of a branch bank of the United States on the cashier of the bank at Philadelphia, for the payment of money; and in such case the indictment may charge the passing to be with intent to defraud the bank or the persons to whom it was passed. *U. States* v. *Shellmire*, 1 Bald. 370.

144. And in such case the law presumes that the intent exists to defraud any person who may suffer a loss by receiving such paper as genuine. *Ib.*

145. Where an indictment charged in one count, a prisoner with falsely making, forging, and counterfeiting, with causing, and procuring to be falsely made, forged, and counterfeited, and with willingly acting and assisting in the said false making, forging, and counterfeiting; it was held that the indictment followed the words of the statute; it was good, though all these charges were contained in one count. *Rasnick* v. *Commonwealth*, 2 Virg. Cas. 356.

146. In an indictment for uttering as true, a counterfeit bill, the number and check-letter of a forged bank-bill, and the words in the margin, need not be described in the indictment. *Com.* v. *Taylor*, 5 Cushing's R. 605; *People* v. *Franklin*, 8 John. Cas. 299.

147. Where a person is indicted for having in possession instruments used in counterfeiting coin, it is not necessary to charge the offence to have been committed feloniously. *Miller* v. *State*, 2 Scam. R. 233.

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148. Where the defendant was indicted to have had in his possession, knowingly, and without lawful excuse, certain instruments and tools used in counterfeiting the coin current in this State; held that the allegations were sufficiently descriptive of the offence, and in conformity to the definition of the crime in the criminal code. *Ib.*

149. An indictment under the 75th sec. of the Criminal Code (1), for having in possession counterfeit bank-notes, purporting to be notes of the Merchants' Bank of the City of New York, with intent to utter and pass the same as genuine, is sufficient without the allegation that the intent was a felonious one. *Quigley* v. *People*, 2 Scam. 301.

150. It is not the terms used in the indictments that fix the character of the offence of forgery; the reason why the tenor of an instrument should be set out is, that the Court may judge of its character, and then apply the law. *Walton* v. *State*, 6 Yerg. 377.

151. It is indictable under the statute of the State, to counterfeit the current coin of the United States. *Chess* v. *the State*, 1 Blackf. R. 198.

152. A forged order, in which the goods mentioned are requested to be delivered to the person therein named, is not within the Act of Assembly of 1829, chap. 23, §§ 40, 41, and 50, if the drawer has no interest in the goods mentioned in such order, and an indictment upon such order should allege that the person whose name is forged, had an interest in the goods. *Walton* v. *State*, 6 Yerg. 377.

153. Where it is not alleged in an indictment for forgery, that the defendant had the bill in his possession, for the purpose of rendering the same current, as true, or with intent to pass the same, knowing the same to be false, forged, and counterfeit; held that the indictment was not good, under the Act of 1804, c. 120. *Com.* v. *Arlin*, Thacher's Crim. Cas. 289.

154. A bank-bill is a promissory note within the meaning of the first section of the Act of 1804, ch. 120, and it is not necessary that there should be in the indictment any allegation that the bank was duly incorporated, if the indictment stated a design to defraud an individual. *Ib.*

155. A counterfeit bill may be uttered and passed to one without intent to defraud him, and therefore the statute requires, with good reason, that to make the act criminal, it should be done with intent to injure and defraud some one; the omission of this allegation in an indictment is a material defect, which cannot be supplied by intendment. *Com.* v. *Goodenough*, Thacher's Crim. Cas. 132.

156. Under the statute of 1804, c. 120, an indictment for forgery should allege that the defendants intended to injure and defraud, that being, by the statute, a substantive part of the offence. *Commonwealth* v. *Woodbury*, Thacher's Crim. Cas. 47.

157. Where the allegation in an indictment for forgery is, that the respondent did pass, &c., one certain, false, forged, and counterfeit bank-note, which said note was made in imitation of, and did purport to be, a bank-note, issued by the President, Directors, and Co., of the Bank of Cumberland, by and under the authority of the legislature of the State of Maine, one of the United States of America; held that such allegation showed sufficiently the existence of the bank. *State* v. *Wilkins*, 17 Ver. 151.

158. Where the indictment charges the offence to consist in uttering, and giving in payment a certain counterfeit bank-note, and the statute creating the offence makes it to consist in uttering and giving in payment any counterfeit bank-bill, or promissory note; held that the offence in the statute is well described in the indictment. *Ib.*

159. Where the indictment charged the respondent simply with uttering a piece of false and counterfeit money; it was held that the offence was complete, though it was uttered as base coin. *Ib.*

160. Where an indictment for counterfeiting concludes "contrary to the statute;" it was held defective, and should have been contra formam statuti. *State* v. *Toadvine*, 1 Brevard's R. 16.

161. Where defendant is charged in

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the same indictment, with forging, and assisting in forging, and causing and procuring to be forged, it was adjudged to be good, and in conformity with the Act of Assembly, and the precedents. *State* v. *Houseal*, 2 Brev. 219

162. A note, which is commonly called a promissory note for the payment of money, must be, in the nature of the thing, a promissory note, within the meaning of the act of South Carolina; and the note being set forth verbatim in an indictment for forgery, removes every possible doubt. *Ib.*

163. In cases of forgery, the indictment should not only set forth the tenor of the bill, or note forged, but should profess to do so. *State* v. *Twitty*, 2 Hawks 449.

164. An indictment under the act of Congress, 1798, could not be maintained for forging a counterfeit paper, purporting to be a bank-bill of the United States, signed Thomas Willing, &c., since a forged bill, purporting to be a bank-bill, could not be signed by the president. *Ib.*

165. An indictment for forgery is not repugnant in charging the defendant with forging a bank-note, purporting to have been issued by the president and directors, and company of the bank of Cape Fear, promising to pay, &c. *Ib.*

166. In cases of forgery, the words "false, forged, and counterfeited, promissory note, commonly called a bank-note, purporting to be a good and genuine bank-note of one hundred dollars, on the bank of the State of South Carolina," constitute a sufficient allegation of the existence of such a bank as the bank of South Carolina. *State* v. *Ward*, 2 Hawks' R. 443.

167. An allegation in an indictment on said statute, that the coins intended to be counterfeited, "were current silver coins of this State, and of the United States," is not equivalent to the words in the statute, which shall be made current by the laws of this, or the United States, and therefore insufficient on demurrer. *State* v. *Bowman*, 6 Verm. R. 594.

168. Indictment for passing counterfeit money—requisites. *State* v. *Johnson*, 3 Harrington's R. 561.

169. An indictment charging that the defendant uttered in payment counterfeit coins, "made and counterfeited to the likeness and similitude of the good, true, and current money and silver coin, currently passing in this State, called Spanish dollars," is good, but must be sustained by proof. *Fight* v. *the State*, 7 Ohio (part 1st) 180.

170. It is an indictable offence to utter and publish in this State a forged or counterfeit bank-note of another State, for two dollars; although the passing of any bank-note, under five dollars, is in this State prohibited by the statute. It is not necessary in an indictment to aver that the bank, whose note is alleged to be imitated, or forged, is an incorporated institution. *State* v. *Hart*, 2 Harrison's R. 327.

171. An indictment for the forgery of, and for uttering as true, a paper writing, in imitation of, and purporting to be a bank-bill or note of the bank of United States, but signed by persons as president and cashier, who were not, and never had been such officers of that bank, was sustained by the unanimous opinion of the Supreme Court of the United States; and it was held not to be material whether a forged instrument be made in such a manner, as that if in truth, it were such as it is counterfeited for, it would be of validity or not; and further, that it was no answer to the charge of forgery, that the instrument if genuine, would not be available by reason of some collateral objection not appearing on the face of it. *Ib.*

172. In cases of offering bank-bills, it is only necessary to set out the material parts of the bill, and to allege that the bank is established at a place within the United States, without stating the county or State within which it is situated. *State* v. *Carr*, N. H. 367.

173. Where an indictment for forgery sets out the note according to its purport and effect, and not according to its tenor, the variance in the words, "I promised," and "I promise," is not material. *Com.* v. *Parmenter*, 5 Pick. R. 279.

174. Where the fraudulent posses-

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sion or concealment of the thing constitutes the offence, it shall be sufficient to allege in the indictment that the party charged, fraudulently possessed or concealed such thing, without charging or proving that any particular person, corporation, or company, was intended to be defrauded. *Gabe* v. *State*, 1 Eng. 519.

175. In an indictment on the statute of 103, ch. 120, § 2, for having in possession more than ten counterfeit bank-bills, it is necessary to describe the bills in the indictment, or to set forth therein a sufficient reason why they are not so described. *Com.* v. *Houghton*, 8 Mass. R. 107.

176. But there are cases which will form just and necessary exceptions to this rule; as where the forged instrument has been destroyed by the prisoner, or has remained in his possession; and perhaps in other cases, where the instrument cannot be produced, and there are no laches on the part of the government or prosecutor. *Ib.*

177. But in every such instance, that the exception may be admitted, it must appear in the indictment what is the cause of the non-description of the instrument. *Ib.*

178. The object of setting out the instrument in an indictment for having in possession counterfeit bank-notes, is, that the Court may see and be able to form an opinion, whether it be that which it is alleged to be, and whether it falls within the statute or law upon which the indictment is founded. It is not necessary to set forth any copy or fac simile thereof, but it is sufficient to describe the instrument in such manner as to give it identity. *Gabe* v. *State*, 1 Eng. 519. *State* v. *Martin*, 9 Humph. 55.

179. The place of coinage of a dollar is no necessary part of the description, which is required to be given of a coin in an indictment for forgery. *Com.* v. *Stearns*, 10 Met. 256.

180. The recital of the various inscriptions and devices borne on it, and particularly the date of its issue, would seem to be quite as material as the place of coinage. *Ib.*

181. Where it is alleged in an indictment for forgery, that the respondent "ten pieces of false, forged, and counterfeit coin and money," &c., "unlawfully and feloniously did forge, make, and counterfeit," &c.; the allegation was held sufficient. *State* v. *Griffen*, 18 Verm't 198.

182. The allegation in an indictment for forging coin, "which are current by law and usage in this State," would, by reasonable intendment, have reference to the time of presenting the indictment rather than the time of having in possession, and would therefore be bad, unless such averment is wholly unnecessary, and may therefore be rejected as surplusage; and the Court held that it might be so rejected. *Ib.*

183. The materials of which the false coin is made need not be averred; and if so set forth, need not be strictly proved, since it is in no sense descriptive of the offence, or essential to the identity of the conviction. The allegation of the materials of which the coin is made is found in all the forms of indictment for offences against the currency, but in none of the books is any mention made of the necessity of proof upon this point. *Ib.*

184. In an indictment under the act of 1829, ch. 23, sec. 33, it is sufficient in the indictment to charge the defendant with having kept the counterfeit bank-note with a "fraudulent" intent to pass it. The indictment need not charge that it was kept with a felonious intent. *Perdue* v. *the State*, 2 Hump. R. 494.

185. An indictment for forging a bond against one of the obligors therein, may allege the forgery of the whole instrument by him. *State* v. *Gardiner*, 1 Iredell's R. 27.

186. An indictment charging the forging of "a certain bond," instead of a certain paper writing, purporting to be a bond, is proper. *Ib.*

187. When the objection to the indictment is, that it contains no averment that the paper alleged to be forged was presented or delivered to any one, as a true or genuine acquittance or discharge for goods delivered in consideration thereof; held that this is not necessary at the Common Law, or under our statute. The false mak-

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ing, with intent to defraud, is the gist of the offence. *Commonwealth* v. *Ladd*, 15 Mass. R. 526.

188. It is indictable to utter and publish counterfeit notes of a private banker, knowing them to be forged. *Butler* v. *Com.* 12 Serg. & Rawle's R. 237.

189. Where the indictment states a design to defraud an individual, the existence of the bank need not be alleged. *Com.* v. *Carey*, 2 Pick. R. 47.

190. Where an indictment charges the defendant with altering and defacing "a certain registry and record, being and remaining as a public record, in the office of the Surveyor-General of this Commonwealth, to wit, book F, on the page of the said book containing the list of the returns made by the defendant, while acting as deputy-surveyor;" held that the indictment was good for forging, under the act of 1700. *Ream* v. *Commonwealth*, 3 Serg. & Rawle's R. 207.

191. Where the statute enacts "that every person who shall falsely make, deface, destroy, alter, &c., any record, deed, &c., or any other instrument in writing whatever, with intention to defraud any person, &c., shall be deemed guilty of forgery, R. S. 1838, p. 208, and the indictment charges that the defendant did then and there unlawfully and feloniously destroy, &c., omitting the word falsely; held that the omission of the word falsely was not a good cause for quashing the indictment. *State* v. *Dark*, 8 Blackf. 526.

192. The offence contemplated by the 31st section of the Penal Code, is the fraudulent buying, paying, or tendering in payment, passing, or offering to pass, the false and spurious resemblance or imitation of a bank-bill, note, &c., purporting to have been issued by a corporation, company, or person, that, in point of fact, either never has had existence, or that had ceased to exist prior to the time when such note, bill, &c., purported to have been issued and put in circulation. And to constitute a good indictment in such case, it must be averred either that no such corporation, company, or person ever did exist, or that it had ceased to exist before the date when the bill or note purports to have been issued, as the fact may be; and must likewise be averred that the non-existence of such corporation, company, or person, at the time such note or bill purports to have been issued, was known to the defendant when he passed, or offered to pass, the same. *Williams* v. *State*, 9 Humph. R. 80.

193. Where an indictment is found under the statute (R. S. 638, § 18) for knowingly having in possession instruments adapted and designed for making counterfeit coin, to wit, Mexican dollars, with intent to use the same; it need not allege that the defendant was not employed in the mint of the United States. *Harlan* v. *the People*, 1 Douglass' R. 207.

194. In an indictment for violating the laws of Michigan, against counterfeiting (R. S. 638, §§ 16–18) the offence may be charged to have been committed against the sovereignty of the people of this State, instead of charging it to have been committed against the sovereignty of the people of the United States. *Ib.*

195. Where the defendant is indicted for forgery, and the charge is that he did, feloniously and fraudulently, forge and make a certain writing obligatory in the name of James C. Fogg, the tenor of which writing obligatory is as follows, that is to say, &c., and the instrument set out purports on its face to be executed by Jas. G. Fogg, and Joseph G. Fogg the defendant; held that the charge in the indictment was not good for repugnance. *Fogg* v. *State*, 9 Yerg. 392.

196. The offence contemplated in the 31st section of the penal code of Tennessee necessarily implies an intention to defraud the person to whom the notes are passed, and consequently such intention must be alleged. *Hooper* v. *State*, 8 Humph. R. 93.

197. The intent to commit a fraud by passing counterfeit notes must still be charged, though it may be charged generally, without specifying any particular person, corporation or company intended to be defrauded. *Ib.*

198. It is essentially necessary in an indictment for forgery, that the forged instrument should be set forth

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in words and figures, if in existence and within the control of the prosecutor. *Ib.*

199. Where a defendant is indicted for forging an order, and the order is set out as it was when altered, and the proof was that it was originally drawn for nine dollars, and had been altered to nineteen dollars; it was held that the indictment was sufficient. *State* v. *Flye*, 26 Maine R. 312.

200. It is held that an indictment would not lie for forging a certificate of acknowledgment of a deed, which certificate did not mention that the grantor *acknowledged the execution of the conveyance*. *People* v. *Harrison*, 8 Barb. 560.

201. It is unnecessary that the character and figures on the margin of the order forged should be set out in the indictment. *State* v. *Flye*, 26 Maine R. 312.

202. Where an indictment is laid under the 32d section of the act of 1829, ch. 23, making the fraudulently keeping in possession bank-notes which circulate as currency, felony, it must allege that such notes circulate as currency. *State* v. *Shelton*, 7 Humph. R. 31.

203. In a bill of indictment for passing forged bank-notes, it should be averred that the genuine obligations of the bank, of which the forged resemblance is kept and concealed, did circulate as currency, for if they did not, it could not be kept and concealed fraudulently, for the fraud consists in the intent to pass it as money. *Ib.*

204. The question of the currency is one of fact, and not of law, and must, in indictments of this character, be averred and proved. *Ib.*

205. In Missouri, under the act 1835, an indictment for passing counterfeit bank-notes may describe the notes as "forged and counterfeit," those words being synonymous. *Hobbs* v. *State*, 9 Mo. 845.

206. A bank note as follows: "The President, Directors and Company of, &c., will pay, &c.," signed by the President and Cashier, is properly described as a promissory note. *Ib.*

207. Under that statute it is not necessary to aver that the bank had any legal existence. *Ib.*

208. An averment that the defendant secretly kept instruments for counterfeiting, sufficiently shows a scienter. *Sutton* v. *State*, 9 O. Rep. 133.

209. An indictment for forging a promissory note need not allege the endorsement of the note, though it be forged; it is no part of the note. *Commonwealth* v. *Ward*, 2 Mass. 397.

210. An indictment for a forgery is valid if in it be described *the instrument* or *writing* alleged to have been forged, charging it to have been *falsely made* with the *intent to injure or defraud* some person or body corporate, provided the instrument be such *as on its face* to show that the rights or property of such person or body corporate *may* thereby be injured or affected; it is not necessary that the *facts* and *circumstances* of the case showing the *intent* should be specially alleged in the indictment; it is enough that they be given in evidence on the trial. *People* v. *Stearns*, 21 Wend. 409.

211. *It was accordingly held in this case*, in which the accused was indicted for forging an instrument purporting to be a request from the cashier of a bank in Kentucky to the cashier of a bank in New York, to deliver to *engravers* the *plates* of the bank for the purpose of having new impressions taken, that it was not necessary to charge *either* that there was such a bank in Kentucky, *or* that the person who purported to be the writer of the request was cashier thereof and had a right to make such request, *or* that there were such plates in existence and in the possession or under the control of the cashier to whom the writing was addressed, all this being *matter of evidence*, and not necessary to be set forth in the indictment. *Extrinsic facts* are necessary to be stated only when the operation of the instrument upon the rights or property of another is not *manifest* or *probable* from the face of the writing. *Ib.*

212. *It was further held*, that it was not necessary to allege in the indictment that the bank of Kentucky was a *corporation* duly created; that it was enough to aver that the instrument described was falsely made with the intent to injure and defraud the bank,

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and that under such allegation and exemplification of the act of incorporation was admissible in evidence. *Ib.*

213. In an indictment for forgery, alleging an instrument to be "in the words and figures following," a strict recital is necessary; but the number of a bank-bill, and the figures in its margin marking its amount, are no parts of the bill, and need not be set out in the indictment. *Com.* v. *Bailey*, 1 Mass. Term R. 62; *Com.* v. *Stevens*, 1 Mass. 203.

214. The time when the coin of which a counterfeit is uttered and published, was current by law, usage or custom in this State, is a material ingredient in the offence denounced by our statute, and should be distinctly stated in the indictment. *Nicholson* v. *State*, 18 Ala. R. 529.

215. Where a genuine instrument is altered, so as to give it a different effect, the forgery may be specially alleged as constituted by the alterations, or the forgery of the entire instrument may be charged. *State* v. *Weaver*, 13 Iredell 491.

216. An indictment for forgery of an instrument professing to set it out according to its tenor, should give the names in describing the instrument, spelt as they appear spelt in the original. *Ib.*

217. An indictment for forgery lies for making and issuing a false instrument in the name of another, requesting persons to whom goods have been sent by the owner, to deliver them to the accused, the latter having prevailed upon the owner so to send the goods, by falsely representing that he was directed by those to whom the goods were sent, to buy the same for them. *Harris* v. *People*, 9 Barb. 664. And it is sufficient to charge in the indictment that the forgery was committed with intent to defraud the persons to whom the goods were sent, and to whom the order was directed. *Ib.*

218. An indictment for forgery must describe the instrument alleged to be forged specifically. In an indictment for larceny, it is enough to set forth that the bank-notes of a general description, to a specific amount in value, were stolen. It is not the specific character of the notes, but the theft that constitutes the essence of the crime. In a prosecution for forgery, it is different. The forged instrument must be set out, that the Court may determine advisedly whether the fabrication of it constitute the crime inhibited by the law. *McMillen*, v. *State*, 5 O. Rep. 268.

219. An indictment for having counterfeit bank-notes in possession, and for making sale of them, need not charge that the sale was for a consideration, or to the injury of any one, or that the notes were endorsed. And if such acts are charged to be felonious, it is not error. *Hess* v. *State*, 5 O. Rep. 5.

220. An indictment against a justice of the peace for altering a writ issued by himself, after service and before the return-day, not charging the offence as forgery, cannot be supported. *Com.* v. *Mycall*, 2 Mass. 136.

221. To an indictment upon the 2d section of the statute of 1804, c. 120, for having in possession ten or more counterfeit bank-bills, it is no sufficient objection that it is alleged that such bills purport to be bills of such a bank; that they were payable to the bearers thereof; that they are not alleged to be *similar* bills; that they are described as promissory notes *or* bank-bills; or that it is not alleged that the party charged had knowledge of the false making, &c. *Brown* v. *Com.*, 8 Mass. Rep. 59.

222. Where a defendant is charged with *forging* or *counterfeiting* a *check on a bank*, it is sufficient in the indictment to allege that he falsely made, forged, and counterfeited a certain *check*, with intention to defraud, &c., setting forth the check in hæc verba, with the name of the drawer, as appearing upon it, and it is not necessary to allege, in the words of the statute, that it *was an instrument* or *writing*, being, or *purporting to be, the act of another*, by which a pecuniary demand or obligation is, or purports to be, created, &c., or by which rights or property are or purport to be transferred, &c., or in any manner affected; nor is it necessary to allege that, by such forgery, any person is affected, bound, or in any way injured in his person or property. It would be well, in point of *form*, in such

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case, to allege in the indictment that the accused forged a certain instrument or writing, purporting to be the act of the party whose name is subscribed to it, by which a pecuniary demand or obligation is or purports to be created, and then set forth the instrument or writing in hæc verba. *People* v. *Rynders*, 12 Wend. 425.

223. An indictment under the Revised Statutes is not vitiated by pursuing the forms under the old statutes, in alleging that the defendant made, forged, and counterfeited, *and* caused or procured to be falsely made, forged and counterfeited, *and* willingly acted and assisted in the false making, &c., the latter averments being mere surplusage. *Ib.*

224. An indictment for *forging* a check on a bank in the name of A. B., is *not superseded* by an indictment afterwards found, charging the same defendant with *personating* A. B., and in such assumed character receiving a sum of money, although the money be alleged to have been received from the same individual alleged in the first indictment to have been defrauded by means of the check, and the amount thereof corresponds with the sum received by means of the check. *Ib.*

225. Offences differing from each other, and varying in their punishment, may be included in the same indictment, and tried at the same time, provided they be of the same nature, and differ only in degree; as, for instance, the forging of an instrument, and the uttering and publishing it as true, knowing it to be false. *Haskins* v. *State*, 11 Ga. Rep. 92; *People* v. *Rynders*, 12 Wend. 425.

226. In Arkansas, to constitute a good indictment under sec. 2, ch. 51, Digest, p. 354, for the fraudulent use of an instrument intended for the counterfeiting of coin current, &c., the manner of the use—how the instrument was used—must be charged, as that defendant used it in making and counterfeiting certain money (specifying it) current in the State, &c., by law or usage. *Bell* v. *State*, 5 Eng. 536.

227. An indictment alleging generally that the defendant did fraudulently use such instrument without specifying how it was used, is bad. *Ib.*

228. Although in the indictment the note is set forth as having been made on the —— day of May, and the proof is, that the forged note was dated on a particular day, a conviction will be sustained, notwithstanding the variance, when a satisfactory reason for the omission of a more particular description is given in the indictment. *People* v. *Badgley*, 16 Wend. 53.

229. Where the indictment charges that the forgery was a note, purporting to be a note of the Planters' and Mechanics' Bank of South Carolina, and the *tenor*, as set forth in the indictment, "in words, letters and figures," is a note of the "President, Directors & Co., of the Planters' and Mechanics' Bank of South Carolina;" held that the indictment was not repugnant, nor inconsistent. *State* v. *Calvin*, R. M. Charlton 151.

230. The terms "falsely and fraudulently," involve every idea of deceit, whether practiced upon an individual or body politic, and supersede the necessity of more fully designating the deceit on the person or body politic, the counterfeiter had an intention to defraud. *Ib.*

231. An indictment charging that the defendant did "falsely forge and willingly assent to the falsely making," &c., following the words of the statute, is according to the precedents, and sufficient. *State* v. *Morgan*, 2 Dev. and Batt. 348.

232. The averment in an indictment drawn under the 13d section of the New Jersey act for the punishment of crimes, &c., that it is in the form and similitude of a note of some *incorporated* bank, is material. *Stone* v. *State*, 1 Spen. 401.

233. The indictment will be supported, although it does not charge that the note purported to be signed by the person whose named was forged; if it set forth the purport of the note, giving the name of the maker as part of the description, it is sufficient. *People* v. *Badgley*, 16 Wend. 53.

234. Where an indictment is laid for forging a receipt, it is not necessary that it should be averred that the per-

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son charged with the offence is indebted to the individual against whom the receipt is forged, in order to show that the latter stands in a situation to be defrauded by the former. *Snell* v. *State*, 2 Humph. 347.

232. Where the indictment describes the "counterfeit coin as dollars," it will be good, and it is immaterial whether they be coins of the United States, or of Spain or Mexico; they are equally current in Tennessee, of the same appearance and value, and the word applies as well to the one as to the other, and conveys the same definite idea of each. *Peck* v. *State*, 2 Humph. 78.

236. In a case of forgery, a description of the forged instrument as a "warrant *or* order," is not charging the offence disjunctively, and affords no ground to arrest the judgment. *State* v. *Holley*, 1 Brevard 35.

237. Where a prisoner was indicted for having in his possession forged bank-bills, &c., with intent to pass the same as true and genuine, it was held unnecessary to allege that the bills are for the payment of money. *Townsend* v. *People*, 3 Scam. 326.

238. In an indictment where the defendant is charged with having in his possession "one pair of dies, upon which were made the likeness, similitude, figure, and resemblance of the sides of a lawful Spanish milled silver dollar, &c., for the purpose of making and counterfeiting money in the likeness and similitude of Spanish milled silver dollars," it was held to charge with sufficient certainty the offence designated in the act of 1811, ch. 814. N. R. *State* v. *Collins*, 3 Hawk. N. C. Rep. 191.

239. Where a prisoner is indicted for passing a counterfeit bank-note, it is a good description of the offence to state that the prisoner did "feloniously pass a certain counterfeit bank-note, the tenor of which counterfeit bank-note is as follows, to wit: (giving a copy of the note,) with intent to defraud" the person to whom the bill was passed. *Swain* v. *People*, 4 Scam. Rep. 178.

240. An indictment for forgery will lie for altering the words and figures of a bank-bill,—*quere*, for simply altering the marginal emblems or marks. *State* v. *Waters*, 3 Brevard 507.

241. Where an indictment is laid for the forgery of a bank-bill, the figures which are not an essential part of the bill, may be omitted in the indictment. *State* v. *Carr*, 5 N. Hamp. 367.

242. Where an indictment lies for passing counterfeit bills in North Carolina, the offence must be charged to have been committed intentionally. *State* v. *Penny*, 1 Law Rep. 517.

243. Where an indictment is found for passing a counterfeit bank-note, to a slave, with intent to defraud the bank, it is good. *Brown's case*, 2 Leigh. 769.

244. Where an indictment is found for causing and procuring a counterfeit bank-note to be offered to be passed, without stating by whom or how the accused caused and procured it to be done, it is sufficiently certain and good. *Ib.*

245. Where the indictment alleges that the prisoner "on the fifteenth day of April, in the year of our Lord, one thousand eight hundred and fifty-one, had in his custody and possession ten false, forged, and counterfeit bank-bills," knowing them to be counterfeit, with the intention to pass the same; it is not equivalent to an allegation that he had them in his possession at one time. *State* v. *Bouney*, 34 Maine Rep. 223.

246. In indictments for forgery, the instruments alleged to be forged, should be set forth in words and figures, whenever it is practicable. But, if in possession of the prisoner, or if they be lost, or destroyed, or not attainable by the government, and it be so stated in the indictment, this may constitute a sufficient reason for not setting out exact copies. *Ib.* Vide *Com.* v. *Adams*, 7 Met. 5; *People* v. *Badgley*, 16 Wend. 53.

247. The instrument should be set forth in the indictment according to its tenor, and not according to its purport and effect. *State* v. *Bonney*, 34 Maine, 223; *State* v. *Gustin*, 2 South. 744.

248. The words *warrant and order* in an indictment for forgery, describing the instrument forged, are synonymous with *warrant or order*. *State* v. *Jones*, 1 McMullan 236.

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249. An instrument signed by a party is, in legal parlance, the paper writing of such party. It is his signature which gives it that character, and not the body of the instrument. *Ib.*

250. Every indictment for forgery must set forth the instrument charged as fictitious in words and figures, so that the Court may be able to judge from the record, whether it is an instrument in respect of which forgery can be committed. *Ib.*

251. If an indictment charges the forgery to be with intent to defraud an incorporated bank, and its corporate name is set forth, it is sufficient if it appears to be an incorporated bank within this State. *Ib.*

252. The cashier is a mere officer, representing the bank, and a check drawn upon him as such, is drawn upon the bank; therefore a fraud committed on him is a fraud upon the bank. *Ib.*

253. The same indictment set forth that the paper writing alleged to be forged, purported to be a warrant and order for the payment of money, and to have been drawn by one Tristram Tupper. It then set out the instrument in hæc verba, from which it appeared that it was signed T. Tupper, and averred that the prisoner made it with the intention to defraud Tristram Tupper; held that there was no variance, and that the count was well framed. *Ib.*

254. Where an indictment is laid for counterfeiting, it must charge the counterfeiting to have been done with intent to defraud some particular person. *State* v. *Odel*, 3 Brevard 552.

255. It is necessary that an indictment for forgery should contain an exact copy of the forged instrument. *The State* v. *Dourden*, 2 Dev. 443.

256. An allegation of the legal validity of an instrument, is not necessary in indictments for forgery, unless where it may or may not, from its tenor, be of any validity. *Ib.*

257. Where an indictment is found for retaining possession of an instrument for counterfeiting, &c., it should describe by name, or otherwise, the instrument retained, and allege that it was knowingly retained. *Chamberlain* v. *the State*, 5 Blackf. 573.

258. Where an indictment charged a forgery to have been in the alteration of an order given by the defendant, without charging that the alteration was made after it was circulated and had been taken up by him, it was held to be defective. *The State* v. *Greenlee*, 1 Dev. 523.

259. Where an indictment for forgery contains such a charge as amounts to that crime at Common Law; held that judgment would not be arrested, although the prisoner was indicted under a statute. *The State* v. *Walker*, 2 Tayl. 229.

260. Where an indictment is found against A., for forging an assignment of the promissory note made by B. to C., or bearer, and the second count of the indictment charged that the assignment was forged with intent to defraud C., it was held that this count was valid. *The State* v. *Crawford*, 2 Carter (Ind.) 23.

261. To make an indictment good under the act of 1829, c. 23, § 31, providing a punishment for fraudulently passing any note purporting to be a bank-note, when no such bank exists, it must allege: 1. That there was no such bank in existence as that by which such note purports to have been issued; 2. That the defendant, at the time of the passage of such pretended bank-note, knew there was no such bank in existence; and, 3. That it was passed with intent to defraud the person to whom it was passed. *William* v. *the State*, 9 Humph. 80.

262. An indictment under the Rev. Stat. c. 127, § 18, which provides for the punishment of a person who shall knowingly have in his possession any instrument adapted and designed for coining or making counterfeit coin, with intent to use the same, or cause or permit the same to be used, in coining or making such coin, may be found against a person for so having in his possession, with such intent, an instrument adapted and designed to make one side only of a counterfeit coin. *Com.* v. *Kent*, 6 Metc. Rep. 221.

263. Where the defendant was indicted for forgery, and the charge was that he fraudulently and feloniously kept in his possession a machine, which

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said machine was then and there intended by the prisoner for the forging and counterfeiting the coin current by law and usage in the State of Tennessee; the Court held that this charge was sufficiently specific in its description of the character of the coin intended to be forged and counterfeited. *Bradford* v. *State*, 3 Humph. Rep. 370.

264. Where the indictment charges the offence to consist in forging small notes, or change tickets, purporting to be of a corporation, the indictment is good under the penal code. *Van Horne* v. *State*, 5 Ark. 349.

265. An indictment which charges a bank-bill to have been false, forged, altered and counterfeit, is repugnant. *Kirby* v. *State*, 1 Ohio 185.

266. Where one is indicted for fraudulently keeping in possession and concealing the counterfeit resemblance of bank-notes, under the thirty-second section of the act of 1829, ch. 23, the indictment must charge that the defendant kept and concealed them with an intent to impose them on the community as good money. *Fergus* v. *State*, 6 Yerg. Rep. 345.

267. And where one is indicted for passing counterfeit bank-bills, or for keeping and concealing them, the existence of the bank or corporation of whose notes they are the counterfeits or resemblance, must be alleged. *Ib.*

268. The rule of criminal pleading, requiring an indictment for forgery to show on its face that the forged instrument is literally set out, though one of considerable strictness, is not without reason and good sense for its justification. It relates entirely to the degree of certainty necessary in charging crime upon the accused. Whether, however, it be too strict or not, this Court, powerless to make the law, and bound to *administer* it as they find it, cannot disregard the decision of courts, establishing the rule, and coming down to the present day, without conflict, from an early period in the history of the law. *Dana* v. *State*, 2 Ohio 91.

269. An averment that the defendant "did falsely utter, publish, and put off to G. I., with intent then and there to defraud the said G. I., a certain false and forged note as a true and genuine note of S. R., given for the payment of seven hundred and fifty dollars; which aforesaid forged note, then and there was of the purport and effect following, to wit," does not profess to give an exact copy of the instrument, as the rule requires. *Ib.*

270. The legal import of such an averment is, that the instrument is of the substance and effect following; not that what follows is a copy, in words and figures, of the forged writing. *Ib.*

271. The words "of the purport and effect," in that averment, are a part of the description of the instrument, and cannot be treated as surplusage. *Ib.*

272. Where the defendant was charged with fraudulently passing a counterfeit note, and the note was in these words: "This note, of seventy-five cents, is payable to the bearer at the treasury of North Carolina, agreeably to the Act of Assembly of 1823, ch. 7, Raleigh, 20th July, 1824, J. Haywood, Public Treasurer;" held that the existence of the act referred to in the note should have been averred, and that by the terms of that act, the treasury of North Carolina was bound to pay the note. *Tait* v. *State*, 3 Yerg. 449.

273. An indictment charging the defendant with forging a receipt against a "book account," is indefinite; the term is not known to the law, and in common parlance may mean money, goods, labor, and whatever may be brought into account. Had the charge been forging an acquittance for goods, the evidence of forging the paper described in the indictment would have been proper for the jury. *State* v. *Dalton*, 11 Iredell 379.

274. Where it was charged that Humphreys did feloniously and fraudulently forge a certain writing, as follows: "Mr. Bostick, charge J. S. Humphreys' account to us, Twyman & Tannehill," with intent to defraud said Twyman & Tannehill, &c.; held that the charge was not valid, without charging that Humphreys was indebted to Bostick; and that unless a debt existed there could be no fraud. *State* v. *Humph.*, 10 Humph. 442.

275. If the indictment charge that the counterfeit money was passed to

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persons to the jury unknown, yet if the person be really known, the allegation will be improper, and the prisoner must be discharged from that indictment, and tried upon a new one, rectifying the mistake. *Rouse* v. *State*, 4 Ga. 136.

276. A fortiori, will the indictment not stand, where a wrong person is named in it as the one to whom the money was *passed*, and the right person is fully disclosed by the proof. *Ib.*

277. Where the indictment charges the defendant with the offence of falsely and fraudulently uttering a counterfeit and forged coin, knowing the same to be counterfeited and forged, the indictment was held to be good, without the allegation in the indictment, to whom the coin was tendered by the defendant. The answer to that objection is, that the defendant is not indicted for tendering in payment a counterfeit, forged, or base coin; since the defendant was indicted for uttering a counterfeit, forged, and base coin, and there is no objection made that the person to whom he so uttered it is not stated in the indictment. *Gentry* v. *State*, 6 Ga. Rep. 503.

278. It is an indictable offence at the Common Law to publish a counterfeit note of the Bank of North America, with intent to defraud; and in such case it is not necessary to set forth the ornamental parts of the bill, mottos, &c., in the indictment. *Commonwealth* v. *Searle*, 2 Binn. 332.

279. Under the act of Pennsylvania, of 22d April, 1794, an indictment will lie for forging a note of the Bank of the United States, knowing it to be such, though the charter has expired. *White* v. *Commonwealth*, 4 Binn. 418.

280. On an indictment for forgery, held that, as the prosecution was only for forging the writing, which purported to be a negotiable note, there was no necessity that the indictment should set out the endorsements, or any other matter written upon the same paper, constituting no part of the note itself, and not entering into the essential description of that instrument; and that it was enough to set out in the indictment the note *itself*, without any other extrinsic marks or writings upon the same paper. *Perkins* v. *Commonwealth*, 7 Gratt. Rep. 651.

281. In an indictment for forgery, with intent to defraud, it is sufficient to allege the intent to be "to defraud A.," without showing how, or alleging the interest of A. in the subject. *West* v. *State*, 2 Ala. 212.

282. Indictment against two, one only put upon trial, it is not error if it can be justly inferred from the record that an order for a separate trial was made, though it does not appear in form upon the record. Two may be joined in an indictment for having counterfeit notes in possession. *Hess* v. *State*, 5 Ohio 5.

283. In an indictment for forgery, it is necessary to set forth the tenor of the forged instruments, and the alterations made, and the government is held to strict proof of the instruments as set forth. *United States* v. *Britton*, 2 Mason 464.

284. In cases where the instrument is in the prisoner's possession, or is destroyed or lost by him, so that it is impossible to give the exact tenor, it will be an excuse for not setting it forth in express terms in the indictment. *Ib.*

285. Where, in an indictment for forgery, two distinct offences, requiring different punishment, are alleged in the same count, as where the forging of a mortgage and of a receipt endorsed thereon, are both charged in the same count, and the defendant be convicted, the judgment will be arrested. *People* v. *Wright*, 9 Wend. 193.

286. In charging the forgery or felonious alteration of a mortgage, with the intent to defraud the mortgager, it must be averred that there are, in fact, such lands as are described in the instrument, and that the mortgager had an interest or right in the same. *Ib.*

287. It is a general rule that in an indictment for forgery, the instrument forged should be described particularly. *People* v. *Kingsley*, 2 Cowen 522.

288. But if in the hands of the defendant, or lost, or destroyed by him, the indictment may show this excuse, and set forth the instrument in general terms, if it contain enough to show the offence. Dates, sums, and times of

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payments may be omitted, and parol evidence given of the contents. *Ib.*

289. Where an indictment for forgery charged that D. G. late, &c., on, &c., and after the dissolution of the copartnership of the said D. G. & J. O., did falsely make and forge a certain promissory note, signed by the said D. G., with the partnership name of O. & G., and purporting to have been signed by the said D. G., with the partnership name of O. & G., before the said partnership was dissolved; held that as the note on being produced did not purport to be signed by D. G., the indictment was nevertheless good. *State* v. *Gustin*, 2 South. 749.

290. An indictment founded under the act against forging and counterfeiting, charging the defendant with having in his possession one certain false and forged piece of paper, purporting to be a note issued for money by a moneyed corporation, which, it was charged, the defendant well knew had no existence; was held not to be within the act, because the note described in the indictment was not within the description given by the section. *Commonwealth* v. *Morse*, 2 Mass. 135.

291. The indictment charged the counterfeit coin to be in imitation, &c., of coin, &c., of "the State of Missouri, called a Mexican dollar;" held that the indictment was defective, as the words "State of Missouri," were contradictory and repugnant to the subsequent part of the description, and being descriptive of a material part of the offence, could not be rejected as surplusage. *The State* v. *Shoemaker*, 7 Mo. R. 177.

292. In forgery, where a count in the indictment charges the commission of the offence on a day after the trial, it was held good; and so of a count which does not describe in what part of the receipt the forged words are placed. *Penn.* v. *McKey*, Addis. 33.

293. To an indictment upon the second section of the statute of 1804, c. 120, for having in possession ten or more counterfeit bank-bills, it is no sufficient objection, that it is alleged that such bills purport to be bills of such a bank—that they were payable to the bearers thereof—that they are not alleged to be similar bills—that they are described as promissory notes or bank-bills—or that it is not alleged that the party charged had knowledge of the false making, &c. *Brown* v. *Commonwealth*, 8 Mass. 59.

294. An indictment for counterfeiting need not set out an endorsement upon the counterfeited paper. *Hess* v. *State of Ohio*, 5 Ohio R. 5.

295. On an indictment for forging a check, drawn in the name of a copartnership firm, on the President and Directors of the Manhattan Company, it was held that it was not necessary to allege the names of all the partners who composed the copartnership, or the banking company. *People* v. *Curling*, 1 John's R. 320.

296. Though an indictment for passing counterfeit money purports to set forth the counterfeit note according to its tenor, and contains no averment of its loss, or destruction, the production of the note may be dispensed with, upon proof that the same has been mutilated, or destroyed by the defendant, and other evidence of its contents may be admitted. *The State* v. *Potts*, 4 Halst. R. 26.

297. In an indictment for forgery, a full description of the forged instrument must be set out in the indictment, or the omission excused by proper averments. *Ib.*

298. Where an indictment charged that D. and E., on the 1st day of March, 1847, at the city of Pittsburgh, county of Alleghany, did falsely conspire to utter certain forged notes of a foreign bank, in the form of good notes of that bank, with the intent that said forged notes should be uttered to the citizens of this Commonwealth as good notes, and with intent to cheat the foreign bank, and divers citizens of this Commonwealth; held that in an indictment for such an offence, no overt act need be alleged; that in this indictment, time and place are sufficiently laid, to give the Court jurisdiction; that the words charging the intent to cheat the foreign bank were surplusage that the offence charged in this indictment was a species of the crimen falsi, and was punishable by imprisonment at hard labor, under the 4th section of the Pennsyl-

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vania Act of 1790; and that it was immaterial as regards the offence, whether the foreign bank was incorporated or not. *Clay* v. *Commonwealth*, 4 Barr 210.

299. Where an indictment is found for uttering a counterfeit bank-bill, such bill may be set forth as a forged promissory note; and where a design to defraud an individual is set forth, the indictment need not allege the existence of the bank of which it purports to be a bill. *Commonwealth* v. *Carey*, 2 Pick. 47.

300. An indictment for forgery should describe the instrument in words and figures, except where it is in the possession of the prisoner, and this should be stated. *State* v. *Parker*, 1 Chip. 298.

V. Evidence on the Trial for Forgery —Competency of.

301. Where a concert between two or more to pass counterfeit notes, or any joint or concurrent action in passing them is proved, the act of one is evidence against the other, and the possession of counterfeit notes by one is the possession of another. *U. States* v. *Hinman*, 1 Bald. 292.

302. On an indictment for passing counterfeit bills of a bank out of the State, the testimony of one acquainted with the hand-writing of the president and cashier, though he had never seen them write, was admitted against the genuineness of their signatures. *State* v. *Ravelin*, 1 Chip. 295.

303. And it was held that after such proof other evidence, from appearance of the bills, to their not being genuine, was admissible. *Ib.*

304. On the trial of an indictment for uttering forged money, knowing it to be forged, evidence may be received of former acts, which have a tendency to bring home the scienter to the defendant, though it may, fix upon him other charges than the one on which he is tried. *The State* v. *Twitty*, 2 Hawks 248.

305. On a criminal trial for passing a counterfeit bank-note or check, after proof that the prisoner passed the note and that it was counterfeit, evidence that he had in his possession, and attempted to pass other counterfeit notes of the same kind, to other persons, the day after he passed those in the indictment mentioned, was competent to show the scienter. *Hendrick's case*, 5 Leigh. 707.

306. In a prosecution for passing a counterfeit coin to a person who resides in another State, where a subpœna for such person as a witness has been issued, and returned, not found, the fact of the passing, and the counterfeit character of the coin, may be shown without the production of the coin, in accounting for its non-production. *Kirk's case*, 9 Leigh 627.

307. Where one is found in possession of a forged order in his own favor, the presumption is that he either forged it, or procured it to be forged. *State* v. *Britt.*, 3 Dev. 122.

308. On a criminal trial for passing a counterfeit bank-note, the prisoner moved to exclude the note produced from being given in evidence to the jury, on the ground that the name of one of the firm of engravers, set out in the description of the note in the indictment, did not appear on the note produced. The counsel for the prosecution proved that, when he drew the indictment, he had been able to make out the name on the note from his knowledge that one of the firm of engravers bore that name, though he could not say that he would have been able to do so without his knowledge of that fact, but that the word had since become indistinct, as he supposed by the handling of the note. The Court thereupon denied the motion to exclude the note, and allowed testimony to be given of the passing it. *Buckland's case*, 8 Leigh 732.

309. Where one passes counterfeit money, and another in any way aids and abets its passage, knowing it to be counterfeit; held that an intent to defraud may be inferred, and both are guilty. *The State* v. *Mise*, 15 Mo. 153.

310. It is proper for the State to show, after having shown that the accused had passed a bank-note which was counterfeit, as charged in the indictment, in order to show guilty knowl-

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edge in the accused, that he had passed other counterfeit bank-notes, of a similar kind, to other persons, at different times, before and subsequent to the indictment. *Ib.*

311. Evidence that the accused uttered as genuine what purported on its face to be a bank-note, is competent proof that it was a bank-note, though it is not otherwise proven that such a bank existed. *United States* v. *Foye*, 1 Curtis' Ct. Ct. 364.

312. Parol proof as to the manner in which the accused read the note to the witness to whom he offered it, is competent to show the quo animo with which it was made and uttered. *Butler* v. *the State*, 22 Ala. 43.

313. And on trial of an indictment for the forgery, it is proper to show by the grantor, without notice to produce papers, that the defendant had previously brought to him the draft of an instrument which he saw and read, but never executed, and which was different from the deed which was afterwards brought to him as the same, and as such executed. *State* v. *Shurtliff*, 6 Shep. 368.

314. On the trial of a prisoner for alleged forgery of auditor's warrants, besides the evidence of the handwriting of the prisoner, there being no positive proof of the forged warrant having been seen in the possession or uttered by the prisoner, the State showed that he was the clerk of the auditor, had official custody of his books, free access at all time to the registry, and that the forged warrants in all material respects correspond with the genuine ones in the register. Upon this the prisoner offered to show that the registry was not always or generally in his custody, but was carelessly thrown about the office, accessible to all who might casually enter it, and often with the auditor's office itself for a considerable time in the care of a single servant. Held that the testimony was proper to offer as rebutting testimony, and should be received. *Pagaud* v. *State*, 5 Smedes & Marsh. 491.

315. Where an indictment lies for the forgery of a note, the letter of the cashier of a bank to whom the note was sent for collection, making suggestions as to the evidence of the parties to the notes, is inadmissible; the protest of a notary offered for the same purpose, is also inadmissible. *Farrington* v. *the State*, 10 Ohio 354.

316. Evidence that the bills of a bank are received by public officers of the State, and that such bills are in general circulation, is sufficient to raise the presumption that the acts required by its charter to be done before it should take effect were performed, in an indictment for counterfeiting its notes. *State* v. *Calvin*, R. M. Charlt. 151.

317. On the trial of a prosecution for forging bank-bills, testimony that the prisoner possessed similar bills about the same time, is admissible, although other indictments are pending against the prisoner for these acts. *The Commonwealth* v. *Percival*, Thacher's Crim. Cas. 293.

318. On a trial for forging a letter of credit, the Commonwealth showed that a draft presented by the accused to A. at the same time with the letter of credit, had been filed, together with the indictment against the accused for forging the same, with the clerk of the court, who on making search had been unable to find it, and thereupon offered secondary evidence of the contents of the draft, without having given notice to the accused before the jury was impanelled, of any intention to give such evidence; held that the evidence was good. *Foulkes' case*, 2 Robinson, 836.

319. On a criminal charge of forgery, the production of all the persons through whose hands the instrument had passed, is not necessary. *Bank of Pennsylvania* v. *Haldeman*, 1 Pa. 161.

320. Where a forged paper is passed by the prisoner, bearing date in 1828, with the knowledge of the holder the prisoner alters the date to 1827, shortly after it was passed, and the indictment set forth its tenor and described it as dated in 1827; held that the paper was proper evidence to go to the jury in support of the indictment; notwithstanding the proof that it bore date in 1828, when passed. *Hoffman* v. *Commonwealth*, 6 Rand. 685.

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321. On the trial of an indictment for uttering and publishing as true a forged bank bill, to prove the scienter, it is admissible to show that the prisoner had passed other forged bills, for which indictments were pending against him. *State* v. *Williams*, 2 Rich. R. 418; *State* v. *McAllister*, 24 Maine 139; *Com.* v. *Chandler*, Thacher's Crim Cas. 187.

322. An order on the cashier of the Bank of the United States, is admissible in evidence in support of an indictment for forging an order on the cashier of the corporation of the Bank of the United States. *U. States* v. *Hinman*, 1 Bald. 292.

323. Forging a name is indictable the same as forging a seal, if there is an intention to defraud. *Pennsylvania* v. *Misner*, Addis. 44. Where one of the makers of a note was indicted for forging an indorsement, the maker's possession of a note may be given in evidence to disprove the charge of fraud. *Ib.*

324. On the trial of an indictment for passing a forged note knowing it to be forged, proof that the prisoner endeavored to engage a person to procure for him counterfeit money, that he inquired whether he had brought him any, and of declarations that he intended to cultivate the acquaintance of a counterfeiter, and intended to remove to a place near his residence, is competent as having a tendency to prove the scienter. *Finn* v. *Commonwealth*, 5 Rand. 701.

325. Where an information is filed for passing counterfeit money, no evidence of its being counterfeit can be allowed until the money is produced in court. *State* v. *Osborn*, 1 Root 152; *State* v. *Bloget*, 1 Root 534.

326. On a criminal trial for forging notes, evidence may be offered to show that the prisoner had destroyed them, or that he had admitted the crime without producing the notes. *State* v. *Ford*, 2 Root 93.

327. On a criminal prosecution for uttering and publishing a forged note, evidence is admissible for the purpose of proving the scienter, to show that another note passed by the defendant was a forgery; although he had been acquitted on an indictment for uttering the latter note, the acquittal only goes to weaken the force of this evidence. *State* v. *Houston*, 1 Bailey 300.

328. On the trial of an indictment for uttering counterfeit money, proof that the accused had about the same period passed other counterfeit money of the like kind, is admissible, as tending to establish the scienter. *Martin's case*, 2 Leigh 745.

329. In a case of forgery, where a paper was handed to a witness, with all the writing but the signature concealed, and the witness asked whether the signature was his. The Court held that the witness was under no obligation to answer, without first seeing the contents of the paper. *Com.* v. *Whitney*, Thacher's Crim. Cas. 588.

330. Where one is indicted for having in possession a forged bank-bill, with intent to utter and pass the same, set out the bill in hæc verba, but, in copying the bill, the letter "C" was omitted, and the bill introduced in evidence was lettered "C" in the usual place for marking bank-bills with letters; held to be no variance, and it was further held that a note, payable to "B. or bearer," was properly admitted in evidence, where the description in hæc verba, was B., bearer. *Quigley* v. *State*, 2 Scam. R. 301.

331. The place where an instrument is found or offered in a forged state, affords prima facie evidence, or a presumption, that the instrument was forged there, unless that presumption be repelled by some other fact in the case. *U. States* v. *Britton*, 2 Mason 464.

332. On an indictment for uttering forged notes, the Attorney for the Commonwealth produced three notes purporting to be signed S. F. Belknap, each for the same amount, and of the same tenor and date, and offered evidence tending to show that they were forged, and forged in a particular manner, to wit, by taking a genuine note, and tracing the signature on the alleged forged notes. The Commonwealth afterwards offered thirty other similar notes, which had been uttered by the defendant, at or near the same time with the notes in question, and which were also alleged to be forged; these

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notes were offered as tending to prove the guilty knowledge of the defendant that the notes which he was charged with uttering were forged notes. The defendant admitted that he passed the notes, and if they were not genuine, that he knew the fact, and thereupon objected to the evidence. Before such admission was reduced to writing, to be filed, the Court expressed an opinion, that in reference to the peculiar character of the forgery charged, the inspection of other similar notes, uttered by the defendant about the same time, and alleged to have been forged in the same way, might aid the jury in determining the question of the forgery of the notes in issue, and that the evidence was admissible for this purpose; that the proposed admission should not be received as a substitute for the testimony objected to, but that the jury should consider the case in the same way as if the admission had not been made. It was held that this was competent evidence to prove the guilty knowledge with which the three notes in question were passed; or rather, that it would have been so, but for the admission offered by the defendant, that if the notes were forged he knew that fact, and it was held that this admission did not supersede this evidence or render it incompetent. The offer was hypothetical, and was accompanied by an express denial of the forgery. Besides, it was competent for the prosecuting officer to prove and make out his case by proper and legal evidence, without being obliged to rely upon any admission of the defendant, and that the evidence therefore was rightly admitted, for a legitimate and proper purpose. *Com.* v. *Miller*, 3 Cush. R. 243.

333. One was indicted for uttering as genuine a forged promissory note, and the supposed maker testified that he had never given any one his name in blank, so that a note could be written over his signature. Held that the testimony of a witness, that he once saw a blank paper, on which a note was filled up in his presence, purporting to have the endorsement of the supposed maker upon it, was not admissible to contradict the testimony of the latter, unless such endorsement was first proved to be a genuine signature. *Ib.*

334. Where the testimony of the supposed maker of certain promissory notes, alleged to be forged, was given on the trial of an indictment for uttering the same, and he testified that he had given the defendant one note of the tenor of those mentioned in the indictment, and but one, and that the notes given in the course of his business were entered in the books kept by his clerk; and the clerk testified that he kept an account of the maker's transactions, and that he knew of the latter's giving one note corresponding with the description of the notes set forth in the indictment, and the prosecuting officer proposed to ask the clerk whether he knew of the supposed maker's giving the defendant any other such note than the one he had mentioned; held that the term "such" did not limit the inquiry to a note of a particular tenor or purport, but to the giving of any note of a like kind, and that the question was therefore admissible. *Ib.*

335. Where the person who was supposed to be the maker of notes alleged to be forged, testified on the trial of an indictment for uttering the same, that all the notes given by him prior to the date of the notes alleged to be forged, were entered in the books which his clerk kept, and the defendant introduced evidence to prove that there were confidential transactions between him and the supposed maker, in which the latter had given him notes to be negotiated for his own accommodation, which were not intended to be entered, and would not appear on his books which were kept by his clerk; held that the prosecuting officer, in order to rebut this testimony, might give evidence to show that three notes which had not been entered on the books of the clerk, but which had been negotiated by the defendant, were all taken up and paid by the latter a short time before their maturity. *Ib.*

336. Where the defendant was charged by the grand jury in three distinct counts, on which the defendant has been found guilty with uttering

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three distinct notes of the same date, amount and time of payment—in other words, of exactly the same tenor—and it was objected for the defendant that he could not be found guilty on any one count without affirmative proof showing which one of these notes was before the grand jury when they drew the first count, and so of each count, and that evidence must be sought from the grand jury to show how they designated these three notes, and how they arranged them and appropriated them to the three several counts; the Court held that the objection was groundless. *Ib.*

337. The testimony of witnesses who are acquainted with the signatures of the president and cashier of a bank, from having seen bills of the bank in circulation, is competent to be submitted to a jury to prove that a bill which purports to be a bill of such a bank, is a forgery. *State* v. *Carr*, 5 N. Hamp. Rep. 367.

338. It is material for the government that the prisoner had, at the time, the guilty knowledge that the bills were counterfeit. To this purpose it is usual and proper to show the conduct of the prisoner at the time; and if it should appear that other forged notes were in his possession, or that he had passed other counterfeit bills at or near the same time, all these facts, with all other circumstances, are to be considered by the jury, who will decide whether the defendant had knowledge of the forgery and was a fraudulent dealer in the article. *Com.* v. *Woodbury*, Thach. Crim. Cas. 47.

339. Where, on the trial of an indictment for uttering as true a forged bank-bill, purporting to be a bill of a bank at Worcester, a witness testified that he knew the president of that bank; that when the witness last saw him, which was something less than a year before, he then told the witness that his wife had bought a place in Oxford, and his family were going there to reside; it was held that upon such proof the testimony of the president might be dispensed with, and the forgery of his signature allowed to be proved by other witnesses, within the Revised Statutes, c. 127, § 10. *Com.* v. *Taylor*, 5 Cush. 605.

340. In the absence of the testimony of bank officers, the best evidence which is in the power of the government to produce, is that of persons who are within the jurisdiction of the Court, and who know the existence of the bank and the character of the bills. *Com.* v. *Riley*, Thach. Crim. Cas. 67.

341. Drunkenness of the accused at the time of passing the alleged counterfeit bill, is a circumstance proper to be submitted to the consideration of the jury, and should have its just weight in determining whether the accused knew the bill to be counterfeit. *Pigman* v. *the State*, 14 Ohio R. 555.

342. A forgery may be proved by the testimony of the president and cashier, whose signatures are alleged to be counterfeited, or by a witness who has become acquainted with their handwriting in the course of an official correspondence. *Com.* v. *Smith*, 6 Serg. & Raw. R. 568.

343. In an indictment for forging a bank-note, there is no necessity to prove the existence of the bank, more than the being of a person who purports to have made the instrument, unless it is laid with an intention to defraud such bank or such person. *Ib.*

344. On an indictment for counterfeiting a silver dollar, proof that defendant had counterfeited other dollars, is not admissible. Indictment for counterfeiting must charge it to have been done with intent to defraud some particular person. *State* v. *Odell*, 2 Const. Rep. S. C. 758.

345. Where the prosecution on an information for passing a counterfeit coin purporting to be a half-dollar, knowing it to be counterfeit, offered evidence of the accused's having in his possession at the same time an engraved paper having the appearance of a bank-note, but not purporting to be signed or countersigned, for the purpose of showing the guilty knowledge of the prisoner charged in the information, it was held that such evidence was inadmissible. *Stalker* v. *State*, 9 Conn. Rep. 341.

346. Where the prosecutor, in an information against A. for putting off a counterfeit bank-bill, knowing it to be counterfeit, having offered evidence to

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show that A. and B. had entered into a conspiracy to put off counterfeit bills similar to the bill described in the information, attempted to prove that A. knew the bill in question to be counterfeit, and for this purpose he offered evidence to prove that at two different places, a day or two previous to the alleged offence, and at another place soon after its commission, B. put off other counterfeit bills of the same bank, A. being in company with B. immediately before and after such putting off by B., but not actually present with him at those times; it was held that the whole of such evidence was proper to be submitted to the jury, and if they were satisfied that such conspiracy existed between A. and B., and that B. in pursuance thereof put off such counterfeit bills in the manner stated, these acts of B. were as strong evidence against A. to prove his knowledge of the bill in question being counterfeit, as though he had personally done the same acts. *State* v. *Spalding*, 19 Conn. Rep. 233.

347. If the bank be of another State, its incorporation under the laws of that State must be proved in the same manner as the statute laws of other States are proved, by a copy of the act of incorporation duly certified according to the act of Congress, or by the production of a sworn copy. *Stone* v. *State*, 1 Spen. 401.

348. The existence of a bank whose paper is alleged to have been counterfeited, may be proved by reputation. *Reed* v. *State*, 15 Gris. O. Rep. 217.

349. In cases of forgery under the New York Revised Statutes, where the crime charged is the having counterfeit bank-bills in possession with intent to defraud the bank by which the counterfeit bills purported to have been issued, it is competent to prove the existence of the bank corporation by parol evidence, and the best evidence will not be required. *People* v. *Chadwick*, 2 Park. Crim. Rep. 163.

350. Where a defendant was indicted for forging a bank-note of the Bank of the State of North Carolina, the Circuit Court permitted evidence to go to the jury of a supposed attempt by the defendant, three years previous to the trial and the finding of the indictment, to utter some forged bank-notes of the Northern Bank of Kentucky; it was held that the evidence was manifestly illegal, and had a strong tendency to prejudice the minds of the jury against the defendant. *Morris* v. *State*, 8 Smedes & Marsh. 762.

351. If a person charged with passing counterfeit money has frequently passed other counterfeit money, especially if it be of the same kind, it furnishes a strong presumption that he knew it to be counterfeit. The accidents of trade can hardly be supposed to have placed in his possession so much spurious money; and if it be of the same kind, the presumption is greatly strengthened, because it indicates that he is a dealer in the article. But in order to render this evidence admissible, it must be proved that the money so passed was counterfeit. *Peck* v. *State*, 2 Humph. 78.

352. It is not enough that there should be suspicion merely; if the coins or notes thus passed at another time, are not produced at the trial, so that whether they are counterfeit or not may be clearly established, the proof that they were counterfeit (so far as the belief and knowledge of the witness can go), ought to be direct and positive. *Ib.*

353. In cases of forgery, comparison of hands is not to be admitted as direct evidence to prove or disprove the genuineness of a signature or writing; but in a case where the ordinary evidence of that fact is so contradictory as to leave it doubtful, then such evidence may be given. *People* v. *Hewit*, 2 Parker's Crim. Rep. 20.

354. Proof that the plaintiff forged a note and attempted to pass it, in Sangamon county, are facts from which the jury might infer the place of forgery, and it is a question to be left to the jury whether he forged it where he attempted to pass it, or elsewhere, and in the absence of other proof they would be warranted in saying he had done it where the venue was laid. *Bland* v. *People*, 3 Scam. 364.

355. Where the defendant is indicted for passing counterfeit bank-bills, a witness acquainted with the hand-

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writing of the president of the bank will be permitted to prove the falsity of the signatures to the bills, upon showing that he is not interested in the event. *State* v. *Stalmaker*, 2 Brevard 1.

356. Where the prisoner is in possession of the forged notes mentioned in the indictment, with other forged notes of the like kind, this fact, and the plates, implements and materials for forging such notes, are prima facie evidence that the prisoner was a forger. *Spencer's case*, 2 Leigh 751.

357. And the circumstance that such forged notes, &c., are found in the possession of the prisoner in the county of B. is like prima facie evidence that he committed the forgery there. *Ib.*

358. Other testimony than that of the president and cashier, or of those who have seen them write or are acquainted with their hand-writing, is competent to prove that a bank bill is counterfeit. *State* v. *Lawrence*, Brayt. 78.

359. In a prosecution for passing a counterfeit note of the Bank of the United States, evidence of passing a counterfeit note of another bank at another time is inadmissible; or if given and not objected to, the jury will be instructed not to consider it. *United States* v. *Roudenbush*, 1 Bald. 514.

360. But after evidence that a note of the description mentioned in the indictment had been forged and passed, testimony may be given to show delivery and passing of other counterfeit notes on the same bank before or after passing the one in question. *United States* v. *Doebler*, 1 Bald. 519.

361. Where writings are not so ancient that they cannot be proved by living witnesses, it is not allowable to prove the hand-writing of a party by a mere comparison of the disputed paper with a writing admitted or proved to be genuine. But where in the course of the trial such evidence is admitted at the instance of the State, the error may be cured by the Court instructing the jury that the evidence was illegal and should not be regarded by them. *State* v. *Givens*, 5 Ala. Rep. 747.

362. A paper which is copied into an indictment for forgery, but touching which there is no allegation, and which can have no influence in determining whether the defendant is guilty in respect to the forgery charged, is irrelevant to the issue, and cannot upon proof that the defendant admitted its genuineness be laid before the jury, that by a comparison with it of the note alleged to be forged they may say whether they were both written by the same hand. *Ib.*

363. Where no evidence is adduced to show that the defendant is guilty of the forgery of a note as charged, it is not allowable for the jury to compare the note with a paper admitted to be written by the defendant, and if satisfied of the sameness of the hand-writing, to convict him of the offence. *Ib.*

364. Where an indictment is found for winning a certain sum of money; held that the prosecution might prove the winning of a smaller. *Parsons* v. *the State*, 2 Carter, (Ind.) 499.

365. A copy of a forged bill with the deposition of the person in whose hands the bill is, is not competent evidence where the bill itself is not produced. *Smith* v. *Holebrook*, 2 Root 45.

366. On an indictment for forgery, persons of skill can be called in to testify as to the genuineness of any bank-note, &c., but they need not testify to the genuineness of the signatures. *Johnson* v. *State*, 2 Carter 652.

367. While on a trial for passing counterfeit bank-notes, the prisoner appeared clearly to have been confederated with one L. in passing them, and to have been present when L. passed such notes, and the notes so passed by L. were produced in evidence against the prisoner as admissible; held that they were evidence. *Martin's case*, 2 Leigh 745.

368. In a prosecution for forging and delivering bank-notes, proof of the fact of forging a large quantity, and the delivering of one note having been given, parol evidence was admitted of the contents of a letter to an accomplice from the defendant, on the subject of counterfeit notes, for which the accomplice could not account, and had not searched, but believed he had lost. *U. States* v. *Doebler*, 1 Bald. 519.

369. It will be presumed that an ac-

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complice would destroy a letter which is not necessary; to produce it would implicate him, and no search is necessary before admitting secondary evidence. *Ib.*

370. And if the letter to which it is an answer is in the hands of the defendant, it is not necessary to give notice to the defendant to produce it before evidence is given of the contents of such answer. *Ib.*

371. In an indictment for forgery, it is not necessary to give notice to produce a paper in the hands of the defendant, or an accomplice, or a third person, so as to protect the defendant, or give notice that evidence of its contents will be offered at the trial, though such paper is not the subject of the indictment. *Ib.*

372. Where a defendant is indicted for passing counterfeit bank-bills, evidence of the defendant's conduct at the time, and in passing other bills near the same time, is competent to show a knowledge that the bills were counterfeit. *State* v. *Van Heuten*, 2 Penn. 672.

373. Where on information for uttering and passing a counterfeit bill, it was held that parol evidence was competent to show that the person whose name appeared on such bill as president, was president of the bank by which the same purported to be issued, *State* v. *Smith*, 5 Day 175, and held that evidence of the declarations and acts of the prisoner, tending to show his knowledge that the bill was counterfeit, was admissible. *Ib.*

374. On a trial for forgery of a bank-note against one, the prosecutor, after laying a foundation by proof for connecting the prisoner with other persons in the general transactions, may offer evidence that different parts of the machine employed in the counterfeiting, were found in possession of other persons respectively; but with respect to the effect of such evidence and the fact, the jury must decide. *U. States* v. *Craig*, 4 Wash. C. C. 729.

375. The possession of other counterfeit paper by the defendant, or a confederate, at the time of passing the counterfeit notes, is admissible as evidence of the scienter. *U. States* v. *Mitchell*, 1 Bald. 366.

376. On the trial of a person charged with passing counterfeit bank-notes, it is competent to prove he has passed other counterfeit paper, without producing it, if it be out of the jurisdiction of the Court. *Reed* v. *State*, 15 Ohio 217.

377. On trials for forgery, the possession of coining instruments may be given in evidence against the prisoner to prove the scienter. *State* v. *Antonio*, 3 Brev. 562.

378. In a case of forgery it is competent to prove that the writing was actually passed, for the purpose of establishing the fraudulent intent with which it was made. *Haskins* v. *State*, 11 Geo. 92.

379. It is certainly true, as a general rule, that evidence of other transactions than those charged in the indictment cannot be received; but where knowledge constitutes an essential ingredient in the guilt, this rule is relaxed. In such cases, transactions of a like kind with those charged in the indictment, may be given in evidence; therefore, in case of an indictment for forgery, it was clearly competent to prove the passing of two pieces similar to those described in the indictment in a gambling-house; and if competent to prove they were passed by the defendant, it was necessary to state the circumstances under which they were passed, so as to enable the jury to judge of the guilty knowledge. If the witness had been permitted to state only, that he had received these two pieces from the defendant, without explaining in what way, or under what circumstances, the jury would have been less able to draw the inferences upon which to found their verdict. *Powers* v. *State*, 9 Humph. 274.

380. On the trial of an indictment for forgery, charged in the first count to have been committed by the accused, by having in his possession a forged bank-note, purporting to have been issued by a certain banking association, with intent to utter the same, and in the second count, with uttering and publishing such notice, it is competent to prove, by parol, that there is such an institution in existence, doing business in this State, without offering

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in evidence the articles of association under which such bank was organized. *Dennis* v. *the People*, 1 Parker's Crim. R. 469.

381. Where the paper with these unessential marks and writings is offered in evidence, for the purpose of sustaining the prosecution for the forgery of the note, there will be no valid objection on the ground of variance between the proofs and the charges laid in the indictment. *Perkins* v. *Com.*, 7 Gratt. 651.

382. An accused, being in possession of the forged order drawn in his own favor, were facts constituting complete proof that, either by himself, or by false conspiracy with others, *he* forged or assented to the forgery of the instrument; that he either did the act or caused it to be done, until he showed the actual perpetrator, and that he himself was not privy. *Ib.*

383. Where, upon the trial of a prisoner for forgery, in passing a counterfeit bank-bill, the Court allowed a witness to mention, in answer to a question of the prosecuting attorney, the names of persons who were competent judges of the genuineness of bank-bills; held that this was proper. *McCartney* v. *the State*, 3 Ind. 353.

384. Upon the trial of such an indictment, the State may show, in order to prove the defendant's criminal intent, that, about the time the bill was passed, he uttered other counterfeit bills on the same bank and other banks; and the fact that indictments against the defendant are pending, or have been tried, for the passing of such other notes, will not affect the admissibility of such proof. *Ib.*

385. The State may also show what the defendant said at the time of passing the bill described in the indictment, in regard to it. *Ib.*

386. Where, at the trial upon such an indictment, the Court instructed the jury that if they were satisfied that the defendant uttered in payment and put away the note described in the indictment, that it was forged and false, and that the defendant knew it to be so, and put it upon the person named in the indictment, with intent to defraud him, no other proof of the existence of the bank upon which it purported to be, was necessary; held that the instruction was proper. *Ib.*

VI. Witnesses competent to Testify in Cases of Forgery.

387. Where a witness for some years previous was much in the habit of receiving and paying away notes of a particular bank, he is competent to prove the genuineness or forgery of a note on that bank, though he has never seen the president or cashier write, and never had a letter from them. *The State* v. *Chandler*, 3 Hawks 393; but see *the State* v. *Allen*, 1 Hawks 6.

388. In a prosecution for forgery, the person whose name is alleged to have been forged is not a competent witness to establish the forgery. *State* v. *Whitten*, 1 Hill S. C. 100.

389. Experts who never saw the officers of a bank write, may be introduced to prove the note counterfeit. *Farrington* v. *State*, 10 Ohio 354; *May* v. *State*, 14 Ohio 461.

390. The alleged maker of a forged note is a competent witness to prove the forgery, but the bona fide endorser of such a note, unless he has paid such note, cannot be admitted as a witness. *Respublica* v. *Ross*, 2 Yeates 1 S. C.; 2 Dall. 239.

391. The promiser of a note which is alleged to have been forged cannot be a witness in support of the indictment for forgery, being a party aggrieved, under the Vermont statute for the punishment of high crimes and misdemeanors. *State* v. *A. W.*, 1 Tyler 260.

392. The cashier of the bank from which the forged bill purports to come, is competent to testify to the forgery. *Commonwealth* v. *Read*, Thacher's Crim. Cas. 180.

393. A judgment was obtained before a justice of the peace against A. and his surety B. B. paid a part of the judgment, and took the constable's receipt, which receipt he fraudulently altered so as to make the sum larger. Afterwards A. settled with B., and repaid him what appeared by the receipt

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to have been paid by B.; held that on an indictment against B. for the forgery, A. was a competent witness for the State. *State* v. *Bateman*, 3 Iredell's R. 474.

394. On an indictment for passing a forged bank-note, a witness is competent to prove that the note was counterfeit who had for ten years been employed as cashier of a bank, who in that capacity had received and passed away a great number of the notes of this bank, without ever having had one returned as a counterfeit, and who swore that he believed he could readily distinguish between a genuine and a counterfeit note, not only from the hand-writing of the signatures, but also from the paper, engraving, and general appearance of the note. *State* v. *Harris*, 5 Iredell's R. 287.

395. The person whose instrument is alleged to be forged is not a competent witness to prove the forgery, unless the instrument said to be forged is produced at the trial. *Commonwealth* v. *Hutchinson*, 1 Mass. 7.

396. In a prosecution for forgery, the person whose name is charged to be forged is a competent witness to prove that fact. It is not necessary for the prosecution to call the alleged subscribing witness. *Simmons* v. *State*, 7 O. Rep. 116.

397. Upon the trial of an indictment for passing a forged instrument, when the instrument alleged to have been forged has been secreted to protect the offender, the person whose name is charged to have been forged, and who has seen and copied the instrument, is a competent witness to prove the instrument forged, &c. The production of the instrument itself will be dispensed with. *Commonwealth* v. *Snell*, 3 Mass. Rep. 82; *State* v. *Phelps*, 11 Vt. 116.

398. A check, in the name of B., on the bank, was passed by C. to D., who received the money and remitted it to C., as his agent. The check was subsequently found out to be a forgery, and the bank got possession of the money before it reached the hands of C. On an indictment for the forgery, B. was held to be a competent witness to show the forgery, he having received a release from the bank, and that he was not answerable to C. for the money even if the check were genuine, the bank having acted without his direction. *People* v. *Howell*, 4 John. 296.

399. The ground on which the prosecutor is admissible as a competent witness in a case of forgery is, that though he *may* be interested in the question, he is not interested in the event of the suit, because the verdict and judgment in such suit could not be given in evidence in the suit against the prosecutor, and he will not gain or lose by its event; and this is equally true, whether the civil action were commenced by the defendant against the prosecutor before the indictment, or whether such action remained to be commenced afterwards. *Com.* v. *Peck*, 1 Metc. Rep. 428.

400. A witness who had never seen a person write, nor received letters from him, and who hath no knowledge of his hand-writing but that derived from having received bank-notes, in the course of business, which purported to be signed by the person as the president of the bank, and were reputed to be genuine, is incompetent to prove his hand-writing, or to prove that a bank-note, purporting to be signed by him, is counterfeit; at least, unless the ordinary occupation of the witness is such as to render it probable that he has received and passed large sums, so as to become a skilful judge, and unless it appear that he has actually passed them so long ago as to allow time for the return of them if spurious. *State* v. *Allen*, 1 Hawks' R. 6.

401. The modes of proving hand-writing are, by the evidence of those, 1st. Who have seen the person write, which is most certain. 2d. Who, in course of correspondence, have received pertinent answers, or other letters, of such a nature as renders it highly probable that they were written by the person. 3d. Who have inspected and become acquainted with ancient authentic documents which bear the signature of the person. *Ib.*

402. And hence it seems, that a witness, having no knowledge of the hand-writing of a person but that derived

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from the signatures to the bank-notes, who is a banker, and, in that character, has habitually, for several years, received and paid away large sums in such notes, which he believed to be genuine, and were so reputed, is competent to prove that a note, purporting to be a bank-note, and to be signed by the same person, was not signed by him, and is counterfeit. *Ib.*

VII. Evidence necessary to support the charge of Forgery.

403. On a criminal trial for forgery of a check on a bank, where there is proof rendering it highly probable that the original paper has been lost or destroyed, though this was not done by the accused, or by his procurement, secondary evidence of the contents, character, and description of the paper, is competent to sustain the prosecution. *Pendleton's case*, 4 Leigh 694.

404. Where the intent is charged to have been to defraud the bank purporting to have issued the notes, the bank must be proven to be a real body, capable of being defrauded. *People* v. *Peabody*, 25 Wend. 473.

405. An indictment for the forgery of an order for $48, is not sustained by an order offered in evidence for $49. *The State* v. *Handy*, 2 App. 81.

406. In Pennsylvania, an indictment for forgery charges the word birch to have been altered to batch, by erasing the letters *irc* and inserting the letters *atc*; it will be sustained by evidence of the erasure of *ir* and substitution of *at*. *State* v. *Rowley*, Bryt. 76.

407. Where an indictment for forgery contains an allegation that the act was done with intent to defraud A. B., the Court held that the intent to defraud A. B. was material, and must be proved. *Com.* v. *Whitney*, Thacher's Crim. Cas. 588.

408. The offence of attempting to pass a forged piece, is fully made out, if it is shown that the attempt was made by the agent of the prisoner, employed by him. *United States* v. *Morrow*, 4 Washington's R. 733.

409. Where a prisoner was indicted for altering an order in writing for money payable to the defendant, and the evidence was his confession that another did it, the defendant knowing and assenting to it; it was held sufficient to warrant a conviction. *Com.* v. *Parmenter*, 5 Pick. 279.

410. Where the defendant is charged with having forged a promissory note, described in the indictment as a note without a seal, the indictment will not be supported by evidence tending to prove that the defendant had committed forgery under a seal, and it is error in the Court to admit such evidence in proof of the charge. *Hart* v. *State*, 20 Ohio, R. 49.

411. Where an indictment is founded on the Rev. Stat. c. 127, it is sufficient to allege, that the defendant "had in his possession a piece of false and counterfeit coin, counterfeited in the similitude of the good and legal silver coin, current in this Commonwealth by the laws and usages thereof, called a dollar, with intent to pass the same as true, knowing the same to be false and counterfeit," without giving any further description of the dollar; and in such case would be supported by proof that the defendant had in his possession a coin counterfeited in the similitude of a Mexican dollar, with such intent and knowledge. *Com.* v. *Stearns*, 10 Metc. R. 256.

412. And such knowledge may be established, by evidence that the defendant previously passed similar counterfeit coins, although an indictment is pending against him for such passing. *Ib.*

413. Where the testimony was that the defendant passed a bank-note, and that the note was fictitious; that he gave different accounts as to the person from whom he received it, and did not attempt, upon trial, to explain; held that such testimony was sufficient to sustain a verdict of guilty. *Perdue* v. *State*, 2 Humph. 494.

414. It is a question for the jury to decide, as to defendant's knowledge of the spuriousness of the bank-note. *Ib.*

415. On an indictment for having in possession false and counterfeit bills on a foreign bank, with intent to bar-

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ter, &c., the State is not bound to prove it to be an incorporated bank by the production of its charter. *Sasser* v. *State*, 13th Ohio R. 453.

416. Possession of such bills, with intent to barter or dispose thereof for the benefit of another, is within the statute. *Ib.*

417. Proof of uttering and publishing counterfeit bank-notes as true and genuine, will not sustain an indictment under the 29th section of the statute, for selling and bartering such notes. *Vanvalkenburg* v. *State*, 11 O. R. 404.

418. Where the notes are charged to be counterfeited by the prisoner, with intent to defraud the Bank of the United States, or any person, it is not necessary to the conviction of the accused that these facts should be established by positive proof; circumstantial evidence is sufficient, if it be such as to satisfy the minds of the jury of the existence of the facts which it is intended to prove. *United States* v. *Moses*, 4 Wash. R. 726.

419. Where an indictment is found, under sections 4 and 5, ch. 216, R. S., for counterfeiting or passing a bank-bill, purporting to be issued by any bank, the existence of the bank need not be proved. *State* v. *Hayden*, 15 N. H., R. 355.

420. In order to constitute the offence of having a counterfeit bank-note in possession, three facts must conspire, and have to be proved by the prosecution: 1, the possession of the bank-bill; 2, the knowledge of its being counterfeit; and 3, the intention to pass it, with a view to defraud. *Harlan* v. *People*, 1 Doug. 207.

421. Where the accused is charged with having "forged and counterfeited a certain order for the payment of money, purporting to be made and drawn by Eaton Clark and Isaac Somes, selectmen of the town of M.;" it was held unnecessary to sustain the indictment, to prove that those men were in fact selectmen of the town. *State* v. *Flye*, 26 Me. 312.

422. On an indictment for the forgery of an order, it is necessary that the order should import that the persons in whose names it was made, have a disposing power over the subject of the order, or that it should be proved that the persons in whose names it was made, had such power. *Ib.*

423. Where an indictment charged in the first count, the prisoner with passing as true a counterfeited promissory note, and described the note, which purported to be issued by the Globe Bank of New York; it was held that such indictment was founded on the 2d section of chap. 216, R. S., for passing a counterfeited promissory note, and was not an indictment found under the 5th section, for passing a counterfeit bank-bill; that the two offences subjected the offender to different punishments, and were distinct; and that the evidence did not prove the offence laid in the first count. *State* v. *Hayden*, 15 N. H. 355.

424. In the second count of the indictment, the prisoner is charged with passing, and using as true, a false, forged, and counterfeited writing, purporting to contain evidence of a debt, contract, and promise, and the writing is described as issued by the Globe Bank of New York; this count was founded upon sec. 1, ch. 216, R. S., which imposes a penalty for falsely making, &c., any writing purporting to contain evidence of the existence of any debt, &c., while it should have been founded on the 5th section of the act. *Ib.*

425. A person indicted for having in in his possession a counterfeit bank-note for the purpose of selling, bartering, or disposing of the same, cannot be convicted by proof, of having in possession such note with intent to pass the same to an innocent person as true and genuine. *Hutchins* v. *State*, 13 O. 198.

426. In Ohio, the 22d, 29th, and 32d sections of the act for punishment of crime respecting counterfeit bank-notes, are different and distinct offences, and proof of the one will not support an indictment for either of the others. *Ib.*

427. If an instrument, from its face, purports to have been made in Charleston, S. C., and it is proved the prisoner, at its date, was there, and had the same in his possession, it is sufficient evidence to show that it was made there. *State* v. *Jones*, 1 McMullan 236.

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428. Where defendant was indicted for counterfeiting a bill of an incorporated bank, incorporated by the name of "The President and Directors of the Bank of South Carolina;" the bill produced was of "The Bank of South Carolina;" it was held that the evidence did not support the indictment. *State* v. *Waters*, 3 Brevard 507; *Ib.*, 2 Const. R. 669.

429. In a prosecution for forgery, the forged note being seen in the hands of the defendant, in the county in which the forgery is charged to have been committed, is, in the absence of all proof of the place where, and the person by whom the note was actually forged, sufficient evidence to justify a conviction. *State* v. *Morgan*, 2 Dev. & Batt. Rep. 348.

430. On an indictment for having ten counterfeit bills in his possession, it is essential to the conviction of the accused, not only that he shall have had the ten bills in his possession on the same day, but at the same moment. *Edwards* v. *Com.*, 19 Pick. 124.

431. Where a defendant was indicted for passing a forged promissory note as true, purporting to be made by A., payable to B. or order, evidence of the uttering of such note, with the endorsement of B.'s name on the back thereof, was held to sustain the indictment. *Com.* v. *Adams*, 7 Metc. 50.

432. On a charge of *uttering and publishing* a promissory note, with the names of several individuals upon it as endorsers, all which endorsements are charged to be forged, it is not necessary for the purpose of sustaining the indictment, to prove *all* the endorsements to be forgeries; it is enough that one or more are proven to be forgeries. *People* v. *Rathbone*, 21 Wend. 509.

433. Where the charge is, the false making of a note, &c., but the count also sets out a written recommendation of the solvency it makes, without any allegation in respect thereto, the defendant may be found guilty by proof of the forgery of the note, although no evidence is adduced as to the recommendation. *State* v. *Givens*, 5 Ala. 747.

434. On an indictment in the State of New York against a prisoner, for *having in his possession, with intent to pass, bank-notes* purporting to have been issued by a banking corporation of a State, *other* than that of New York, it is not necessary to prove that there is in fact such a corporation in existence; at all events, proof of the most general character of its existence is sufficient. *People* v. *Davis*, 21 Wend. 309.

435. Where a *direct charge* rests for its truth upon the testimony of *accomplices*, such proof is sufficient to convict, if it be *corroborated by the evidence of credible witnesses*, although such evidence has only an *indirect* tendency to establish the commission of the *particular offence* alleged; as, where the testimony of the accomplices fixes upon the defendant the charge of having in his possession counterfeit bills, with the intent to pass, and the proof, by the unimpeached witnesses, shows that the defendant was possessed of a *press* and *plates* used in making counterfeit impressions of bank-bills. The confirmation of the accomplices must, however, be of some fact or facts which go to fix the guilt of the defendant. *Ib.*

436. On a trial for passing counterfeit bank-notes, it need not be proved that the notes are counterfeit, by an officer of the bank. *Martin's case*, 2 Leigh 745.

437. Upon a criminal prosecution for forgery of a written instrument, the Commonwealth may, without producing as a witness the party by whom the instrument purports to be signed, and without accounting for his absence, show that the instrument is not genuine, by the testimony of other witnesses; such evidence being in its nature secondary to that of the party whose signature is in question. *Foulker's case*, 2 Robinson 836.

438. To make out a conviction for uttering or passing counterfeit paper, the defendant must have been present at the act, privy to it, or aiding, consenting, or procuring it to be done. *U. S.* v. *Mitchell*, 1 Bald. 366.

439. Where the defendant was charged with knowingly retaining in his possession certain dies and plates, and other apparatus and instruments, made use of in forging, &c., it was held that the words "other apparatus and in-

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struments," in the indictment, were surplusage. Held that to convict the defendant, it must be proved that he knowingly retained in his possession some instrument named in the indictment. *People* v. *State*, 6 Blackf.'s Rep. 95.

440. Proof of the passing in payment, of base metal in the likeness or similitude of gold, will not support the charge in an indictment of passing in payment, "counterfeit gold coin." *Rouse* v. *State*, 4 Ga. 136.

441. Where an indictment was found for passing counterfeit coin, it was held that the averment that it was passed to a particular person, was material, and that the Christian name of the individual must be proved as charged; and where he was called Eli Clemens, in the indictment, and there was no proof that his Christian name was Eli; it was held that it was error to instruct the jury that they might infer from the testimony that his name was Eli. *Gabe* v. *State*, 1 Eng. 519.

442. Under an indictment for forgery, there need not be a literal correspondence between the instrument described in the indictment and that given in evidence at the trial; if the correspondence is such as will prevent the accused from being a second time put in jeopardy for the same cause, should he be acquitted, or from being a second time punished if he be convicted, it is enough. *Butler* v. *State*, 22 Ala. 43.

VIII. Miscellaneous.

443. Passing a paper, is giving it away in payment or exchange. Uttering it is an assertion that it is good, with intention to pass or an offer to pass it. *U. S.* v. *Mitchell*, 1 Bald. 366.

444. There can be no conviction upon a count charging an intent to defraud a person or corporation, which has no existence, for nonentities have no rights to be prejudiced by such an act. *State* v. *Givens*, 5 Ala. 747.

445. Under the Arkansas statute requiring the name of the prosecutor to be endorsed upon the indictment, or a statement respecting the testimony to be made at the end of the indictment, in cases of trespass upon the person or property of another, less than a felony, held that passing counterfeit coin was not such a trespass as was contemplated. *Gabe* v. *State*, 1 Eng. 519.

446. Where an indictment (set forth in the record of the finding and in the entry of the arraignment as an indictment for "forgery") contained a count for forging and counterfeiting a note, and a count for feloniously using and employing as true a counterfeit note, and the verdict found the prisoner guilty of "forgery," as alleged in the indictment, it was held that a discharge must be entered on the second count. *Page's case*, 9 Leigh 683.

447. A demurrer to an indictment for forgery, on the ground of a variance between the instrument described therein, and that given in evidence at the trial, cannot be entertained by the Court, unless oyer of the instrument is craved. *Butler* v. *State*, 22 Ala. 43.

448. Where there is an evident ambiguity on the face of the note alleged to have been forged, arising from the use of words, which are awkwardly, unskilfully, or designedly inserted, it is the duty of the Court to examine it, and to instruct the jury as to how it should be read. *Butler* v. *State*, 22 Ala. 43.

449. It is no justification, on a criminal trial for having counterfeit bills in possession, in the act to pass them, that the bills were passed at a gaming table. *Com.* v. *Percival*, Thacher Crim. Cas. 293.

450. On the trial for an indictment for passing counterfeit money, the jury should be satisfied that the resemblance of the forged to the genuine piece is such as might deceive a person exercising ordinary caution. *U. States* v. *Morrow*, 4 Wash. C. C. 733.

451. Intoxication cannot be pleaded as a defence in an indictment for passing counterfeit money, if the defendant was possessed of his reason, and was capable of knowing whether the note passed by him was good or bad. *U. States* v. *Roudenbush*, 1 Bald. 514.

452. In a case of forgery in the Circuit Court of the "United States," the

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defendant has not the privilege of presenting challenges. *U. States* v. *Shive*, 1 Bald. 510.

453. Where an indictment is presented for forgery, held that a variance of a letter in any word is not material, which does not make it another word, or one varying in sense and grammar. *U. States*, v. *Hinman*, 1 Bald. 292. When there is a doubtful case it will be left to a jury to find whether both words are the same. *Ib.*

454. Where a party was convicted under the Massachusetts statute of 1804, c. 120, § 2, for possessing not less than ten similar counterfeit bank-bills, with intent to pass them, and objected that the bills being of different dates were not similar, the objection was not sustained. *Commonwealth* v. *Whitmarsh*, 4 Pick. 233.

455. Where a note is passed as genuine, by a person knowing it to be forged, the law infers the intent to defraud, because it is the natural consequence of the act. *Com.* v. *Whitney*, Thacher's Crim. Cas. 588.

456. In a case of forgery, if there was not an actual authority, still if the defendant had fair ground to consider that he had authority to use another's name, that would negative the intention to defraud, and would relieve him from the imputation of guilt, which arises out of the transaction. *Com.* v. *Whitney*, Thacher's Crim. Cas. 588.

457. With regard to forgery, the Bank of the United States was established by a law of Congress, and must be considered as established in all the States, and consequently licensed and authorized by law as a bank within the Commonwealth of Mass. *Com.* v. *Woodbury*, Thacher's Crim. Cas. 47.

458. Where a defendant is charged with forging a bank-note, "purporting to have been issued," &c, promising to pay; held that it must be understood as descriptive of a bill, purporting to promise as well as purporting to have been issued. *State* v. *Twitty*, 2 Hawks' R. 449.

459. The offence of forging in the county, cannot be inferred from the fact of uttering and publishing in the county. *Com.* v. *Parmenter*, 5 Pick. 279.

460. Where the check was made and was produced at Boston, in an altered state, and the prisoner offered no explanation of the time or place of the alteration, it was held that the presumption was, that the alteration was made in the State of Massachusetts. *United States* v. *Britton*, 2 Mason 464.

461. Charging a person with forging a *letter* without saying more, does not either necessarily or according to the presumed understanding of the hearer, impute a criminal offence. The import of such a charge is at least as ambiguous and indeterminate as that of being a "rogue" or "*forsworn*," and for the like reasons the charge that a letter had been "*written*" by one person "*to defraud*" another, should not be deemed actionable slander *per se*, and especially as such a charge does not import that the letter was not in the name of the writer himself. *Jackson* v. *Weisiger*, 2 Mon. 214.

462. Where the record shows that upon the trial of an indictment for forgery, the prisoner's counsel, among other things, prayed the Court to charge the jury, that if they were satisfied the note offered in evidence was a false note of a bank, company, or association actually existing in the State of Illinois, they should acquit whether such bank or company was chartered by the laws of that State or not This instruction was refused by the Court, but they charged the jury that if they found the note one of an existing company, known to the prisoner as not legally chartered by the laws of Illinois, they should convict.. Held that in giving this charge the Court below were in error. *Cahoon* v. *State*, 8 Ohio R. 537.

463. If a prisoner is guilty in fact of forgery, his conviction may be sustained, either under the acts of 1736–'7, the act of 1801, or at Common Law. *State* v. *Jones*, 1 McMullan 236.

464. Where a party was indicted for passing and having in his possession for the purpose of passing, forged and counterfeited bank-notes, with intent to pass and *with intent to defraud the Bank of Warsaw*, which was an association formed according to the provisions of the general banking law, and the objection that no such corporation or artificial person existed, was taken on the

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trial and overruled; it was held an error, the fact appearing by a bill of exceptions that the conviction was erroneous, and the judgment was set aside. *DeBow* v. *People*, 1 Denio 9.

465. Where on the trial of an indictment for forgery the case had been submitted to the jury, and they had retired to consider of their verdict, they returned into court, and asked the Court to instruct them as to whether it was necessary that they should be satisfied that the prisoner did actually and personally forge the paper charged in the indictment, in order to his conviction, and the Court instructed them that either the actual forgery by the prisoner, or his actual presence aiding and assisting with a felonious intent when the forged instrument was made, constituted the offence of forgery; it was held that the instruction being responsive to the inquiry propounded by the jury, even if it was an abstract proposition, yet as the jury asked an instruction on the point, and the instruction given correctly stated the law, it was no ground for setting aside the verdict. *Perkins* v. *Com.*, 7 Gratt. 651.

466. Where an information was made for uttering and passing a counterfeit bill, and one only of the several counts was attempted to be proved, and the jury found a general verdict of guilty, it was held that such finding was good, although the jury omitted to find the prisoner not guilty as to the counts not proved. *State* v. *Smith*, 5 Day 175.

467. On the trial of an indictment for forgery in the second degree, under the twenty-first section of the 4th article of the act concerning crimes and punishments, the jury found the defendant guilty, "in manner and form as charged in the within indictment;" held that as under this indictment the defendant could not be convicted of any inferior degree of forgery, it was unnecessary for the jury to specify in their verdict of what degree of offence they found the defendant guilty. *State* v. *Shoemaker*, 7 Mo. Rep. 177.

FORMER ACQUITTAL AND CONVICTION.

I. Former trial and conviction. Plea of, when a bar to a subsequent prosecution.
II. Former trial and conviction. Plea of, when no bar, &c.
III. Former acquittal. Plea of, when a bar to a subsequent prosecution.
IV. Former acquittal. Plea of, when no bar, &c.
V. Miscellaneous.

I. Former Trial and Conviction—Plea of, when a Bar to a Subsequent Prosecution.

1. Where a bill of indictment for an assault and battery was found in the Superior Court against the defendant, and pending the same, after his knowledge thereof, and before his arrest, he procured himself to be indicted for the same offence in the County Court, and there voluntarily submitted and was fined; held that the conviction in the County Court was a good defence to the indictment in the Superior Court. *State* v. *Casey*, Busbee N. Car. 209.

2. A plea of former conviction by a Justice of the Peace for an assault and battery, interposed to an indictment for the same offence, was held to be good, if it appeared by the plea and record of conviction that the offence was the same for which he had been tried, convicted, and punished, and that the Justice had jurisdiction over that offence; and it was held that the defendant ought not to be held again to answer. *Commonwealth* v. *Goddard*, 13 Mass. 455.

3. Where two persons are wounded by the same assault and battery, and the defendant has been legally convicted before a competent court for the assault and battery committed on one of them, such conviction was held to be a bar to an indictment for the assault and battery committed on the other. *State* v. *Damon*, 2 Tyler 387.

4. An indictment for an assault and battery upon B. having been found against one, and a conviction had upon it, a second indictment being found against the same defendant and others for riot and beating the said B., it was

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held that a plea of the former conviction was good as a bar to the second indictment. *Commonwealth* v. *Kinney*, 2 Virg. Cas. 139.

5. A conviction and punishment for one felony is a discharge of all precedent felonies, not capital, and a defendant ought not to be arraigned for such precedent felonies, if he plead the conviction and punishment in bar. *Crenshaw* v. *State*, 1 Martin & Yerger 122.

6. In Connecticut, a conviction having been obtained upon an indictment for an attempt to commit a rape, it was held to be a good plea in bar to an indictment for rape; because the offence charged in the first indictment was contained in that alleged in the second indictment. *State* v. *Shepard*, 7 Conn. 56.

7. Where a prisoner, in committing a felony not capital, at the same time commits a capital felony, though not intentional, but consequential on the felony which is not capital, if the State thinks proper to prosecute for the lesser offence, it was held that a conviction for the lesser offence operated as a bar to an indictment for the capital offence. *State* v. *Cooper*, 1 Green 362.

8. If a prisoner be tried by a Justice of the Peace on a charge of larceny, and convicted and perform the sentence, such conviction and performance of the sentence by the prisoner is a bar to an indictment for the same offence, although the proceedings before the Justice were erroneous, and might have been set aside for error; for such proceedings must be considered good until the same are reversed. *Commonwealth* v. *Loud*, 3 Metcalf 328.

9. In Massachusetts, a conviction or acquittal on an indictment under sec. 5, ch. 126 of the Rev. St., would be a good bar to a second indictment for the same act, alleging it with the aggravating circumstances described in the 3d section of the statute. *Commonwealth* v. *Squire*, 1 Metcalf 258.

10. Where a defendant has been convicted of arson, it was held that such conviction could be pleaded in bar of an indictment for murder which was a consequence of the burning for which the prisoner was convicted. *State* v. *Cooper*, 1 Green 361.

11. A conviction, judgment, and execution upon one indictment for a felony not capital, is a bar to all other indictments for felonies not capital committed previous to such conviction, judgment, and execution. *Crenshaw* v. *State*, 1 Mart. & Yer. 122.

12. Where commissioners are bound to keep the streets of an incorporated town in repair, and are liable to an indictment for every neglect of this duty, if two or more of the streets of the town are out of repair at the same time, and several indictments are found, a conviction on one of such indictments is a bar to all of the others. *State* v. *Commissioners*, &c., 2 Murphy 371.

13. Where an indictment contains several counts, all relating to the same offence, a conviction had on any one of the other counts will be a bar to the offence charged in the first, and consequently a bar to any future prosecution for the same offence. *U. States* v. *Keen*, 1 McLean 429.

14. There is no ground, under the statute, for proceeding by information to award additional punishment, in a case where it appears that the same two prior convictions, relied upon to support the information, were recited in the indictment, were found by the general verdict, and therefore constituted a part of the conviction on which the judgment proceeded. *Plumbly* v. *Commonwealth*, 2 Metcalf 413.

15. By statute of 1830, in Vermont, the selling of liquor without license being indictable, upon an indictment for such offence, a former conviction, in order to be effectual as a bar, must be shown to have been for the same offence for which the prisoner stands indicted. *State* v. *Ainsworth*, 11 Vermont 91.

16. A judgment on the conviction, in order to render the prisoner's plea in bar an answer in bar to a second indictment, is not necessary. The verdict itself, whether of conviction or acquittal, formal or virtual, constitutes a bar. *Mount* v. *State*, 14 Ohio 295.

17. A verdict of guilty, on which judgment impends, in one of several informations, for having several forged bills in possession, is a bar to a subsequent information founded on the pos-

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session of any part of the same parcel of bills. *State* v. *Benham*, 7 Conn. 414.

18. On an indictment for robbery, where the prisoner relied upon a plea of autrefois convict, on a charge of burglary, the indictment in that case having charged the breaking and entering with intent to commit the robbery, which, by demurrer to the plea, was admitted to be the same as that charged in the second indictment; it was held that the plea of former conviction was sufficient in law, because the record shows the second case to be the same transaction with the first. It was also held that the plea of autre fois convict is sufficient, where the prisoner might have been convicted on the first indictment by the evidence necessary to support the second. *Roberts* v. *State*, 14 Georgia Rep. 8.

19. A fine for a breach of the peace assessed upon a warrant, issued under the authority of the statute of 1802, is a legal bar to a subsequent indictment against the same party for an assault and battery, in which the breach of the peace, for which he was so fined, had been committed. *Commonwealth* v. *Miller*, 5 Dana 320.

20. Where a defendant is charged in one indictment with burglary and larceny, and in another for robbery, both being for the same stealing of goods, a conviction on the first indictment for burglary and larceny is a good plea in bar to a trial on the second indictment. *State* v. *Lewis*, 2 Hawks 98.

21. To constitute the plea of a former conviction an available defence in bar of another prosecution, the former conviction must have been lawful. If the tribunal had not competent jurisdiction, or the proceedings were illegal, or the indictment invalid, the conviction will be treated as a nullity. *State* v. *Spencer*, 10 Humph. 431.

22. In Tennessee, to make a plea of former conviction before a justice of the peace available as a bar to a prosecution in the Circuit Court for the same offence, the plea must distinctly aver that the justice of the peace heard the evidence. *State* v. *Spencer*, 10 Humph. 431.

23. Under the Tennessee act of 1848, entitled an act for the punishment of small offences, passed January 11, 1848, a former trial and conviction for an assault and battery, before a justice of the peace, may be pleaded in bar to a subsequent indictment for the same offence; and it is held to be a bar even if the act were unconstitutional. *McGinnis* v. *State*, 9 Humph. 43.

24. Upon a plea of former conviction, under the act of 1848, it is necessary to aver that the defendant was brought before the justice, and to state what amount of fine was assessed against him by the justice; because if the fine were under two or over fifty dollars, it would be illegal, and would constitute no bar to a subsequent indictment for the same offence. *State* v. *Atkinson*, 9 Humph. 677.

25. A former conviction, in order to be available, should be specially pleaded. It cannot come in by way of evidence under a plea of not guilty. *State* v. *Barnes*, 32 Maine (12 Red.) 530.

26. Where the defendant has been indicted and convicted for running a horse race, such conviction may be pleaded in bar to an indictment for betting on the same horse race. *Fiddler* v. *State*, 7 Humph. 508.

27. Where a plea of former conviction is made, and the record is objected to as being defective, for the reason that the justice of the peace, after an examination of the case, ordered the defendant to recognize for his appearance at the Court of Common Pleas to answer for the offence; and that he afterwards permitted him to retract his plea and to plead guilty, whereupon he proceeded to sentence him to pay a fine and costs of prosecution; it was held that the plea was sustained by the record of conviction. *Commonwealth* v. *Goddard*, 13 Mass. 455.

28. Where a defendant was indicted for murder and tried, and was found guilty of manslaughter, but not guilty of murder, which verdict was set aside on appeal on behalf of defendant; it was held, upon a new trial on the same indictment, that the defendant could only plead a former acquittal as to the charge of murder, and that he could be legally tried on the charge of manslaughter. *Slaughter* v. *State*, 6 Humph. 410.

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29. Where two bills of indictment were preferred against the prisoner for passing counterfeit bank-bills, and he demanded his trial on both, but was tried only on one, convicted and sentenced to be hung, and afterwards was pardoned by the governor and set at liberty, when he was again arrested on a second indictment; held, on an application for his discharge under the habeas corpus act, that the prisoner was entitled to his discharge. *State* v. *Stalnaker*, 2 Brevard 44.

II. Former Trial and Conviction—Plea of, when no Bar, &c.

30. Where there has been a conviction upon an indictment of being a common seller of spirituous liquors, it cannot be pleaded or proved in defence of a complaint for a single act of sale, though such act be within the time embraced in the indictment. *State* v. *Maher*, 35 Maine Rep. 225.

31. A fine imposed by a Court on one for contempt, in committing an assault and battery in its presence, is no ground for a plea of a former conviction to an indictment for the same assault and battery. *State* v. *Yancy*, 1 Car. Law Rep. 519.

32. If a prisoner is convicted of an assault and battery before a justice of the peace on his own information, or confession, and fined, this cannot be pleaded in bar of an indictment for the same offence. *Commonwealth* v. *Alderman*, 4 Mass. 477.

33. If a person is charged with an assault and battery, and through fraud procure his conviction, and be nominally fined, he will not be allowed to plead such conviction in bar to an indictment, before a court of competent jurisdiction. *Commonwealth* v. *Jackson*, 2 Virg. Cas. 501.

34. And in such case, if the fraudulent conviction be pleaded in bar, and the prosecution by way of replication, set-up that the conviction was obtained through fraud, such a replication will be considered good on demurrer. *Ib.*

35. Fraud used to procure a conviction, renders a plea of such conviction, on the trial under subsequent indictment for the same offence, invalid. *State* v. *Little*, 1 N. Hamp. 257.

36. If a defendant charged with an assault and battery, authorize a third person to make a complaint against himself before a justice of the peace, and employ counsel on behalf of the people to prosecute such charge before the justice, and so manage the case as to procure a mere nominal fine to be imposed by the justice, in order to shield himself from adequate punishment; it was held that a conviction thus procured was obtained by covin and fraud, and could not be pleaded in bar. *State* v. *Little*, 1 N. Hamp. 257.

37. If a conviction is obtained for a lesser offence, as a conviction for an assault and battery with intention to commit murder, it cannot be pleaded in bar to an indictment for murder. *Commonwealth* v. *Roby*, 12 Pick. 496.

38. In Alabama, neither a conviction nor pardon for a particular offence, can operate as a bar of any other distinct offence. *Hawkins* v. *State*, 1 Porter 475.

39. In South Carolina, it was held that a conviction for a subsequent offence, which was pardoned by the Governor, did not operate as a bar to the prosecution of any other offence not particularly mentioned in the Governor's pardon. *State* v. *McCarty*, 1 Bay 334.

40. When a special term is held by a court, not duly authorized by law, all proceedings before such court are coram non judice and void; and a person convicted at such court, cannot be considered as having been within the contemplation of law put in jeopardy, and he may yet, after such conviction, be lawfully tried, precisely as if no such proceeding had ever taken place before such court. *Dunn* v. *State*, 2 Pike's Arkansas R. 229.

41. If, after a prisoner has been convicted, the judgment is arrested, the proceedings set aside and the prisoner discharged, he cannot be considered to have been legally in jeopardy, and cannot plead the arrest in bar to a subsequent indictment. *Gerard* v. *the People*, 3 Scam. 362.

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42. The Court has the power, after a conviction for a felony, to grant a new trial, with the consent of the prisoner, and the verdict and judgment will be no bar to his being again tried for the same offence. *State* v. *Slack*, 6 Alabama 676.

43. A prisoner who has been once before sentenced to confinement to hard labor, for a term of years, in the State prison of another State, is liable to an additional punishment, not exceeding seven years, under the statute of 1827, c. 118, § 19, and such additional punishment is no bar to another upon a subsequent commitment. *Commonwealth* v. *Mott*, 21 Pick. 492.

44. It is no bar to an indictment for a riot, that the defendant was convicted before a justice of the peace under the laws of the corporation of St. Louis, of the same offence. Riots, &c., are expressly excepted by statute from the jurisdiction of a justice of the peace. *State* v. *Payne*, 4 Missouri 376.

45. Where a replication to a plea of a former conviction before a justice of the peace, under the act of 1848, ch. 55, alleges that the proceedings before the justice were fraudulent and collusive, and were instituted by the procurement of the defendant, and further alleges, that the justice did not hear the evidence in the case ; it was held that if both or either of these allegations should be sustained by the proof, the proceedings before the justice would be treated as a nullity, and as no bar to an indictment for the same offence. *State* v. *Colvin*, 11 Humph. 599.

46. Where a witness having been summoned to attend before the grand jury to give testimony against another for selling spirituous liquors ; on the day before he was so to appear, went before a justice of the peace and made a complaint for the same offence, upon which the defendant being brought before the justice, pleaded guilty and was fined by the justice after hearing the evidence ; it was held that these proceedings before the justice were a fraud, and would not constitute a plea in bar to an indictment for the same offence. *State* v. *Lowry*, 1 Swan, 34.

47. A single act of selling spirituous liquors, is an offence under the statute ; and presuming to be a common seller, is a different and higher offence, and both have their different and appropriate punishments ; and upon a trial for common selling, the single acts of sale are not prosecuted, and a conviction therefore for common selling is no bar to a prosecution for single acts, though done all within the same length of time. *State* v. *Coombs*, 32 Maine (2 Red.) 529.

48. Where a defendant has been indicted and convicted for advising the slave of another to run away, and pleads such conviction in bar to another indictment for a similar offence committed at the same time, but with reference to another slave ; it was held to be no bar to the second indictment. *Smith* v. *Com.*, 7 Gratt. 593.

49. In Arkansas, under the act of 1840, conferring jurisdiction upon the City Court of Little Rock, a trial for an assault and battery, in that court, but was held to be coram non judice, and void ; and consequently a conviction in that court for an assault and battery, is no bar to a subsequent indictment for the same offence in a court of competent jurisdiction. *Rector* v. *State*, 1 Eng. 187.

50. If a defendant has been convicted before a justice of the peace for an assault and battery, it is no defence to a subsequent indictment for a riot, founded upon the same breach of the peace for which the defendant was convicted before the justice of the peace. *Scott* v. *United States*, 1 Morris 142.

51. A trial and conviction before a Court of Special Sessions, for an assault and battery, constitutes no bar to a subsequent indictment for manslaughter, when the person assaulted dies afterwards of the wounds caused by the blows, for inflicting which the complaint for assault and battery was made. *Burns* v. *the People*, 1 Parker's Crim. R. 182.

52. Under the Rev. Stats., ch. 133, of Massachusetts, a prisoner, in case he has been twice before sentenced, is still liable to additional punishment upon a third conviction, for a term not

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less than seven years, in like manner as upon the first two convictions. *Plumbly* v. *Com.*, 2 Met. 413.

III. Former Acquittal—Plea of, when a Bar to a Subsequent Prosecution.

53. A nolle prosequi may be entered in a capital case, at the pleasure of the prosecuting officer, before a jury is impanelled; but if a nolle prosequi is entered after the jury have been charged with the cause, without the consent of the defendant, and the record disclosing no necessity for this discharge, it is held that the defendant cannot be put on his trial a second time for the same offence; and that in such case, discharge and acquittal are synonymous terms. *Mount* v. *State*, 14 Ohio 295; *Reynolds* v. *State*, 3 Kelly 53.

54. In the State of North Carolina, a jury, after a case has been submitted to them, cannot separate without finding a verdict; and if they do, the prisoner cannot be put on trial again for the same offence. *State* v. *Garrigues*, 1 Haywood 276.

55. Where an indictment is found against one, for assaulting another, so that the life of the latter was put in great jeopardy, a plea of acquittal by a justice of the peace, is a good bar to such indictment. *Com.* v. *Cunningham*, 13 Mass. 245.

56. If the indictment is valid, upon which a verdict of acquittal or conviction is found, such verdict will be a sufficient bar to any subsequent prosecution for the same offence; even though judgment has not been perfected on the verdict. *State* v. *Norvell*, 2 Yerger 24.

57. If, after a conviction on a valid indictment, judgment be erroneously arrested, this would be matter proper for a plea of former acquittal, and would, if pleaded, be a bar to subsequent prosecution. The judgment of discharge so made, may, however, be reversed on appeal, and in that case, the former judgment will be carried into effect against the prisoner. *State* v. *Norvell*, 2 Yerger 24.

58. A former acquittal on an indictment for a rape, on the traverse of which it appeared that the act charged as a rape, was committed, is a bar to a subsequent prosecution founded on the same transaction for an assault and battery. *Case of Serjeant*, N. Y. Gen. Session, March, 1817, 2 City Hall Rec. 44.

59. In all cases of indictments or informations for matters criminal, in which the accused has been acquitted, and his acquittal has not been procured by his own fraud or evil practice, he shall not again be put in jeopardy by a new trial granted upon the motion of the State or the public prosecutor. But in all cases of conviction on criminal prosecutions, the accused is entitled to relief by new trial, in the same manner as in civil actions. *State* v. *Brown*, 16 Conn. 54.

60. Where a prisoner has been discharged from a former commitment on a charge of murder under the habeas corpus act, on account of delay on the part of the prosecution, it was held that he could not be legally indicted and tried on the same charge. *State* v. *Fley and Rochelle*, 2 Brevard 338.

61. Although the State may have been improperly refused, by the Court, leave to enter a nolle prosequi, or the Court have misdirected the jury, or illegal evidence may have been admitted, or legal testimony rejected, or the verdict be against evidence, the verdict and judgment of acquittal on an indictment, if fairly obtained, are conclusive; and neither by the principles of the Common Law, nor by the provisions of our Constitution, can a defendant again be put in jeopardy for the same offence. *State* v. *Davis*, 4 Blackf. 345.

62. In case of an indictment for a major offence, where the jury trying the case could lawfully have returned a verdict for the lesser offence, an acquittal under such indictment would be a bar to an indictment for the minor offence; as an acquittal for murder would be a bar to an indictment for manslaughter; and so of a burglary, when the same indictment included a charge of larceny, an acquittal would be a complete discharge. *State* v. *Standifer*, 5 Porter 523.

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63. In all criminal prosecutions, where a conviction would subject the prisoner to capital punishment, or would render him liable to be restrained from his personal liberty, an acquittal by a jury is a complete bar to any subsequent trial for the same offence. *State* v. *Spear*, 6 Missouri 644.

64. Where a party relies upon a plea of former acquittal, it is not considered good, unless it appear that, under the first indictment or complaint, the real merits could have been tried, and that the party was actually in jeopardy. *Commonwealth* v. *Curtis*, Thacher's Crim. Cas. 202.

65. Where an indictment charges forgery to have been committed by the alteration of an order drawn by one G., on the firm of J. Irwin & Co., and the defendant is tried and acquitted on the indictment, such acquittal was held to be a good plea in bar to a second indictment for the same forgery, which contained a description of the firm as "John Irwin & Co." *Durham* v. *the People*, 4 Scam. 172.

66. Where a man is indicted for an offence, and is tried and acquitted, he cannot be afterwards indicted for the same offence, if the first indictment was valid, and such that he could lawfully have been convicted on it. *Gerard* v. *People*, 3 Scam. 362.

67. If a defendant is indicted for seduction, tried and acquitted on that charge, it will be a good plea in bar to a second indictment for fornication, growing out of the same act. *Dinkey* v. *Commonwealth*, 17 Penn. State R. 126.

68. Where each count of an indictment is regarded as containing the charge of a distinct and substantive offence, and on the trial the defendant be acquitted of the charge on either count, he cannot be again put in jeopardy upon that charge, no matter whether in point of fact the offences charged be separate and distinct in their nature, or the same offence charged in different forms. *Esmon* v. *State*, 1 Swan 14.

69. Where the proceedings are upon a complaint and warrant before a justice of the peace, in a matter where he has final jurisdiction, the prisoner having been arraigned, tried, and discharged as not guilty, and judgment entered, cannot be again put upon trial under another similar complaint and warrant for the same offence. *Stevens* v. *Fassett*, 27 Maine (14 Shep.) 266.

70. A trial on an indictment charging the accused with having uttered and published as true a promissory note made by the accused, on which the names of certain individuals appearing as endorsers, were alleged to have been forged, it is a good defence, under the plea of former acquittal, that the defendant had been before indicted and tried for the offence of forging and counterfeiting the same endorsements, and on such previous trial had been acquitted by the verdict of a jury upon the merits, the only controverted question on both trials being whether such endorsements were genuine. *The People* v. *Allen*, 1 Parker's Crim. R. 445.

71. Where a defendant has been once tried upon all the counts, and acquitted of some of them, to try him again on the same counts would be putting him in a jeopardy a second time for the same charge, contrary to the tenth section of the Bill of Rights. *Campbell* v. *State*, 9 Yerger 333.

72. Where a party is acquitted of the charge in one count of the indictment, he is clear of that charge forever; he can no more be brought in jeopardy upon that charge again, than if it were the only count in the indictment. *Ib.*

73. The Supreme Court of Pennsylvania held that the inability of the jury to agree did not present such a case of necessity as would authorize the Court to discharge them, and that discharging them for that reason, exempted the defendant from liability to subsequent trial. *Weinzorflin* v. *State*, 7 Blackf. 186.

74. In the case of an indictment where there has been a trial on the merits by a competent Court, and a judgment for the defendant, the judgment will not be reversed for an error of the Court, in refusing to permit the prosecuting attorney to enter a nolle prosequi, or in rejecting evidence offered by him; the defendant not being liable to be put in jeopardy again

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for the same offence. *The State* v. *Johnson*, 8 Blackf. R. 533.

75. If the jury in a capital case separate without returning a verdict, the prisoner shall not be tried again for that offence. *State* v. *Garrigues*, 1 Haywood's Rep. 276.

IV. Former Acquittal—Plea of, when no Bar, &c.

76. A former trial is no bar, unless the first indictment was such as the accused might have been convicted upon, by proof of the facts set forth in the second indictment. To constitute a bar, the offence charged in both indictments must be identically the same in law as well as in fact. *Burns* v. *People*, 1 Parker's Crim. R. 182; *Price* v. *State*, 19 Ohio 423; *Durham* v. *People*, 4 Scam. 172; *State* v. *Glasgow*, Dudley S. C. 40; *Com.* v. *Wade*, 17 Pick. 395; *Com.* v. *Roby*, 12 Pick. 496; *State* v. *Birmingham*, Busbee N. C. 120.

77. As where the defendant was indicted for retailing spirituous liquors to one P. S., and it appeared that upon the same facts, under a former indictment for retailing to some person to the jurors unknown, he had been acquitted, upon the ground that the retailing was to the said J. S., and not to one unknown; held that the plea of autrefois acquit was no bar to the second indictment. *State* v. *Birmingham*, Busbee N. C. 120.

78. Where the defendant had been indicted for stealing a sheep, charged to be the property of P. P., and acquitted at the trial, on the ground that the owner of the property was unknown, and he was afterwards indicted for the same offence, the sheep being charged to be the property of some one to the jurors unknown; held that the plea of former acquittal was no bar to a conviction upon the latter indictment. *State* v. *Revels*, Busbee N. Car. Rep. 200.

79. The law has invested Courts of Justice with authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject, and when a plea of discharge of the jury is interposed under such circumstances, such plea will not constitute a bar to further proceedings, and will give no right of exemption to the prisoner from being again put upon trial. *United States* v. *Perez*, 9 Wheaton 579.

80. Upon an invalid and insufficient indictment, in a case of murder, where the prisoner has been acquitted, it is no bar to a second indictment for the same offence. *State* v. *Ray*, Rice's R. 1.

81. If a jury have failed to find a verdict at one term, after the case has been submitted to them, they may be discharged by the Court, and the case may be postponed to the next term, and it will form no bar to subsequent proceedings. *Commonwealth* v. *Olds*, 5 Littell 137.

82. The jury on the trial of an indictment containing several counts, one for making a revolt, another for running away with a vessel, &c., being discharged on the ground of insanity of one of the jurors, without the prisoner's consent, and a second panel having been called, the prisoner's counsel then interposed a special plea, setting forth the previous arraignment, trial, and discharge of the jury without the prisoner's consent, and alleging that such discharge amounted to acquittal; but it was held that such plea could not be in bar of another trial. *U. States* v. *Haskell*, 4 Wash. C. C. Rep. 402.

83. In the case of the *Commonwealth* v. *Cook, et al.*, 6 Sergeant & Rawle's Rep. 577, such a plea prevailed, on the ground that in capital cases the Court could not, without the prisoner's consent, discharge the jury when they had not agreed, and said they could not agree.

84. If, after the jury are sworn in a criminal case and depart from the bar, one of the jurors separate from his fellows, whereby the Court are compelled to discharge the jury without the consent of the defendant, he may be again put upon his trial, on the same indictment. *State* v. *Hall*, 4 Halsted 256.

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85. An indictment having been quashed on account of an important blank in it, the prisoner insisted that under "an act further to amend the penal laws of this Commonwealth," he was discharged from further prosecution for the supposed crime; but held that "the second section of the act entitled an act further to amend the penal laws of this Commonwealth, passed the 29th January, 1805, does not protect the defendant in this case from further prosecution." *Com.* v. *Chichester*, 1 Vir. Cas. 312.

86. An indictment, trial, and acquittal for the *forgery* of a certificate of deposit of money in a bank, constitutes no bar to a subsequent indictment for an attempt to obtain money from another bank, by color of a *forged letter* enclosing a certificate of deposit and requesting the amount to be transmitted to the writer of the letter. *People* v. *Ward*, 15 Wen. 231.

87. Where an indictment is laid for maiming and disabling one, a record of acquittal, put in as a plea in bar to a trial on the indictment, cannot prevail, unless it shows a good count for mayhem. *Com.* v. *Somerville*, 1 Virg. Cas. 164.

88. A plea of former acquittal by a Court of Examination, having been interposed to an indictment for wilful murder; it was held that a Court of Examination had not power to acquit a prisoner charged before it with murder, of the murder with which he stands so charged, and to remand the said prisoner to be tried in the Superior Court for manslaughter on account of the same homicide; and that if such Court does not make such a discrimination, the prisoner is not thereby discharged from any part of the felonious homicide with which he stands charged, but may be indicted for murder before the Superior Court. *Com.* v. *Meyers*, 1 Virg. Cas. 188.

89. If a plea of former acquittal by a justice of the peace, be pleaded in bar to an indictment for an assault and battery, and it appear that the assault and battery is of a high and aggravated nature, not within the jurisdiction of the justice, and the prosecution reply that matter, then the judgment of the justice will be no bar to the indictment. *Com.* v. *Goddard*, 13 Mass. 455.

90. Unless the plea of former acquittal or conviction states the court, the time of the trial, and the proceedings connected therewith, and proofs of the record, such a plea will be disregarded, and may be set aside on motion without demurrer. *Wortham* v. *Com.*, 5 Rand. 669.

91. A nolle prosequi entered by the attorney for the prosecution, and a consequent discharge of the prisoner, is not a sufficient bar to a future indictment for the same offence, and forms no plea of former acquittal. *Com.* v. *Wheeler*, 2 Mass. 172; *Lindsay* v. *Com.*, 2 Virg. Cas. 345; *Wortham* v. *Com.*, 5 Rand. 669.

92. An acquittal of a prisoner charged with burning the barn of James T., on account of the misdescription of the name of James (which ought to have been Josiah), was held not to be a sufficient bar to a future indictment with a proper description. *Com.* v. *Mortimer*, 2 Virg. Cas. 325; *Com.* v. *Wade*, 17 Pick. 395.

93. Where a prisoner was indicted for forging and uttering a false order, and was tried and acquitted on such indictment; upon a subsequent indictment for fraudulently obtaining store goods by means of such forged order or false token, a plea of a former acquittal under the first indictment could not be entertained, and was held to be no bar to the prosecution founded upon the second indictment. *Com.* v. *Quann*, 2 Virg. Cas. 89.

94. A plea of former acquittal was pleaded in a case where the prisoner was a second time indicted for the same act of shooting as was charged in the first indictment; but a different person being charged to have been killed in the second indictment, the plea was held to be bad, for the reason that the jury on the first indictment, may have acquitted the prisoner on grounds that did not bear upon the second indictment. *Vaughan* v. *Com.*, 2 Virg. Cas. 273.

95. And where the jury in such case, on the trial upon the second indictment, find that the prisoner is guilty of the malicious shooting as alleged in the

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second indictment, and that he was not before acquitted of the same offence, this was held a sufficient answer to the plea of former acquittal. *Ib.*

96. The unwarrantable discharge of the jury after evidence closed in a capital case, is equivalent to an acquittal. *Ned* v. *State*, 7 Porter 187.

97. A jury having brought in a verdict of "guilty of forging a receipt for the use of H. P.," while the indictment charged it to have been for the use of H. *B.*, the verdict not sustaining the indictment, it was abandoned; it was held on a new indictment, charging as the jury found on the first, that the former discharge could not be pleaded in bar to the second indictment. *State* v. *Huffman*, Addis. 140.

98. A discharge of a jury in a criminal case, on the ground of necessity, or under some sudden emergency which could not be foreseen or controlled, does not constitute a bar to another trial, and it would seem to be so even in a capital case. *U. States* v. *Shoemaker*, 2 McLean 114.

99. The prosecuting attorney has an undoubted right to enter a nolle prosequi before the defendant is put upon his trial; but after the trial has once been commenced, and the jury sworn, then the relation of the defendant to the case is such as to take away from the prosecuting attorney such power or right; and if he assume such power, the defendant is entitled to a verdict as of acquittal. *Ib.*

100. An acquittal upon an indictment for a rape, against a person of color, cannot be pleaded in bar to an indictment against the prisoner for an assault with intent to commit the rape upon a white female, under the act of 1823 (1 Rev. Stat. c. 111, § 78), because both offences are felonies, created by different statutes, and the latter requires different allegations in the indictment, and different proof on the trial, from the former, and because an indictment for the commission of a felonious act, is not supported by proof of an intent to do that act; and an indictment for the latter, if a felony, may be sustained after an acquittal upon an indictment for the former. *State* v. *Jesse*, 3 Dev. & Batt. 98.

101. It is not of unfrequent occurrence that the same individual, at the same time and in the same transaction, commits two or more distinct crimes, and an acquittal of one will not be a bar to punishment for the other. *State* v. *Standifer*, 5 Porter 523.

102. Where a plea of former acquittal is, that the defendant had been tried by a justice of the peace for an assault and battery on A. M., with intent to murder him, and had been acquitted by the justice, and that the assault and battery mentioned in the indictment was the same offence for which he was tried and acquitted before the justice of the peace; it was held that the justice of the peace had no jurisdiction to try the prisoner for the offence so charged, and that such plea could not be a bar to the indictment. *State* v. *Odell*, 4 Blackf. 156.

103. Where a prisoner has been tried on an indictment for setting fire to the barn of N. G., and acquitted on the ground that the evidence showed the ownership of the barn to be in N. C., which was held material; it was held that such acquittal could not be pleaded in bar to a second indictment for the same burning, but alleging that it was the barn of N. C. *Com.* v. *Wade*, 17 Pick. 395.

104. Where the first indictment charges the prisoner with having stolen, taken and carried away one bank-note of the Planters' Bank of the State of Tennessee, payable on demand at the Merchants' and Traders' Bank of New Orleans, upon which indictment he is acquitted; the second indictment charges him with having stolen, taken and carried away, one bank-note of the Planters' Bank of the State of Tennessee, payable on demand at the Mechanics' and Traders' Bank of New Orleans; it was held that the former acquittal in such case would be no bar to the second indictment. *Hite* v. *State*, 9 Yerger 357.

105. If a co-defendant has been acquitted, it was held that his acquittal would be no bar to a prosecution against the other defendant. *State* v. *McClintock*, 1 Iowa (Green) 392.

106. A discharge from a former indictment, upon payment of costs, in

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consequence of the refusal of the prosecutor to prosecute further, is no bar to a subsequent indictment. *State* v. *Blackwell*, 9 Alabama 79.

107. The plea of a former acquittal is untenable in a case where an indictment is quashed by reason of some of the grand jurors who found the bill being incompetent to act, and a subsequent indictment is found, to which such plea is made. *Brown* v. *State*, 5 Eng. 607.

108. If a plea of former acquittal omits to state that the offences charged in the two indictments, are one and the same offence, it is clearly defective, and will be held bad on demurrer. *McQuoid* v. *the People*, 3 Gilman 76.

109. Where the defendant was indicted for assault with a dangerous weapon, in a court of the United States, which had no jurisdiction over the offence, tried and acquitted; it was held that the acquittal in such court could not be pleaded in bar to an indictment in a State court for the same offence. *Com.* v. *Peters*, 12 Metc. 387.

110. Autrefois acquit is not a good plea, if the former indictment was so far defective that no valid judgment could have been given upon it. *The People* v. *Barrett*, 1 John. R. 66.

111. An acquittal by a jury on a charge of having a single bank-bill in possession, with an intent of passing the same, constitutes no bar to a prosecution against the accused so acquitted. Cases of *Van Houghton* and *Harvey*, N. York General Sessions, May, 1817, 2 City Hall Rec. 73.

112. A trial and acquittal on an indictment charging the accused with having mixed arsenic with flour, and with having caused it to be administered to one L. L., with intent to kill and slay her, are no bar to a subsequent indictment charging the same accused with the same act of mixing the arsenic, and causing it to be admistered to one W. P. L., with intent to kill and slay him. *The People* v. *Warren*, 1 Parker's Crim. Rep. 338.

113. On a plea of autrefois acquit, where the only issue is the identity of the offences, a variance between the record of acquittal and the indictment under which the trial is obtained, in the number of articles charged to have been taken, and in the names of the owners of the property, will be disregarded if no proof is given on the part of the prosecution to show that the offences are in fact different. *The People* v. *McGowan*, 17 Wend. 386.

114. If, by a reversal of the judgment, the prisoner could be placed in the same position which he occupied when the error was committed, it might then be said that his life had never been in jeopardy, and that he could be arraigned again; but it seems not otherwise. *Ned* v. *State*, 7 Porter 187.

115. A judgment acquitting several defendants charged with committing an offence jointly, will not bar prosecutions against each one charged with part of the same offence separately committed by him. *Com.* v. *McChord, et als.*, 2 Dana R. 242.

116. A discharge under the provision of the Mississippi habeas corpus act, can only be sufficient to a discharge from imprisonment, and will be no bar to a future prosecution for the same offence. *Byrd* v. *State*, 1 How. 163.

117. Where the Court before which the former trial took place, had no jurisdiction of the offence, the party cannot be deemed in law to have been put in jeopardy, because no valid and binding judgment could have been rendered by such Court. *Com.* v. *Roby*, 12 Pick. 496.

118. So, where the indictment was insufficient in form or substance, and no judgment could be rendered upon it, because it is deemed as a nullity, wholly inoperative and void, and upon which no punishment can be awarded. *Ib.*

119. So, after the jury is impanelled and charged with the prisoner, and progress made in the trial, if through the death or sudden sickness of a juror, the illness of the prisoner, or other cause of urgent necessity, the progress of the trial is interrupted, another jury may be impanelled and the prisoner again put upon his trial. *Ib.*

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V. MISCELLANEOUS.

120. The essence of a plea of former acquittal or conviction being, that the prisoner was legitimo modo acquietatus, &c.; therefore it was held to be necessary that the prisoner should have been acquitted or convicted, not only in due form, but by a court having competent jurisdiction. *Bailey's case*, 1 Va. Cas. 258.

121. Where a prisoner makes the plea of former acquittal or conviction, he must be ready to establish the allegations in his plea, with the record; and in case he fails to do this on the spot, his plea will be overruled, unless some sufficient excuse can be given for his not being ready; and, in that case, time will be given to produce the record. *Com.* v. *Meyers*, 1 Va. Cas. 188.

122. If a plea of former acquittal or conviction be tendered, the fact that the attorney for the prosecution demurs to such plea, admits the existence of the record of such former acquittal or conviction. *Ib.*

123. Where the plea of former acquittal and conviction is found against the defendant, he will be put to plead again to the indictment, as if no previous proceedings had passed; and therefore it is not necessary that the defendant should plead over to the country, as well as ask judgment on his plea in bar. *Com.* v. *Goddard*, 13 Mass. 455.

124. In Mississippi, a writ of error in criminal prosecutions, after a verdict of a jury and judgment of acquittal, cannot be granted to the State. *State* v. *Anderson*, 3 Smed. & Marsh. R. 751.

125. A former acquittal, if it cannot be pleaded in bar to a subsequent indictment, cannot be taken advantage of as an estopple. *State* v. *Jesse*, 3 Dev. & Batt. 98.

126. Where a prisoner, upon an indictment in the Supreme Court of Massachusetts, pleaded a former conviction in the Municipal Court, it was held that a motion by the prosecution for a certiorari, to bring up the whole of the proceedings in the inferior Court, could be entertained, when the attorney-general suggested a diminution of the record. *Com.* v. *Roby*, 12 Pick. 496.

127. And in case a certiorari be made and duly certified, the Court will not look into such record so certified, if the attorney-general demur to such plea, without suggesting diminution of the record, in order to ascertain the sufficiency of the plea of a former conviction. *Ib.*

128. Where a person of color has been acquitted upon an indictment for rape, and is subsequently indicted for an assault, with intent to commit the rape upon a white female, under the act of 1823, he cannot object upon the trial that the evidence offered proves an actual rape, because the jury may convict for the specific charge contained in the indictment, if the evidence proves that charge, notwithstanding it may also prove the other charge for which the prisoner has been formerly tried and acquitted. *State* v. *Jesse*, 3 Dev. & Batt. 98.

129. It is not sufficient to make a judgment on one indictment a bar to another, that evidence of the facts alleged in the first, would also be evidence of the facts alleged in the latter, as an acquittal upon an indictment for the burglary and stealing, is not a bar to a second indictment for the burglary, with intent to steal. *Ib.*

130. Where a party relies on the plea of a former acquittal, it must appear that the offences were one and the same, and that it was described in the first indictment, so that judgment could have been rendered on it on conviction against the defendant; in other words, the first indictment must contain no material defect, and the proceedings must have been according to law. *Com.* v. *Goodenough*, Thacher's Crim. Cas. 132.

131. To entitle a person to the benefits of the plea of former acquittal, it is necessary that the crime charged in the last bill of indictment be precisely the same with that charged in the first, and that the first bill of indictment is good in point of law. 1 Chitty's Crim. Law, 453; 1 Easts. Pleas of the Crown, 522.

132. As where one indictment charges the prisoner with committing an assault on D., with intent to murder, and another charges the prisoner with the

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murder of C., both offences arising out of the same affray; it could not be tolerated that the offender, because acquitted of the charge of murder, should necessarily be discharged of the assault, with intent to murder. *Ib.*

133. Where a party relies on the plea of former acquittal, on the ground that the offences charged in the first and second indictment are identical, it is necessary in all cases, where an averment can be legally made of identity of offences, to aver the identity; and it then becomes a question for the jury to determine whether the averments are sustained, and the offences identical; and in such case, where the plea consists of matter of record and matter of fact, the issue made thereon is to the country. But when it appears from the plea of former acquittal, that the offences are distinct, the Court will direct a verdict to be found against the plea, without submitting the matters of fact to the jury. *Hite* v. *State*, 9 Yerg. 357.

134. A defendant may be legally convicted of retailing without a license, and of trading with a slave, though both offences arise out of the same act. *State* v. *Glasgow*, Dudley S. C. 40.

135. A novel assignment not being admissible in a criminal case, the proper, and only proper mode of replying to the plea of former conviction, is to traverse the alleged identity. *Duncan* v. *Com.*, 6 Dana 295.

136. Where a riot took place at a religious meeting, it was held that the rioters could not be indicted both for the riot and for disturbing the religious meeting, as the punishment for the former covered the latter offence. *State* v. *Townsend*, 2 Harrington 543.

137. Where a defendant, on the trial of an indictment for assault and battery, offered in evidence a transcript from the record of a justice of the peace, showing a former conviction of the defendant for an assault and battery, alleged to be the same offence, though the transcript did not state that some person present at the commission of the offence was examined as a witness before the justice; still, it was held that such transcript was admissible. *Goudy* v. *State*, 4 Blackf. 548.

138. And the facts relative to the evidence, given at the trial before the justice, might be proved by parol. *Ib.*

139. Where a record of former conviction could not conclusively identify the offence for which the prisoner had been convicted, with that for which he was afterwards charged; it was held that oral testimony was perfectly competent for the purpose of showing whether the acts had been identical, or whether they had been, as they appeared from the records of them, prima facie to have been distinct, and committed at different times. *Duncan* v. *Com.*, 6 Dana 295.

140. Where there was an issue formed upon the plea of the general issue, and a jury sworn and impanelled, and at the same time there was a demurrer to the plea of former conviction, which was overruled; it was held that the State could be permitted to reply in such case, and that the prisoner was not entitled to his discharge, if the State was not ready to proceed on the issue formed upon such replication. *State* v. *Nelson*, 7 Ala. 610.

141. In a case where the indictment charged the defendant with larceny, in the dwelling-house of one W. F. To this charge the defendant pleaded a conviction of the larceny in the Police Court, on the complaint of F., and averred that the stealing, taking, and carrying away mentioned in the indictment, is the same stealing, taking, and carrying away mentioned in the complaint, and no other or different, and that the Police Court had jurisdiction of the offence. To this plea the Attorney for the Commonwealth put in a replication, setting forth that the offence charged was a larceny in F.'s dwelling-house, which was a high and aggravated crime, and that the Police Court had no jurisdiction of the offence. A rejoinder traversing these averments on the replication was put in, and to this rejoinder the prosecuting attorney demurred, on the ground that the rejoinder was a departure from the plea, and that it was double, but the Court held that the rejoinder was good, and that it was not double. *Commonwealth* v. *Curtis*, 11 Pick. 134.

142. In such case the defendant

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should have pleaded a former conviction as to the larceny, and not guilty as to the residue of the charge; and if the attorney for the people had demurred to the plea, assigning the formal defect as a cause for demurrer, the plea must have been adjudged bad. *Ib.*

FUGITIVES FROM JUSTICE.

I. Treaties and Statutes respecting Fugitives from Justice. Construction of. The crimes contemplated by the Treaties and Statutes.
II. Charge of the Crime. How made, and before whom.
III. Surrender.
IV. Warrant.
V. Habeas Corpus—Decision on, how reviewed.

I. Treaties and Statutes respecting Fugitives from Justice — Construction of—the Crimes contemplated by the Treaties and Statutes.

1. A treaty which contains provisions in futuro, is in the nature of a contract, and becomes no rule for the Courts, until legislative action shall be had on the subject. *In re Metzger*, 1 Parker's Crim. R. 108.

2. The treaty with France, in 1843, providing for the surrender of fugitives from justice, cannot be carried into effect by the President of the United States, without an act of Congress. *Ib.*

3. The provisions of the Revised Statutes of Mass. c. 142, § 8, for the arrest of persons charged with the commission of offences in other States, is not contrary to the Constitution or laws of the United States. *The Commonwealth* v. *Tracy*, 5 Met. 536.

4. The provisions of the Revised Statutes do not apply to the case of a fugitive from justice, demanded under the act of Congress. *In the matter of Clark*, 9 Wend. 212.

5. The clause of the Constitution of the United States, which directs the surrender of a fugitive from justice, upon the demand of the executive authority of the State from which he fled, contains no grant of power, but is the mere regulation of an existing right on the part of the State making the surrender. *In the matter of William Fetter*, 3 Zabris. R. 311.

6. When a person steals goods abroad, and comes into Pennsylvania, he cannot be indicted there, but is to be treated as a fugitive from justice. *Simmons* v. *Commonwealth*, 5 Binn. 617.

7. Where a bill was drawn by the Bank of Ireland on the Bank of England, on the 2d July, 1854, to the order of Mrs. A. Haliday, for £43 7s. 6d. sterling; and after several intermediate endorsements, was endorsed to Chas. McIntosh & Co., by letter, the possession of which was surreptitiously obtained by Alex. Heilbonn, the accused, a clerk for McIntosh & Co., who wrote the following endorsement on the bill: "Received for Chas. McIntosh & Co. Alex. Heilbonn, No. 9 Vine Street, Regent Street, No. 73, Aldermanbury," on which the bill was paid to the accused; held that such endorsement did not amount to the crime of forgery though it appeared that Heilbonn had no right to endorse Bills of Exchange, or to receive the amounts thereof, and that the words "Chas. McIntosh & Co." were an imitation of the hand-writing of a member of the firm, the rest of the endorsement being in the undisguised hand-writing of said Heilbonn. *In re Heilbonn*, 1 Parker's Crim. 429.

8. And held that the offence of the accused belonged to a different class of crimes, and was not one of the crimes provided for in the treaty between this country and Great Britain. *Ib.*

9. An offence made indictable by statute is a crime within the meaning of the Constitution and law of Congress on this subject. *In the matter of Clark*, 9 Wend. 212.

10. When this proceeding is had under the comity of nations, it seems that the offender would be surrendered only when charged with crimes of great atrocity, or deeply affecting the public safety. *Ib.*

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II. CHARGE OF THE CRIME; HOW MADE, AND BEFORE WHOM.

11. To enable a magistrate to arrest and examine an alleged fugitive from justice from another State, it must be shown to him by a complaint in writing on oath, that a crime has been committed in the foreign State; that the accused has been charged in such State with the commission of such crime; and that he has fled from the State, and is found here. *In the matter of Hayward*, 1 Sandford's R. 701.

12. These facts are to be distinctly alleged; it is not sufficient that they may be inferred from what is stated. *Ib.*

13. Therefore, an affidavit that E. H. has been charged in Pennsylvania, on the oath of W. H., with felony, viz., with cheating and defrauding W. H. and others, residents of that State, and that he is a fugitive from justice from that State, is insufficient to authorize the arrest of E. H. here, under the Fugitives from Justice act. The affidavit does not show that the alleged crime was committed in Pennsylvania, or that E. H. fled from that State. *Ib.*

14. It would be discreet for the magistrate in all such cases to require an authenticated copy of the charge or complaint made in the foreign State. Whether such copy be necessary was not decided. *Ib.*

15. Where the charge of the crime is made in the complaint in general terms, and the complaint also contains all the facts on which the charge is made, and from such facts it clearly appears that no such crime has been perpetrated, but some other offence not provided for in the treaty, the complaint itself disproves the general charge, and does away with the foundation for the warrant. *In re Heilbonn*, 1 Parker's Crim. R. 429.

16. Where a party was arrested as a fugitive from justice under a warrant issued by a Commissioner appointed by a Court of the United States, and was subsequently brought before a Justice of the Supreme Court of the State of New York on habeas corpus, for the purpose of inquiring into the cause of his detention with a view to obtaining his discharge; held that it was proper for the Justice to look behind the warrant for the purpose of ascertaining whether the complaint made was sufficient to confer jurisdiction on the Commissioner. *Ib.*

17. In order to give a magistrate jurisdiction under the acts of the Legislature of Indiana, approved Feb. 12, 1838 (Rev. Stat. 1843), relative to fugitives from justice, it should be proven that the person sought to be apprehended has left the State in which he committed the crime for the purpose of escaping punishment for it. *Degant* v. *Michael*, 2 Carter (Ind.) 396.

18. Where a complaint is made under the act of Congress of 1848, c. 167, for the extradition of one charged with a crime in Great Britain, proof that the person who as Justice of the Peace took the affidavits of the commission of the crime and issued the warrant in Great Britain for the apprehension of the person charged, was accustomed to act as Justice of the Peace, is held to be sufficient evidence prima facie of his authority to take the affidavits and issue the warrant. (Per McLean, Wayne, Catron, and Grier, JJ.; contra, per Taney, C. J., Daniel, and Nelson, JJ.) *In re Kane*, 14 How. U. S. 103.

19. A Commissioner of the Circuit Court of the United States has jurisdiction under the act of Congress of 1848, c. 167, of a complaint for the extradition of one accused of a crime in a foreign country, without being specially appointed or authorized by the Circuit Court to discharge such duty. (Per McLean, Wayne, Catron, and Grier, JJ.; contra, per Taney, C. J., Daniel, and Nelson, JJ.) *Ib.*

20. The Judges and Commissioners whom the act of Congress of 1848, c. 167, gives authority in proceedings for the extradition of persons accused of crimes in a foreign country, have jurisdiction of a complaint which is made for that purpose by a Consul of Great Britain, without a previous requisition by his government upon the President of the United States. (Per McLean, Wayne, Catron, and Grier, JJ.; contra, per Taney, C. J., Daniel, and Nelson, JJ.) *Ib.*

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III. Surrender.

21. The Governor of one of the United States has not the authority to deliver up to a foreign government a person accused of having committed a crime in the territory of that government. (By a majority of the Court.) *Holmes* v. *Jennison*, 14 Pet. 540.

22. The Governor of this State is not authorized to surrender to the Governor of the Province of Canada, on request of the latter, a person who has committed a crime in that province and has escaped into this State; and a warrant, issued by the Governor of this State, to detain and surrender such person, does not authorize his arrest and imprisonment. *Holmes ex parte*, 12 Verm. R. 631.

23. Every sovereign State may at its option surrender a criminal to the government against whose laws he has offended. *In the matter of William Fetter*, 3 Zabris. 311.

24. The United States Government have never acknowledged the right of foreign nations to demand the surrender of fugitives from justice independent of treaty stipulations. *Ib.*

25. A fugitive from justice from either of the United States may, under the provision of the Constitution of the United States (art. 4, sec. 2), be arrested and detained in this State, in order to his surrender, before a requisition is actually made upon the executive for his surrender. *Ib.*

26. It is not necessary in order to warrant the surrender or detention of the fugitive, that the crime with which he stands charged should constitute an offence at the Common Law. *Ib.*

27. To warrant the surrender or detention of the fugitive, it must appear that the crime with which he stands charged was committed within the State from which he is alleged to be a fugitive. *Ib.*

28. A foreign government has no authority by the laws of nations to demand of the Government of the United States a surrender of a citizen or subject of such foreign government having committed a crime in his own country, and afterwards found within the limits of the United States; such authority has no existence without, and can only be secured by, a treaty stipulation. *Case of Jose Ferreira Dos Santos*, 2 Brock. 493.

29. But even if such authority existed, the judicial officers of the United States have no authority to surrender the obnoxious individual, or to detain him in custody, until a formal requisition for the surrender could be made by the foreign government upon the United States. *Ib.*

30. The judicial power of the United States was created in order to enforce the laws of the United States, and no authority is given to the federal judiciary to assist in the execution of the penal laws of a foreign country. *Ib.*

31. No one can be surrendered under the treaty who is only charged with crime before a committing magistrate. He must under our law be indicted, or under the French law be mis en accusation by the chambre des mises en accusation. *In re Metzger*, 1 Parker's Crim. R. 108.

32. In Pennsylvania, a fugitive from a foreign country cannot be arrested by a magistrate on the charge, made by a private person, of having committed murder, in order to give the executive of the United States an opportunity to surrender him. *Commonwealth* v. *Deacon*, 10 S. & R. 125.

IV. Warrant.

33. The power to issue warrants for the purpose of arresting fugitives, under the tenth article of the treaty between the United States and Great Britain, concluded on the ninth day of August, 1842, and under other treaties between this Government and foreign governments, is conferred by the act of Congress of August 12, 1848, ch. 167, both upon the several judges of the State Courts, and upon the justices of the Supreme Court, and the several District Courts of the United States and the Commissioners appointed by the Courts of the United States. *In re Heilbonn*, 1 Parker's Crim. R. 429.

34. A warrant can only be issued

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upon complaint made upon oath, or affirmation, charging some person with having perpetrated one of the crimes enumerated and provided for in the treaty; and when the complaint is insufficient there is no jurisdiction to issue the warrant. *Ib.*

35. Warrants issued by the Governor for the apprehension of fugitives from justice, are required to be under the great seal of the State; and the impression of the seal being unintelligible, makes void the warrant. *Vallad* v. *Sheriff*, 11 Mo. R. 24.

36. A judge, or justice of the peace, has power to order the arrest of a fugitive from justice from another State, before demand. *State* v. *Bugine*, 4 Harrington's R. 572.

37. A regular demand under the act of Congress, and warrant of the Governor to surender a fugitive, is conclusive; and the court, or judge, cannot, on habeas corpus, inquire further into the offence charged. *Ib.*

38. A defendant who has been merely charged, or accused, before a magistrate in France, authorized to arrest, is not one accused—mis en accusation—within the terms of the treaty of 1843, between the United States and France, and he cannot be demanded by the French government, nor surrendered by the American, by the terms of that treaty. *In the matter of Metzger*, 1 Barb. R. 248.

39. A fugitive from justice, from another State, may be arrested in Georgia, and on sufficient proof of guilt be detained in custody for a reasonable time, in order to give the foreign executive an opportunity to make a regular requisition for his delivery under the Constitution of the United States. *The State* v. *Loper*, Geo. Decis., Part 2, 33.

V. Habeas Corpus—Decision on, how Reviewed.

40. On a traverse to a return upon a writ of habeas corpus, the process by which the accused is detained, being regular on its face, the burthen of proving the defects alleged in the traverse, or the facts therein mentioned, rests upon the prisoner. *Matter of Heyward*, 1 Sandford's R. 701.

41. Where, on habeas corpus, it appears that the accused is detained on a warrant committing him for examination as an alleged fugitive from justice from another State; the fact that his examination is not closed, is no ground for the officer issuing the writ to omit to inquire into the legality of his detention. *Ib.*

42. On habeas corpus, a Court or judge before whom is brought a defendant arrested as a fugitive from justice, by a warrant from the executive of one State, on the requisition of the executive of another State under the Constitution and laws of the United States, will not look into the probable guilt of the accused; the only inquiry is whether the warrant on which he is arrested states that the fugitive has been demanded by the executive of the State from which he is charged to have fled, and that a copy of the indictment, or an affidavit charging him with having committed treason, felony, or other crime, certified, by the executive demanding him, as authentic, have been presented. *In the matter of Clark*, 9 Wend. 212.

43. The inquiry on the traverse of the return to a habeas corpus, is summary; and the prisoner may prove the documents on which his arrest was founded, by the best evidence at hand, or which he can procure with reasonable diligence, without regard to the ordinary rules of evidence. *In the matter of William Felter*, 3 Zabris. 311.

44. The justice who issued the process, and the clerk of his court, are competent to prove on what papers the process issued: and there is no impropriety in their appearing as witnesses. *Ib.*

45. In order to enable the judge to remand a prisoner, brought before him by habeas corpus, and who is detained on an iregular commitment, the testimony must be before the judge on the return of the writ, or at the hearing thereon. It is too late to present the requisite testimony on a subsequent day, when the judge announces his decision to discharge the prisoner. *Ib.*

46. Although the judges of this court

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are clothed with authority, as criminal magistrates, it is not any part of their ordinary duty to attend to the arrest and examination of persons charged with criminal offences. It must be an extreme case; either in the nature of the charge, or the difficulty of procuring the action of the regular criminal judges, to warrant the judges of this court in devoting their time to it. *Ib.*

47. The proper mode of reviewing a decision of a State judge, made in such case, is by appealing to the Supreme Court of the State, and from thence to the Court of Appeals, and from thence to the Supreme Court of the United States, if the decision of the Court of Appeals be against the power claimed under the United States law. *In re Heilbonn*, 1 Parker's Crim. R. 429.

48. In a case of this kind, where a defendant is remanded, the Court will not grant a stay of proceedings on the prosecution of a writ of error. *In the matter of Clark*, 9 Wend. 212.

FUGITIVE FROM SERVICE.

1. Where a slave has run away or escaped from service, he can be retaken and returned to service only on the demand of his owner or his agent or attorney. *In re Kirk*, 1 Parker's Crim. R. 67.

2. The power of legislating on the subject of fugitives from service belongs exclusively to the Government of the United States, and it is not competent for State authorities to add to, or interfere with the subject. *Ib.*

3. The statute of the State of New York, (1 Rev. Stat. 659, § 15,) allowing the master or commandant of a vessel in case a slave have concealed himself on board his vessel, and thus escaped to this State, to retake the slave, and take him before the mayor or recorder for the purpose of obtaining a warrant for his removal from the State, conflicts with the Constitution of the United States, and is therefore void. *Ib.*

4. In a proceeding on habeas corpus, under the Revised Statutes, where a person claimed as a fugitive from service avers that he is a freeman, it is a sufficient answer to the allegation by the claimant that such person is his slave, and a demurrer to such answer on the ground that it is argumentative and evasive, will be overruled. *In re Belt*, 1 Parker's Crim. R. 169.

5. In submitting proof of the claim to the alleged fugitive, the claimant may show the contemporaneous acts of the fugitive and himself during the period when the relation of master and slave, is said to have existed between them. *Ib.*

6. The general rule of evidence in regard to the proof of the laws of the various States of the Union, laid down in Greenleaf's Evidence, § 489, has not been adopted by the New York courts, and is not the rule therein, excepting so far as it is enacted by the act passed April 12, 1848, entitled an "Act relative to the proof of the Statute and Common Law of other States," &c., (p. 442.) *Ib.*

7. The provision of the New Code of the State of New York, "that no person shall be excluded as a witness by reason of his interest in the event of the action," does not apply to cases of habeas corpus, and the claimant to an alleged fugitive from service cannot testify in behalf of his claim. *Ib.*

8. A general understanding that the laws of any State create slavery, cannot exempt a Judge from requiring lawful evidence that there are such laws; and when a claimant of an alleged fugitive fails to give such evidence, he fails to establish the main point in his case, issue having been joined thereon, that the person was bound to him in service. It being sufficiently shown that the alleged fugitive was bound in service to the claimant, yet if he instead of removing the slave from the State without delay, has detained him in his own custody, that is a good reason why the slave is entitled to his discharge, there being but one case in which a fugitive slave can be kept by his master in his personal charge in this State, and that is under the law of Congress to take him without delay before the proper authority, in order to

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obtain the certificate necessary for his removal from the State. Where it appears that the claimant of a slave holds him in this State not for the purposes contemplated in the act of Congress, but he holds him as a slave because he owes him servitude, it is the duty of the judge to order him to be discharged from custody. *Ib.*

GAMING.

I. Horse-racing, Gaming, &c.
II. Statutes respecting Gaming, &c.
III. Indictment and presentment for Horse-racing, Gaming, &c.
IV. Evidence necessary to support the charge of Horse-racing, Gaming, &c.
V. Miscellaneous.

I. Horse-racing, Gaming, &c.,

1. When one bets on a horse-race, it is not gaming within the meaning of the 10th section of the act of the 14th of March, 1848, concerning crimes and punishments and proceedings in criminal cases. *Shelton's case*, 8 Gratt. 592.

2. As to what constitutes a race-field within the meaning of the Virginia act to prevent unlawful gaming. *Wilson's case*, 9 Leigh 648.

3. It is necessary that the race should be run, in order to constitute a betting on it the offence of gaming. *Fiddler* v. *State*, 7 Humph. 508.

4. In Tennessee, by the act of 1833, ch. 10, sec. 2, it is provided that "all and every person betting or running, aiding and abetting in running, any horse-race in or along any public road in this State, shall be liable to be indicted under the same rules and provisions as are now in force in this State against unlawful gaming." By this statute a party is indictable for running a horse-race along a public road, although no bet may have been made on the race. *State* v. *Fiddler*, 7 Humph. 502.

5. To constitute what is commonly called a horse-race, it is not necessary that there should be a bet or wager; or that there should be a distance to be run agreed upon; or that there should be judges appointed to decide the race. *Watson* v. *State*, 3 Ind. R. 123.

6. Where one lends money to set up a faro bank, and receives a part of the earnings, it is not an offence against the sixteenth section of article 8 of the Missouri statute concerning crimes and their punishments. *O'Blennis* v. *the State*, 12 Mo. 311.

7. The setting up of a gaming table, at which money or any other thing shall be bet, is a specific offence; and the keeping of such table may, if there be betting against it, be another act of violation; and keeping a bank, and either inducing or permitting any person to bet against it, is another, and different infraction of the statute. *Com.* v. *Burns*, 4 J. J. Marsh. 177.

8. To set up a gaming table, is to provide whatever may be necessary for the game, and either by acts or words, to propose to play it. *Ib.*

9. A man may set up a gaming table, without any table, in a literal sense; or without having money or property to stake on the game, for his credit may be substituted. Simply setting out a table, or putting upon it a pack of cards, would not be setting up a gaming table; a servant can do this, or any other person may do it, merely for amusement, or for the accommodation of others, without having any agency, or participating at all, in any game which may be played. *Ib.*

10. Even if a game be played, and he who sets out the table, and places on it the cards, participates in the game, and wins or loses money, he may not be guilty of having set up a gaming table; he may be a better against the bank. There must be a bank, and a banker, or a gaming table, and a keeper of it. *Ib.*

11. Setting up a gaming table is no violation of the statute, unless a game be played, and something be bet. To play a game, is the object of setting up; without such object, a gaming table cannot be set up within the prohibition of the statute. Such purpose is an indispensable constituent in the definition of the words, to "set up a gaming table." *Ib.*

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12. A person may keep a gaming table who has no interest whatever in it. He may barely deal the cards for the real banker. Such a person could not, with propriety, be considered as having set up the bank, or gaming table, according to the proper definition of that offence; but, by keeping the table or bank, and dealing the cards, he induces other persons to bet, and thereby occasions a breach of the law, and contributes to the mischief intended to be remedied. *Ib.*

13. Playing the game is not indispensable to the setting up of a gaming table, though it is essential to the legal guilt attached to the setting up. The table must be set up; and also, something must be bet on a game played on it. *Ib.*

14. A man may, therefore, set up a gaming table, on which no game shall be played; but he cannot be convicted for a violation of the law, unless a game be played, and something be bet upon it. *Ib.*

15. Some person must, therefore, keep the table, and deal the cards, if the game be a game of cards. If such person be not the person who set up the table, the latter may nevertheless be guilty of a clear violation of the law, in both its letter and spirit. *Ib.*

16. Every game at which money or property is won and lost, is unlawful. Every such game is not only contrary to good morals, and therefore to the general policy and objects of the law, but it is in some way or other, directly or indirectly, prohibited by legislative enactments; and is, therefore, in a stricter sense, unlawful. It is the winning and losing, that is the betting, which constitutes the real evil against which the Legislature has directed its efforts. Betting is unlawful, whatever may be the occasion; and the money or thing staked for the bet is forfeited. *Vicaro* v. *Commonwealth*, 5 Dana 505.

17. That there is in contemplation of law, and in the view of the Legislature, no distinction in point of legality, though there may be in the degree of offensiveness between the several classes of games themselves, is particularly manifested by the several enactments against those who suffer them to be played in their houses. *Ib.* 506.

18. In Missouri, under the statutes of 1845 to punish gaming, to bet on any gambling device is an indictable offence. *State* v. *Bates*, 10 Mo. 166.

19. Every separate act of betting on any gambling device, though at the same sitting, is held to be a separate offence. *Forney* v. *State*, 13 Mo. 455.

20. To constitute a violation of the statute, the billiard-table need not be kept in the same room, or under the same roof, where the spirituous liquors are retailed; if the one is contiguous to the other, and forms part and parcel of the same establishment, it falls within the meaning of the statute. *Smith* v. *the State*, 22 Ala. 54.

21. Where an indictment is laid for keeping a billiard-table in connection with a house where spirituous liquors are retailed, as an appendage thereto, it is sufficient, when it pursues the words of the statute literally (Clay's Digest, 434, § 19). *Ib.*

22. Where an indictment charged that the defendants kept a gaming place for "money, hire, gain and reward," and the proof was that it was the general custom for the party defeated to pay for the use of the tables one shilling for each game; held that this was a gaming for money within the terms of the statute. *The State* v. *Leighton*, 3 Foster (N. H.) 167.

23. In Kentucky, the betting of checks or counters of a faro bank, which it is agreed and understood by the parties shall represent bank-notes or money, and for which money or bank-notes are paid by the parties, is a violation of the statute against gaming, and will support the charge of keeping a faro table, at which money or bank-notes are bet. *Ashbuk* v. *Com.*, 7 B. Monr. 44.

24. In Iowa, horse racing is not a game of chance, within the terms of the statute to prevent and punish gambling. *Harless* v. *United States*, 1 Morris 169.

25. On a presentment for unlawful gaming, where it appears that persons charged were in a storehouse in a village late at night, after persons cease to come to the store to purchase goods,

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and the door was locked; held that it was a public place, within the meaning of the statute against gaming. *Commonwealth* v. *Feazle*, 8 Gratt. 585.

26. In Indiana, the winning of any sum of money, however small, at a game with cards, is an indictable offence under the laws of that State, of which the Circuit Court has exclusive jurisdiction. *State* v. *Albertson*, 2 Blackf. 251.

27. In Virginia, the exhibitor of a gaming table called hap-hazard, alias blind-hazard, alias skin cup R., makes himself liable to the same punishment with the exhibitor of a faro bank, and comes within the meaning of the 17th section of the gaming act. *Commonwealth* v. *Wyatt*, 6 Rand. 694.

28. Where one plays a game, knowing that others are betting, he is guilty of gaming, under the Tennessee statute, passed to prohibit gambling. *Smith* v. *the State*, 5 Humph. 163.

29. The game or sport of cock-fighting is unlawful, because it is a violation alike of the prohibitions of a statute, and of the plain dictates of the law of humanity, which is at the basis of the Common Law, and specially recognized in the Constitution, which makes it the duty of the legislature "to countenance and inculcate the principles of humanity." *Commonwealth* v. *Tilton*, 8 Met. Rep. 232.

30. The offence of gaming is complete by playing once. *Swallow* v. *State*, 20 Ala. Rep., N. S. 30.

31. An unoccupied storehouse, situated in a town, and fronting on the street, if habitually resorted to by persons for the purpose of playing cards, comes within the provision of the statute against playing cards at any "outhouse where people resort." *Ib.*

32. In Alabama, betting on the result of an election after the election has been consummated, is not within the statute of 1830. Atkin's Digest, 209, § 49. *State* v. *Henry*. 2 Ala. Rep. 340.

33. The keeping of a room or place for the sale of tickets in lotteries not authorized by law, is not an indictable offence. *People* v. *Jackson*, 3 Denio 101.

34. Betting on the result of an election is held to be an indictable offence. *Parsons* v. *State*, 11 Carter's Rep. 499.

35. All wagering contracts are rendered void by statute. *Ib.*

36. Where the defendant let a shed contiguous to a passage-way between the shed and his store, and received the rent knowing that the shed was used for gaming; held that the defendant did actually occupy the shed, within the meaning of St. 1798, c. 20, § 2, of Massachusetts. *Commonwealth* v. *Dean*, 1 Pick. Rep. 387.

37. Where the evidence establishes that the defendant did not himself make the bet, but procured it to be done for him by another; held that it is not necessary that a person to be guilty as principal, should perpetrate the offence with his own hands, for if it be committed through the medium of an innocent agent, the employer, though absent when the act is done, is answerable. *Williams* v. *State*, 12 Smed. & Marsh. Rep. 58.

38. Permitting a pack of cards to be used with which money is won and lost is an offence, punishable under the statute against gambling. *State* v. *Pardon*, 3 Mo. 83.

39. Although the setting up of a gaming table may alone be an indictable offence, the keeping of such table and the inducing of any person to bet upon it is another, where each shall have been committed by different persons or at different times; nevertheless, as they are co-operating acts constituting altogether one offence, when committed by the same person at the same time, an indictment for that combined act in violation of law may properly charge the whole in one count, and but one punishment can be inflicted, as for one offence. *Hinkle* v. *Com'lth*, 4 Dana 519.

40. Where a horse was sold to the defendant for sixty-five dollars, payable when Gen. Taylor should be elected President of the United States, which sum was subsequently paid by the defendant and the horse was worth eighty dollars; held that the transaction was a wager within the statute. *Parson* v. *State*, 2 Carter 499.

41. In Arkansas, under the act of 1845, relative to billiard tables, the setting up and keeping of a billiard table is no offence. *Mayers* v. *State*, 3 Eng. 222.

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42. The act provides that before the table be set up, the sum of twenty five dollars shall be paid into the State treasury, and a like sum into the county treasury, and any person setting up the device and thus refusing to pay, is guilty, &c. *Ib.*

43. The essence of the crime is, that the party should have refused to pay the tax imposed, and unless this be charged the indictment is void. *Ib.*

44. The assemblage of eight or ten persons, by invitation, at a private house or room, to which the public have not the right to go, for the purpose of playing cards, or participating in social amusements, does not constitute such house or room "a public place" within the statute against gaming. *Coleman* v. *State*, 20 Ala. R. 51.

45. If the occupants of a room are in the constant habit of inviting a number of persons to their room for the purpose of playing cards, and others are allowed to come uninvited, without any restraint, it is testimony tending to prove the room a public place, and the jury may find so. *Ib.*

46. Any contest or course of action commenced and prosecuted in consequence of a bet or wager, and with a view to determine the bet or wager upon the event of such contest or course of action, is gaming. *State* v. *Smith*, 1 Meigs 99.

47. To constitute gaming, there must not only be a betting upon the determination of an event, but the course of action to bring about such event, must have been originated and commenced with a view to determine the bet. *Ib.*

48. A bet that one candidate will beat another, as it falls within the evils intended to be suppressed, must be construed to be a bet on an election within the contemplation of the sixth section of the act of Kentucky. *Com.* v. *Pash*, 9 Dana 31.

49. Where the place where the gambling occurred was open to the public, and it was used for illegal purposes; held that it did not subject the owner of the land over which the road passed to the penalties of the act. *Roberts* v. *Com.*, 11 Monr. 3.

50. Indictment for playing cards "at a public place." The proof showed that there was a large assembly of persons, on a public day, at a certain storehouse in the country. The defendants, five in number, went into a piece of woods where undergrowth was very thick, and into a deep hollow in said woods, about four hundred yards from said store, and out of sight of any road, and there engaged in a game of cards. Whilst so engaged, three other persons came to the same place and took part in the game, one of whom testified, that when he went into the woods he did not know where the defendants were, but hunted them up; that he had never known cards to be played at that place before, but that during the previous year he had known persons to play "in the piece of woods" some fifty or one hundred yards from "said hollow." It was held that the playing was not at a public place. *Bythwood* v. *State*, 20 Ala. N. S. 47.

51. A room in the second story of a two-story house, which is accessible only by means of a flight of steps leading up to it on the outside, and which is used by one of the proprietors of the house as a sleeping apartment, the lower room being used by the proprietors for retailing spirituous liquors, is within the prohibition of the statute against gaming at any storehouse for retailing spirituous liquors, or house or place where spirituous liquors are retailed or given away. *Johnson* v. *State*, 19 Ala. 527.

52. Where one keeps a billiard table, though he do not play on it himself for money, nor permit others to do so, yet, if for a stipulated compensation per game, he allows persons to use it, he is liable to indictment. *Ward's case*, 3 Leigh 743.

53. In North Carolina it is no offence against the law of that State to gamble with a slave. *State* v. *Pemberton*, 2 Dev. 281.

54. Keeping a gaming house is an indictable offence under the laws of Georgia. *State* v. *Savannah*, T. U. P. Charlt. 235.

55. In Tennessee, all persons who incite the playing of cards for money or other valuables, though they may not bet, are guilty of gaming under the

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statutes of that State, and are to be considered as principals. *Howlet* v. *State*, 5 Yerg. 145.

56. Where one bets upon the results of the Presidential election in the United States, he is within the letter and meaning of the Tennessee act of 1823, c. 25, § 2, and liable to be indicted. *Quarles* v. *State*, 5 Humph. 561.

57. Where persons are concealed in bushes and briars, on land owned by a county for supporting its poor, and there gaming, they will not be liable in Virginia for gaming in a public place. *Com.* v. *Vandine*, 6 Gratt. 689.

58. A bet is a wager, and the betting is complete when the offer to bet is completed. The placing of money on the gaming table is such an offer, and if no objection be made by the player or owner of the table or bank, it is an acceptance of the offer, and the offence against the statute is complete, although from any cause whatever the game should never be played out, and the stake be neither lost nor one; the offence which the act designed to punish, is betting, not the winning or losing. *State* v. *Welch*, 7 Port. 463.

59. Where a prisoner pleads guilty to an indictment for gaming, it amounts to nothing more than an acknowledgment of the facts charged; and whether such facts constitute an offence, is left open to be decided by the Court. *Crow* v. *State*, 6 Texas R. 334.

60. It is not indictable under the statute to bet on a game of ten-pins or billiards. *Ib.*

61. A back room, occupied by the Register in Chancery as a bed-room, adjoining the front room, which was his office, and communicating with it by a door, *is not a public place* within the statute against gaming, it being shown that the house was surrounded in the rear by a high fence; that the playing took place at night, when the doors were locked and the windows closed; that the persons present, about eight in number, came by invitation from the occupier of the room, and that they entered through a back door, and not through the public office. *Roquemore* v. *State*, 19 Ala. 528.

62. In order to constitute a wager, both parties should be subjected to a risk. *Quarles* v. *State*, 5 Humph. 561.

63. The act of South Carolina of 1802 subjects the offender to the penalty of fifty dollars for either playing at any of the prohibited games or betting on the hands of those who shall so play, or for keeping a tavern or other place to accommodate persons so playing, and actually accommodating them therein; the offence is not committed by the keeper of a tavern, &c., unless he makes a practice to accommodate gamesters, who actually do game in his house, booth, &c. *State* v. *Brice*, 2 Brev. 66.

64. In North Carolina, the playing at cards for money or property, in a counting-room attached to and under the same roof with a store-room in which spirituous liquors are retailed, falls within the prohibition of the act of 1831, c. 26, (1 Rev. Stat. c. 34, § 69,) forbidding the playing "at any game of cards in any house where spirituous liquors are retailed, or any outhouse or store attached thereto, or any part of the premises occupied with such house." *State* v. *Terry*, 4 Dev. & Batt. 185.

65. In Massachusetts, the game of bowls is an unlawful game, within the provisions of the Rev. Sts. c. 50, § 17. *Commonwealth* v. *Stowell*, 9 Metc. 572.

66. The statute provides that "if any person, not licensed as an innholder, victualler, or retailer of spirituous liquors, shall keep, or suffer to be kept, in any house, building, yard, garden, or dependency thereof, by him actually used or occupied, any tables for the purpose of playing at billiards, or any other unlawful game, every person so offending shall, for every such offence, forfeit," &c. *Ib.*

67. The offence here mentioned is not a continuing offence. *Ib.*

68. It consists in permitting persons, for hire and reward, to resort to a building, used by the defendant, for the purpose, on their part, of playing at bowls. This offence may be repeated from day to day, and in connection with different individuals, and, of course, may be the subject of distinct indictments, or distinct counts in the same indictment. *Ib.*

69. The statute offence is complete if they were permitted by the defend-

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ant to resort to a building by him used for the purpose of playing at bowls. *Ib.*

70. A neighborhood road is a "public place," within the statute against gaming; it being shown that the playing took place near an assemblage of persons, some of whom were looking on at the playing, and others passing about at the time. *Mills* v. *State*, 20 Ala. 86.

71. The term "highway," as used in the statute against gaming, means a public road, one dedicated to, and kept by the public, as contra-distinguished from a private way, or a neighborhood road. *Ib.*

72. The charge of keeping a house in its ordinary acceptation, is equivalent to having it in possession or occupying it. *State* v. *People*, 4 Scam. 168.

73. Keeping a billiard-room, without allowing any noise, to disturb the neighborhood, and without allowing any bets on the game, does not become a public nuisance, unless it be in a tavern, where it is made a nuisance by statute. *People* agt. *Sergeant*, 8 Cow. 139.

74. It is not deemed a nuisance at Common Law. *Ib.*

75. Playing the rub to determine which party shall pay for the use of the table, does not constitute gaming. *Ib.*

76. In Alabama, betting at the game of billiards or pool is not an indictable offence, at least since the passage of the Revenue Law of March, 1848. *State* v. *Moseley*, 14 Ala. 390.

77. Bowling alleys, connected with taverns, are unlawful, though the players only risk the price of the game. *State* v. *Records*, 4 Har. Rep. 554.

78. The offence of gaming is complete by playing *once*, and does not require a repetition of it. *Cameron* v. *State*, 15 Ala. Rep. 383.

79. In North Carolina, under the statute against gaming, Rev. Stat. ch. 34, § 69, the place of gaming and the place of retailing must be the same house, or, at the least, parts of the same establishment. "The premises," mean those places only which are occupied by the retailer, with the house in which he retails as one whole. *State* v. *Black*, 9 Iredell 378.

80. The charge of gaming is not of itself an offence punishable by law. *State* v. *Colton*, 6 Texas 425.

81. In Arkansas, since the passage of the act of March, 1848, "to provide for the assessment and collection of taxes," a pool table may be exhibited under a license, and those who bet at it are not punishable under the 12th section of the 6th chapter of the penal code, though the indictment was found previous to the passage of the act first mentioned. *State* v. *Allaire*, 14 Ala. 435.

82. Any contest or course of action commenced and prosecuted in consequence of a bet or wager, with the view to determine the bet or wager upon the event of such contest or course of action, is gaming. These two propositions clearly embrace a bet or wager upon the result of a contest between two game cocks. *Bagley* v. *State*, 1 Humph. 486.

83. Keeping a gaming-table called "shuffle-board," is not indictable under the act of Assembly of North Carolina, concerning gaming, the jury having found that this is not a game of chance but one of skill. *State* v. *Bishop*, 8 Iredell 266.

84. The game of ten-pins is not a game of chance, and, therefore, persons playing at it are not indictable under the act of Assembly of North Carolina, Rev. Stat. ch. 34, § 68. *State* v. *Gupton*, 8 Iredell 271.

85. The game of "loto" is a gaming device, and if a loto table is kept at which the game was played for money, it is an indictable offence. *Lowry* v. *State*, 1 Mo. Rep. 722.

86. A house in which a faro table is kept, for the purpose of common gambling is, *per se*, a nuisance, and it is not necessary, to constitute it such, that there should be proof of frequent frays and disturbances committed there. *State* v. *Doon*, R. M. Charlt. 1.

87. The use of a faro table for the purpose of gambling, is not rendered lawful by the tax imposed on the instrument. *Ib.*

88. Where a physician and a few friends, present by invitation, played cards or dice at night, with closed doors, in his office, where he exhibited

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his medicines, received professional calls at all times, and, being unmarried, ate and slept; held that the office was not a public place, within the meaning of the statute of Alabama, against gaming. *Clarke* v. *State*, 12 Ala. 492.

89. A steamboat is held to be a public place, within the statute of Alabama, against unlawful gaming. *Coleman* v. *State*, 13 Ala. 602.

90. An indictment for betting money is not supported by proof of the betting of United States treasury warrants. *Williams* v. *State*, 12 Smed. & Marsh. 58.

91. The effect of a demurrer to an indictment is to admit the facts as stated in the indictment. *State* v. *Fearson*, 2 Md. 310.

92. The suffering persons to play cards, and bet upon games at cards, as in a tavern on the Sabbath day by a licensed tavern keeper, is an offence prohibited by act of 1823, ch. 16, § 11, which provides that no housekeeper shall sell any strong liquor on Sunday, or suffer any drunkenness, gaming, or unlawful recreations in his or her house. *Ib.*

93. A tavern-keeper is clearly a housekeeper in contemplation of this act, and the term gaming, as there used, is synonymous with betting on games. *Ib.*

94. The design of that act was to make that unlawful on a Sunday which would be deemed in law as innocent on any other day; therefore the term gaming there used cannot be supposed to mean unlawful games, which is the usual meaning of the term, for such are violations of the law, whether practiced on Sunday or any other day. *Ib.*

II. Statutes respecting Gaming, &c.

95. In Virginia, playing at cards in a tavern is unlawful, and in violation of the act, whether the party bets or not. *Com.* v. *Terry*, 2 Virg. Cas. 77.

96. As to what constitutes a public place, within the meaning of the Virginia gaming act, vide *Walker* v. *Com.*, 2 Virg. Cas. 515.

97. In Virginia, the statute of February 26th, 1828, prescribing a new punishment for a certain species of gaming committed after the 1st of May, 1828, does not operate as a repeal of the former statutes defining the offence and prescribing other punishments for the same, as to such offence committed before May 1st, 1828. *Com.* v. *Pegram*, 1 Leigh 569.

98. Where one takes a chance in a raffle at $20, or any smaller sum, where the property raffled for exceeds $20 in value, and the raffling takes place in a private house, it does not come within the Virginia act of gaming. *Com.* v. *Garland*, 5 Rand. 652.

99. One, however, who takes his chance in such case, and wins the thing raffled for, comes within it. *Ib.*

100. If the prize is won by two persons in partnership, and the value to each, when divided, does not amount to $20, neither of them is within the act. *Ib.*

101. One who takes a chance in a raffle, does not become liable to the penalty prescribed for the purchase of a foreign lottery-ticket, by the latter part of the 26th section of such gaming act. *Ib.*

102. In Maryland, the act of 1797, c. 110, in relation to faro tables, only has reference to dwelling-houses, outhouses, and places occupied by tavern-keepers, &c. *Baker* v. *State*, 2 Har. & J. 5.

103. In Virginia, the statute of March 26, 1842, enacting that in all recoveries hereafter had for violations of the gaming laws, the fee recovered shall be ten dollars for the Commonwealth's attorney, and the sum of thirty dollars shall be paid to the literary fund in lieu of the sum as at present provided, did not apply to offences committed before its passage, but such offences remained liable to prosecution and punishment under the pre-existing law, the same as if the said statute had never been passed. *Pitman's case*, 2 Robinson 800.

104. In North Carolina, a retailer of spirituous liquors is not an ordinary keeper, within the meaning of the act of 1801, to prevent excessive gaming. *The State* v. *Hox*, 3 Dev. 116.

105. Where, upon the occasion of a public muster at a tavern, certain per-

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sons were engaged in gaming in a barn two hundred yards distant from the tavern house, and in a separate enclosure, though on the same plantation, the barn being sixty or seventy yards in the rear of another barn in which spirits are sold by the tavern-keeper; it was held that the first-mentioned barn was a public place, within the meaning of the Virginia act against unlawful gaming. *Tanner's case*, 8 Leigh 741.

106. Where the lessee and occupier of a tavern was also the occupier, under the same lease, of a storehouse, which, however, was not within the curtilage of the tavern nor connected in any way with the tavern, it was held that the storehouse was not a part or an appurtenance of the tavern, within the terms of the Virginia statute against unlawful gaming (1 Rev. Code, c. 147, § 16). *Sander's case*, 5 Leigh 751.

107. To make a separate house an appurtenance to a tavern within the terms of that provision, such house must be occupied in connection with the tavern, for the accommodation of guests, as part of the tavern. *Ib.*

108. The 126th section of the Criminal Code of Illinois provides, that if any person shall for his gain or profit, keep, have, exercise or maintain a common gaming house, table, or room, or in any house or place occupied by him, procure or permit persons to frequent or come together to play for money, such person shall on conviction be fined, &c. The principal object of this section evidently is to suppress gaming-houses, and prevent public houses from being resorted to for the purposes of gaming, by reaching and punishing those having the control of such establishments. *Stoltz* v. *People*, 4 Scam. R. 168.

109. In Tennessee, betting on elections, by the act of 1823, c. 25, § 2, is declared a misdemeanor, and upon conviction by presentment or indictment, the offender shall pay a fine for the use of the county, as in cases of betting on any game or games of hazard, by the laws now in force and use. *State* v. *Trotter*, 5 Yerg. 184.

110. The statute of Maine, c. 35, § 7, has provided for the punishment of two distinct offences: one for keeping a house, shop, or other place, resorted to for the purpose of gaming; and the other, for permitting a person to play at cards, dice, billiards, or other game, for money, or other things, in any house, shop, or place under his control or care. A person may permit one to play at such games for money, in a place under his control, and yet not keep a house or place resorted to for that purpose. So one may own and control a house or place resorted to for the purpose of gaming, without being the keeper of the house or place in the sense of the law. *State* v. *Currier*, 23 Me. 43.

111. As to the application of the rule of construction furnished by the 13th sec. of the gaming act of Arkansas (Digest 367, 368). *Brown* v. *State*, 5 Eng. 607.

112. In Ohio, the third and fourth sections of the statute for the prevention of gaming, apply as well to the betting on elections as to any other bet. *Veach* v. *Elliot*, 1 McCook 139.

113. The act to punish betting on elections, and the act more effectually to prevent gambling, have operated to supersede a portion of the seventh and eighth sections of the gaming act, but have not repealed other sections of that statute. *Ib.*

114. Any place which for the time is made public by the assemblage of people, is a public place within the meaning of the act against gaming. *Campbell* v. *State*, 17 Ala. 369.

115. According to the act of Ga. of 1847, gambling is playing with cards, dice, or any other game of chance or hazard, *for the purpose of betting, winning, or losing money, or any other thing or things, article or articles of value or otherwise, or any property, or any other article or articles, thing or things, of value.* It consists also in playing at these games that others may bet, win, or lose money, or any other thing or things, &c.; and in betting, winning, or losing money, or any other thing or things, &c., whilst others play the game. *Johnson* v. *State*, 8 Ga. 451.

116. This construction excludes the idea that playing, *per se*, without betting on the game, or without any intent or purpose that others may bet, is an offence. A game at cards, or any other

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game at chance or hazard with a negro or free person of color, simply for amusement, without more, is not made an offence by the act. *Ib.*

117. The act of Georgia of 1847, by its title, is an act to prevent gambling with negroes, or free persons of color, by white persons. Our opinion is, that it creates the offence in three different forms: 1st. Playing and betting with a negro, or free person of color, by those engaged in the game; 2d. Playing, without betting, on the part of those engaged, but with the purpose and intent that others may bet upon the game; 3d. Betting on a game played by others. *Ib.*

118. In Kentucky, the act of 1833, against gaming, leaves the amount of the fine imposed by section 10, not less than $200, nor more than $500, to the discretion of a jury. *Ervine* v. *Commonwealth*, 5 Dana 216.

119. The second section of the act of 1823, if not repealed, applies only where a gaming table or bank is set up, or kept, not where games with cards are merely permitted. *Ib.*

120. The act of Tennessee of 1799, ch. 8, makes void all contracts, the consideration of which is money, lost by playing at cards, dice, billiards, horse-racing, or any other species of gaming whatever, or by betting upon the parties who shall play at such cards, or run such races, and also inflicts a penalty of five dollars upon any person or persons who shall encourage or promote any match, or matches, at cards, dice, billiards, or any other game of hazard, or address for money, or other valuable thing. The act of 1803, ch. 12, makes it indictable for any person to play within the meaning of the act of 1799, ch. 8. *Bagley* v. *State*, 1 Humph. 486.

121. The act of Tennessee, 1820, ch. 5, exempts turf-racing from the penalties inflicted by the statutes against gaming. Match races for short distances not being regarded by sportsmen as turf-racing, the exemption in this act was not considered as extending to such races. The act of 1833, ch. 10 (Comp. stat. 360), explanatory of the act of 1820, ch. 5, declares that all horse-racing, without regard to the distance which may be run, when the same is run upon a track or path, made or kept for the purpose of horse-racing, shall be deemed turf-racing within the meaning of the Acts of Assembly of this State. *State* v. *Posey*, 1 Humph. 384.

122. The legislature never intended to tolerate horse-races, gotten up and run at distilleries, grogshops, and musters, where the crowds of excited intoxicated persons would render it alike dangerous and demoralizing. *Ib.*

123. In Massachusetts there is no statute that makes the game of billiards, cards, or dice unlawful, absolutely, per se, wherever or however used. It is only where used at licensed houses, or at places opened and kept for the purpose, for hire, gain, or reward, as places of common resort, that these games are thus declared to be unlawful. *Commonwealth* v. *Goding*, 3 Metc. 130.

124. The obvious intent of the statute is to extend the same prohibition to unlicensed houses, if opened as places of common resort, and that they shall be deemed places of common resort if the proprietor and occupant shall so open them for hire, gain, or reward. *Ib.*

125. By the act of Tennessee of 1824, c. 5, § 2, grand juries are authorized to send for witnesses to give evidence of unlawful gaming, and such witnesses are required to give evidence of any offence that may be known to them against the statutes to suppress gaming. *State* v. *Smith*, 1 Meigs 99.

126. By the act of 1823, c. 25, § 2, betting on an election is declared to be a misdemeanor, and the persons guilty thereof are subject to punishment, as in cases of betting on any games of hazard, by the laws then in force. *Ib.*

127. The language used in the act of Arkansas against gaming, although not possessing great legal accuracy and precision, is nevertheless sufficiently explicit and comprehensive to include every species of gaming, be the name or denomination what it may, if adapted, devised, or designed for the purpose of playing any game of chance at cards, or at which any money or property may be won or lost. *State* agt. *Mathis*, 3 Ark. 84.

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128. In Tennessee, an Act of Assembly of 1824, directed that all statutes made for the suppression of gaming, should be remedially construed. Every species of gaming then punished by law, was considered and treated as a misdemeanor. But when faro, in 1827, was rendered infamous, and in 1829, a felony, the rule of construction created by the act of 1824, was no longer applicable. *McGowan* v. *State*, 9 Yerg. 184.

129. In Tennessee, in relation to the offence of gaming, the act of 1824, c. 5, § 2, gives the grand jurors of the State very extensive inquisitorial powers, making it their duty to inquire diligently after all such offenders, and giving them the power to call all persons for examination before them whom they may believe to have any knowledge of the commission of such offences. *Ib.*

130. In Kentucky, the 10th sec. of the statute of 1833, against gaming, (Stat. Law, 760,) enacts that where any owner or tenant of a house, outhouse, or arbor, or any other place whatever, &c., shall permit, or suffer any unlawful gaming in any such house, &c., such owner, tenant, or other superintendent, shall for every such offence, forfeit and pay not less than $200, nor more than $500. *Calvert* v. *Commonwealth*, 5 Mon. 264.

131. The statute embraces an owner who superintends the house, a tenant (which might extend to any actual occupant) who superintends the house, and also any other person who, though neither the owner, nor tenant, nor actual occupant of the house, is yet (as the owner, or tenant, or occupant might be) the superintendent of it, which he can only be by authority, express or implied, from the person having the possession or control of the possession. *Ib.*

132. In Ohio, the act of January 17, 1846, the "more effectually to prevent gambling," does not repeal, alter, or modify the act of March 12, 1831, "for the prevention of gaming," but comes in aid of the latter, to suppress gambling houses, and to punish severely the keeper of any gaming device or establishment. *Buck* v. *State*, 1 McCook 61.

133. The voluntary permission of a single act of gambling in a house or place not kept "to be used or occupied for gambling," does not come within the act of January 17, 1846, but is provided for by the 9th section of the act of March 12, 1831. *Ib.*

134. An indictment under said section of said last-named act is defective, unless it set forth the names of the person or persons permitted by the accused to play, or an averment that their names are unknown. *Ib.*

135. The statute 1847–'8, of Kentucky, applies to all kinds of gambling. *Roberts* v. *Com.*, 11 Monr. 3.

136. In Mississippi, the statutes against gaming are held to be remedial and not penal, and therefore not to be construed strictly. *Cain* v. *State*, 13 S. & Marsh. 456.

137. In Tennessee, by the 2d section of the act of 1784, ch. 18, it provided that any person who shall encourage or promote gaming, upon conviction before a justice of the peace shall forfeit and pay the sum of five dollars. The 2d section of the act of 1824, ch. 5, makes it the duty of grand jurors where they shall have a well-grounded belief that the offence of gaming has been committed, to apply to the Court for subpœnas to bring before them any person or persons as witnesses whom they may believe to have a knowledge of such offence, and such witnesses, when they appear, shall give evidence of any offence they may know against any of the statutes to repress and prevent gaming. *Fugate* v. *State*, 2 Humph. 397.

III. Indictment and Presentment for Horse-racing, Gaming, &c.

138. An allegation that the defendant bet upon a horse-race, does not allege an offence, the words not necessarily imputing that the race was run. *Dobkins* v. *the State*, 2 Humph. 424.

139. It was held to be an offence under the statute for a person to permit his horse to be run in a horse-race, and a separate offence for a person to act as rider in a race. *State* v. *Ness*, 1 Carter's R. 64.

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140. In an indictment for permitting a horse to be run in a horse-race, along a public highway, the termini of the highway need not be stated. *State* v. *Armstrong*, 3 Indiana Rep. 139; *State* v. *Burgett*, 1 Carter 479.

141. An indictment against a person for suffering certain unlawful games with cards, for brandy, money, &c., to be played in his grocery, should state the names of the persons who played, or state that they were unknown. *Ball* v. *State*, 7 Black. 242.

142. Where an indictment charges that the defendant acted as rider in a certain horse-race which was then and there run along a public highway in said county, between animals of the horse kind, in a trial of speed; the Court held that the charge thus made is too loose and vague to be considered sufficient in an indictment founded on section 103, c. 53, R. S. *Mayers* v. *State*, 1 Carter 251.

143. To charge in an indictment that the defendant did bet at a certain gaming bank, then and there exhibited and kept, called Monte, describes with sufficient certainty the offence inhibited by the statute. *McKissick* v. *State*, 2 Texas 356.

144. In indictments for gaming, it was not necessary to state how much money was won or lost, nor who won or lost money *Montee* v. *Commonwealth*, 3 J. J. Marsh. 132.

145. It is not necessary to designate the name of the game. The courts do not judicially know the technics, nor the appellatives of gamblers. *Ib.*

146. "A game of chance, on a bank, or on a gaming table," is description sufficient, to import a direct and specified charge of a violation of the statute. The insertion of the name by which the game is generally known might contribute to its indentification; but it is not indispensable, and without other allegations, would not show that it was an unlawful game of chance. *Ib.*

147. "A game of chance," would not be sufficiently descriptive, because it would not appear whether it was a game with dice or cards, or on a bank, or gaming table. The specifie game should be stated. *Ib.*

148. The indictment must lay *some* day, and the day so stated must be a period within which the law authorizes a prosecution to be commenced. *Anthony* v. *State*, 4 Humph. 83.

149. To make it criminal to gamble for any "valuable thing," the "valuable thing" so bet must be set forth and described in the indictment or presentment. *Ib.*

150. Where an indictment charges that unlawful gaming is carried on at a house of public resort, it is sufficient under the Virginia gaming act. *Wirtham* v. *Com.*, 5 Rand. 669.

151. An indictment containing three counts, for playing at cards in an out-house where people resort, in a store-house for retailing spirituous liquors, &c., in a public place, is good, without designating to whom the out-house or storehouse belongs, or without designating the description of the place by a more certain description. *State* v. *Atkyns*, 1 Ala. 180.

152. An indictment for gaming is sufficient against one, though many others are charged in the indictment who were not connected in gaming with him. *Brown* v. *the State*, 5 Yerg. 367.

153. The name of the game need not be stated in the indictment; but there should be in it some description of the game, as, that it was with cards, dice, &c., in order that the defendant may be apprized of the particular charge which he is required to answer. *Webster* v. *State*, 8 Blackf. 400.

154. Where an indictment charged the defendant with unlawful gaming at the house of A., the same being a house of entertainment; it was held sufficient. *Linkor's case*, 9 Leigh 608.

155. Where a presentment for gaming charged the defendants with playing an unlawful game at the house of A. in B., in the county of C., it was held that the presentment was fatally defective, in not alleging that the house where, &c., was an ordinary, or a public house. *Herd's case*, 4 Leigh 674.

156. The jurisdiction of the District Court is general, and if the indictment charges the offence to have been committed in the proper county, that is a sufficient averment that it is within the

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jurisdiction of the Court. *Drummond* v. *State*, 2 Texas 156.

157. In an indictment for a statutory offence, though the statute must be strictly pursued, it is not necessary to employ the exact words of the statute, unless the words used are the technical words which constitute the specific offence. *Ib.*

158. In an indictment for betting at cards, under the 8th section of the gaming act (Digest, 307), it is not necessary to allege the amount of money bet, nor with whom defendant bet, but the names of the players (if known) must be alleged. *Moffat* v. *State*, 6 Eng. 169.

159. An indictment for playing cards at a public place, need not allege to whom the house or other place belongs; and if the ownership of the place be alleged, it may be treated as surplusage, and need not be proved as laid. *Wilson* v. *State*, 5 Texas 21.

160. An indictment will lie against a person for suffering gaming in a house of which he is possessed. *Com.* v. *Lampton*, 4 Bibb 261.

161. If the indictment charges the offence so as to bring it within the statute, with the allegations of time and place, it is sufficiently certain, although the Christian name of one of those who was charged to have been engaged in the games suffered by the defendant, be omitted. *Ib.*

162. The indictment, that the defendant "did play at cards for money," is sufficiently defined for any reasonable or legal purpose. *Johnston* v. *State*, 7 Smed. & Marsh. 58.

163. In Missouri, *betting* at cards is indictable, under the 16th section of the 8th article of the act concerning crimes and punishments. *Ewbanks* v. *State*, 5 Mo. 450.

164. Where a presentment is made for unlawful gaming, by playing at cards, betting on the sides and hands of those that then and there did play; held that the indictment is not objectionable for duplicity. *Com.* v. *Tiernan*, 4 Gratt. 545.

165. In an indictment for betting on a prohibited game, it is not necessary to allege that the game was played in the county where the bet was made. *State* v. *Kyle*, 10 Mo. 389.

166. A person may be indicted for permitting gaming in his house, or for setting up or keeping a prohibited gaming-table or bank. But there is an essential difference between these offences and the simple act of playing a game, or merely gaming. An indictment for "gaming" would not be good. *West* v. *Com.*, 3 J. J. Marsh. 641.

167. Where an indictment for gaming charges that the defendant was guilty of unlawful "gaming, by then and there wagering and betting money on a certain unlawful game of cards;" this was held to be a good indictment for the offence, under the broad provisions of the act of 1824, ch. 5, and an indictment for gaming at cards need not describe the game played, nor the person to whom the bet was made; nor is it necessary to charge what money or what amount was bet on the game. *State* v. *McBride*, 8 Humph. 66.

168. The words, "did gamble" and "did game," contain and express, ex vi termini, the conjoint facts, that a bet or wager was laid, and that the act to which it related was executed. *Ib.*

169. Where an indictment for keeping a gaming-house, charged in the same count that the defendant kept, and suffered his house to be used for gaming, &c., and it was insisted that this rendered the indictment bad, on the ground that it charged two offences; held that one offence was charged. *Dormer* v. *State*, 2 Carter 308.

170. It is not necessary in an indictment for gaming, to allege the name of any person who played. *Ib.*

171. Where a widow is in the possession and use of a farm, she has the right to control it, and to prevent its appropriation to illegal purposes by those who have no color of title or right of entry, and to a certain extent may be appropriately considered the owner of the lands. No allegation of the character of her right to the tenement is necessary; if she has such a right as enables her to prevent it to be used for the illegal purpose of gambling, she comes within the provisions of the statute, and the averment in the indictment that she is the owner of the tenement is sufficiently sustained by the evidence which shows that she has

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a qualified ownership. *Roberts* v. *Com.*, 11 Monr.'s R. 3.

172. The statute of 1842 (Stat. Law of Ky., 478), provides that if a person shall wager or bet any sum of money or other thing upon the election of any of the officers aforesaid (among whom are members of the General Assembly), within six months next before said election, he shall forfeit and pay the sum of one hundred dollars, to be recovered by indictment. *Com.* v. *Kirk*, 4 Monr. 1.

173. The keeping of a common gaming-house, is indictable at Common Law, because of its tendency to bring together disorderly persons, to promote immorality, and to lead to breaches of the peace. Per Bronson, C. J. *People* v. *Jackson*, 3 Denio 101.

174. But where an indictment only alleged that the defendant kept a common gaming-house, without stating what was transacted there, it would not, it seems, be sufficient. Per Bronson, C. J. *Ib.*

175. And where an indictment charged the defendant with keeping a certain common gaming-house, in which he sold and furnished tickets in lotteries, unauthorized by law, to divers persons, it was held not to charge an indictable offence. *Ib.*

176. An indictment for betting on the result of an election, must state for what purpose the election bet on was held; that is, whether it was for President of the United States, for Governor of the State, &c. *Bellair* v. *State*, 6 Blackf. 104.

177. Where several persons keep a common gaming-house, a joint or separate indictment will lie, but where they are jointly indicted, they are to be considered as tried separately, and each to pay the same penalty, and suffer the same consequences, as if it had been the sole act. *Com.* v. *Hyde*, Thacher's Crim. Cas. 19.

178. The day named in the indictment is not material, provided the time stated be previous to the finding of the indictment; but if it were necessary to prove the time, as it is alleged, a wrong date cannot avail the defendant on a motion to quash. *State* v. *Little*, 6 Blackf. 267.

179. In Virginia, several offences under the gaming act may be charged against different persons in the same indictment, viz., against one for exhibiting, another for playing at, and a third, for permitting faro to be played at his house. *Com.* v. *McGuire*, 1 Virg. Cas. 119.

180. In Arkansas, in an indictment for betting at a game of cards, under the 8th section of the gaming act, (Digest, p. 367,) the names of the persons who played the game (if known), must be alleged, and the proof must correspond with the allegations; the proof must show that all the persons charged to have played were engaged in the game. *Parrott* v. *State*, 5 Eng. 574.

181. In Texas, where a party was indicted under the act of 3d February, 1845, for keeping a ten-pin alley without having paid the license tax imposed thereon by the act of 5th February, 1842; held that it was not necessary, under the statute referred to, for the indictment to charge that the alley was kept for play, or that playing took place, or was permitted thereon. *Needham* v. *State*, 1 Texas 139.

182. Where an indictment is found for gaming, it must allege the name of the person with whom the defendant played, or allege his name to be unknown. *Butler* v. *the State*, 5 Blackf. 280.

183. In Arkansas, in an indictment under the third section of the gaming act, for betting on any of the games prohibited by the first section (Digest, 365), it is not necessary to allege that defendant bet with any particular person. *Drew* v. *State*, 5 Eng. 82.

184. A presentment for unlawfully playing cards at the grocery of D. and C., is substantially defective in not charging the grocery to be a public place, or a place of public resort. *Roberts' case*, 10 Leigh 686

185. In South Carolina, where an indictment under the act of 1816, to prevent gaming, charges the defendant with gaming and keeping a public place or house, used as a place for gaming, it is defective. *The State* v. *Hone*, 1 Rich. 260.

186. It has been held that a general

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charge, that the defendant kept and maintained a common gaming-house, would be sufficient, though the better opinion is, that a further allegation in general terms of what was transacted there, is necessary; but it is not essential to specify what particular games were carried on by the visitors. *Vanderworker* v. *State*, 8 Eng. 700.

187. Concluding an indictment "contrary to the form of the statute in such case made and provided," will not vitiate when it is coupled with an allegation that the offence charged was a "common nuisance," and a further conclusion "against the peace and dignity of the State." The words "contrary to the statute," &c., will be regarded as surplusage, and not as indicating a prosecution under the statute, against gaming-houses. *Ib.*

188. An individual having been punished under the corporate authorities of the city of St. Louis, for keeping a roulette table, cannot be indicted in the State courts for the same offence. *State* v. *Simonds*, 3 Mo. 414.

189. The allegation of the pendency of the election, and that the defendant bet upon the event of that election, is sufficient. It is not necesary that the indictment should allege that the party bet upon the success of any particular candidate. *State* v. *Cross*, 2 Humph. 301.

190. It is only necessary to make such specification of the dictum in the indictment as to apprize the defendant of the charge against him, with such reasonable certainty as to enable him to prepare to meet it, and as will render it a good bar to any subsequent prosecution for the same offence. *Com.* v. *McAtee*, 8 Dana 29.

191. Where a prosecution, under the Rev. Sts. ch. 50, § 17, alleged that the defendant, not being licensed as an innholder or common victualler, did for hire, gain and reward, unlawfully suffer persons to resort to a certain building by him actually used and occupied, for the purpose of playing at a game called bowls, &c., being then and there an unlawful game; held that the offence charged was within the statute. *Com.* v. *Drew*, 3 Cush. 279.

192. In Arkansas, the owner or occupant of a house, &c., cannot be indicted, under the 4th section of the gaming act, for permitting pocre, or any of the small games of cards mentioned in the 8th section of the act, to be played in his house, &c.; but only for suffering some of the armes, tables, banks, &c., embraced in the previous sections, to be played, carried on, or exhibited, &c., therein. *Stith* v. *State*, 8 Eng. 680.

193. In Kentucky, an allegation in an indictment, under the gambling act of 1833, that defendant "did keep a gambling house," is sufficient, so far as relates to his interest or concern in the house. It would not do under the act of 1799. *Commonwealth* v. *Crupper*, 3 Dana 466.

194. And "unlawful games at cards," is a sufficient specification of the game. The indictment will be good without specifying the sum that was lost or won, or by whom it was lost or won. *Ib.*

195. But it must charge, in direct terms, that the gaming was permitted by the defendant; an allegation that he kept a house in which unlawful games at cards were played and permitted, is not sufficient; for it might have been without his permission or knowledge. *Ib.*

196. An indictment may be sustained, under the act of 1826 (prohibiting gaming on one's premises), which charges the person with permitting gaming to be exhibited in his house. *Covy* v. *State*, 4 Port. 186.

197. An indictment against one, for permitting gaming to be carried on in his house, which states the offence to have been committed at ——, in the county of S. (describing the county), is a sufficiently certain description of the place where the offence is committed, to sustain an indictment. *Ib.*

198. Where offences are distinct, different in their nature, and admitting of different degrees of punishment, they ought not to be combined in the same indictment. *State* v. *Fant*, 2 Brev. 487.

199. For keeping a disorderly house, it is sufficient, even in conformity with the strict doctrine of indictments as it prevails in England, to lay the offence as committed in a parish, hamlet or

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ville, without naming a particular spot or place in the parish, ville or hamlet. *Ib.*

200. In South Carolina, in an indictment under the act of 1836, for gaming with a slave, it is not necessary to allege, nor is it necessary to prove, on the trial, what the particular game played at was, or that there was any betting. Such an indictment is sufficient, if it alleges that the defendant "wilfully and unlawfully did game with a certain negro slave," &c.; and it is sufficient to prove on the trial that the defendant played at cards with the slave. *State* v. *Laney*, 4 Rich. 193.

201. In Arkansas, in an indictment for betting at pocre, or any of the small games embraced in the 8th section of the gaming act, it is necessary to state the names of the persons by whom the game was played, by way of identifying the offence. *Backman* v. *State*, 8 Eng. 703.

202. But where the indictment alleges that the names of the persons who played the game are unknown to the grand jurors (which may be done where this is really the case, but not carelessly), such allegation is a material one, is traversed by the plea of not guilty, and must be sustained by proof. *Ib.*

203. Where one bets, and is concerned in betting, at a faro bank; held that such acts are grades of the same offence, and may properly be charged in the same count. *Ward* v. *State*, 22 Ala. 16.

204. Where a count charges the defendant with betting at a certain game of cards called "faro," it is sufficiently certain. *Ib.*

205. Two or more persons may be joined in the same indictment, for betting, or being concerned in betting, at a faro bank. (Clay's Dig. 433, sec. 12, 14.) *Ib.*

206. An indictment which charges the keeping of a faro bank, and inducing persons to play therewith for money, alleges but one offence. *State* v. *Ames*, 10 Mo. 743.

207. Where an indictment is found for permitting gaming in a licensed grocery, it need not set forth the name of the game which was played. *State* v. *Dole*, 3 Blackf. 294.

208. The circumstances which form a part, in order to constitute the offence must be alleged, and they must be truly stated, so that the averments and proofs may reciprocally meet and conform to each other. *Hale* v. *State*, 8 Texas 171.

209. Where an indictment charged that the accused "did play and bet at cards for money, at a game of poker, whist, faro, seven-up, three-up, and other games played with cards," using the words of the statute, it was held good. *Wingard* v. *the State*, 13 Ga. 396.

210. Where an indictment charges several persons with a joint betting at a faro bank, the proof must correspond with the allegation, and show that all the persons named were concerned in the betting. *Johnson* v. *State*, 8 Eng. 684.

211. Where a number of defendants are joined in a count for betting at faro, or any such game, it is proper to charge that they severally bet, to make the indictment available, though the court would not encourage the joinder of persons severally committing the same species of offence, as it produces inconvenience. *Ib.*

212. In North Carolina, under the 69th section of the Revised Statutes, concerning crimes and punishments (1 Rev. Stat. chap. 34, § 69), an indictment will not lie against one for playing at a game of cards in a tavern, if he do not bet on the game, though the other persons with whom he may play may bet. The statute embraces two cases, the playing and betting at cards in a tavern, and the merely betting upon a game played by others; but does not reach the case of playing only without betting. *State* v. *Smitherman & Hethcock*, 1 Iredell 14.

213. In Indiana, when an indictment is laid, under the statute of 1838, alleging that the defendant kept a room to be used and occupied for gambling, it is good, without alleging that gambling has actually taken place in the room. *The State* v. *Miller*, 5 Blackf. 502.

214. An indictment for permitting

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gaming must recite the parties, or allege that they are unknown. It must also specify whether the game was for money or other valuable thing. *Davis* v. *State*, 7 O. 204.

215. An indictment for gaming alleged that the defendant, by playing at cards, &c., had won from A. H., A. C., and G. H., a certain article, &c. The evidence was that the winning was by the defendant and another as partners, from A. C. and G. H. as partners; held that the variance was fatal. *Wilcox* v. *State*, 7 Blackf. 456.

216. The defendant was indicted for a bet or wager upon the result of the presidential election. The indictment charged that the defendant and the other party bet "goods, wares, and merchandise, being valuable things;" held that the indictment was not sufficiently certain. *State* v. *Kilgore*, 6 Humph. 44.

217. An indictment under the first section of the gaming act, charging that the defendant did "unlawfully keep and and exhibit a certain gaming *table*, commonly called *faro*," without the use of the term *bank*, is sufficient. *Brown* v. *State*, 5 Eng. 607.

218. Otherwise with a count charging the defendant with keeping and exhibiting a "common gaming table," giving it no name, &c. *Ib.*

219. Independent of any statute, the keeping a common gaming house is an indictable offence at Common Law, such an establishment being a nuisance. *Vanderworker* v. *State*, 8 Eng. 700.

220. It is not necessary to allege by whose permission the betting, gambling, &c., was done, the proprietor of the house where the device was kept being responsible for the use made of it. *State* v. *Ellis*, 4 Mo. 474.

221. An indictment for gaming need not state the name of the game played. *State* v. *Ross*, 7 Blackf. 322.

222. Where a presentment was made for unlawful gaming at cards at a particular place within six months next preceding, and process was issued summoning the defendant to answer a presentment for unlawful gaming at cards generally, without specifying time or place, it was held that such process was void under the statute of Indiana. Rev. Sts. 1838, 218. *Blanton* v. *the State*, 5 Blackf. 560.

223. An indictment for playing cards "at a public place" is good. *Roquemore* v. *State*, 19 Ala. 528; *Flake* v. *State*, 19 Ala. 551.

224. An infirmary is a public place, within the statute against gambling. *Ib.*

225. Reasonable certainty in the proceedings is all that the law requires in regard to the offence of gaming. *Seal* v. *State of Mississippi*, 15 Smed. & Marsh. R. 286.

IV. Evidence necessary to support the Charge of Horse-racing, Gaming, &c.

226. The averment in the indictment as to the kind of animal that was suffered to be run is descriptive, and must be proved as laid. *Thrasher v. State*, 6 Blackf. Rep. 460.

227. Where an indictment is laid for winning a certain sum of money, the prosecutor may be allowed to prove the winning of a smaller sum. *Parsons* v. *State*, 2 Carter 499.

228. Sums of money stated in an indictment need not be proved as laid, unless they form part of the description of a written instrument, or the exact sum be of the essence of the offence. *Ib.*

229. Evidence that a race was run along a road leading from one town to another, in the county of Switzerland, was sufficient, prima facie, to sustain the averment in the indictment that the road in question was a public highway. *Watson* v. *State*, 3 Ind. 123.

230. Where an indictment was for playing at a game with cards, at a public place, upon which money was bet, and the proof was that property was bet, it was held that the indictment was not supported by the proof. *Hall* v. *the State*, 8 Texas 171.

231. Where one is indicted for permitting a faro bank to be kept and exhibited in his house, it is not sufficient to prove that the house was owned by the defendant, and that the faro bank was kept and exhibited in it; it is ne-

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cessary there should be some further evidence, either positive or presumptive, that the defendant permitted it. *Harris* v. *State*, 5 Texas 11.

232. And where one is indicted for renting a room in his house to certain persons, to the jurors unknown, for the purpose of keeping and exhibiting a faro bank, it is not sufficient to prove that the defendant rented the room, and that a faro bank was kept and exhibited in it; it is necessary there should be some further evidence of facts showing that defendant rented the room for the purpose of keeping a faro bank. *Ib.*

233. Where an indictment contains four counts, and charges the defendant with playing cards "at a highway," "at a house where spirituous liquors were retailed," "at a public place," and "at a public house," while the evidence shows that the playing took place in a hollow more than a hundred yards from a house where spirituous liquors were retailed, and where the persons present had been drinking; that the persons playing, of whom the defendant was one, could not be seen from the grocery, nor from the public road; that witness had never seen, before nor since, any playing or signs of persons having played at that place before; it was held that the evidence would not support either count in the indictment. *Smith* v. *the State*, 23 Ala. 39.

234. Where an indictment for gaming charged the defendant with unlawful playing with cards, to wit, at the game of all-fours, of loo, and of whist, at a public house, to wit, at the store-house of A.; held that, in order to convict the defendant, it must be shown that he played at some one of the games mentioned in the indictment; and that if the playing was at the store-house of A. in the night-time, after the business of the day was at an end and the door closed, the store-house was not in such case, prima facie, a public house, though it was so when open to the public in the daytime. *Windsor's case*, 4 Leigh 680.

235. In an indictment for gaming, it was charged in two of the counts that the defendant and four other persons did *bet together and against each other*, at a game of cards, &c., and in the other count that the said defendant and the said other persons *did bet together* at a game of cards, &c.; held that proof that the four persons named in the indictment played the game of cards, and defendant stood by and bet with one of them, that three of the players bet with each other, but the fourth player did not bet at all, was not sufficient to sustain a verdict of guilty against defendant; that the charge in the indictment, though made with unnecessary complication, should have been proven as alleged. *Hany* v. *State*, 4 Eng. 193.

236. A storehouse in a village, late at night, after persons stop coming to the store to purchase goods, and the door is looked, is not considered a public place, within the meaning of the statute against gaming. *Feazle's case*, 8 Gratt. 585.

237. Where an indictment charges the defendant with winning the sum of $5 by a wager, &c., it is not sustained by proof that he won the promissory note for $5 of the persons with whom he bet. *Tate* v. *the State*, 5 Blackf. 174.

238. Where a presentment for gaming charged the offence as committed at the booth of Price Skinner, and the proof was of gaming at the booth of one Clarke, the said Skinner having no right, interest, or agency in said booth; held that the proof did not sustain the charge. *Commonwealth* v. *Butts*, 2 Vir. Cas. 18.

239. In Virgina, where an indictment is laid against a tavern-keeper for suffering the game of loo to be played in his tavern, by certain persons named, it will be sustained by proof of his having suffered that game to be played therein, though by other persons than those named in the indictment. *Price's case*, 8 Leigh 757.

240. On an indictment for keeping a common gambling-house, presumptive evidence that the defendant is the keeper of the house is sufficient to convict. *State* v. *Worth*, R. M. Charl. 5.

241. There is no law saying that the permitting of gaming to be played at any time in a person's room shall be sufficient evidence that he occupies

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the room for gambling. The jury, therefore, must be left at liberty to determine from the evidence of such permission, either against the defendant or otherwise, as they may think proper. *Armstrong* v. *State*, 4 Blackf. 247.

242. In South Carolina, in an indictment for gaming, to subject the defendant to the pecuniary penalty, under the statute, it is necessary on the part of the State, to prove the offence to have been committed within six months before the commencement of the prosecution; and when the issue of the limited time is found for the defendant, and his guilt before the time found against him, the verdict of the jury should show the finding on each issue by such words as "guilty, but at a time more than six months before the commencement of the prosecution." *State* v. *Waters*, 1 Strob. 59.

243. If an indictment charge that the defendant unlawfully bet and played at a game of cards called faro, for *money*, and the proof is that he bet *bank-notes*, such proof will not be sufficient to maintain the indictment. *Johnston* v. *State*, 1 Mart. & Yerg. 129.

244. The defendant was indicted for betting at a game of cards called pocre, and convicted on testimony that he did bet money at pocre, though the game on which he bet was called *drawn-pocre*, and differed in some respects from pocre. The Court having refused a new trial, the evidence on this point is held sufficient to uphold the verdict. *Barkman* v. *State*, 8 Eng. 703.

245. An indictment for betting money on a game of cards is not sustained by proof of the betting of property. *Horton* v. *State*, 8 Eng. 62.

246. The declarations of a party who is indicted for keeping a faro bank, made publicly at the time of the offence, that he was playing as the agent of another, are incompetent as evidence in his defence. *Com.* v. *Hyde*, Thach. Crim. Cas. 19.

247. One may be charged with playing *at cards or dice*; yet it must be showed that he played *a game*, though it is not required of the prosecutor to show what it is or was called, or that he played a game with any person. *Caggins* v. *State*, 7 Port. 263.

248. In an indictment under the act of 1831, ch. 26, it is sufficient to show that the spirituous liquors were, in fact, retailed in the house in which the playing took place, and it is no defence for the defendants that the retailer has not pursued the directions of the act of Assembly in obtaining a license to retail. *State* v. *Terry*, 4 Dev. & Batt. 185.

249. Upon the trial of one indicted as a common gambler, evidence "that he was and is by reputation a common gambler," is not admissible; his acts and his character are to be proved. *Commonwealth* v. *Hopkins*, 2 Dana 418.

250. Evidence of a single instance of unlawful gaming may go to the jury upon the trial of an indictment as a common gambler, and with other circumstances, *e. g.*, that he displayed gaming implements, &c., might warrant a conviction, while proof of many instances of playing, accompanied with evidence that the accused pursued a lawful calling, and only played for pastime, might not. *Ib.*

251. The facts which may be given in evidence against one indicted as a common gambler, are not merely those perpetrated within the county where the bill is found. It may be shown that he had kept a faro bank, or gaming table, or otherwise been guilty of unlawful gaming in other counties. *Ib.*

V. Miscellaneous.

252. Where two are jointly indicted for allowing gaming in their house, and a jury assess a fine upon them jointly; held that a judgment might be rendered upon the verdict. *Barada* v. *the State*, 13 Mo. 94.

253. Where several persons are jointly indicted for betting at a faro-bank, and the proof is that one of them only is engaged in the betting; held that he might be convicted, and the others acquitted. *Ward* v. *the State*, 22 Ala. 16.

254. In Virginia, the jury may try an offence under the gaming act. *Com.* v. *McGuire*, 1 Virg. Cas. 119.

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255. In Virginia, where the defendant is prosecuted for unlawful gaming, he may appear by attorney, after summons has been duly served upon him, without a personal appearance. *Com.* v. *Lewis*, 1 Virg. Cas. 334.

256. In Virginia, where one is prosecuted for unlawful gaming, he is entitled to a trial by jury, although the penalty is only $20. *Commonwealth* v. *Horton*. Ib. 335.

257. On an indictment for keeping a gaming den, the question whether the game is one of chance, is a matter to be left to the jury. *Glascuk* v. *State*, 10 Mo. 508.

258. In Virginia, the plea of a misnomer is not allowed to a presentment, indictment, or information for unlawful gaming. *Commonwealth* v. *Atkinson*, 2 Vir. Cas. 513.

259. In Virginia, a tavern-keeper presented for allowing faro and loo to be played at his house, may be tried on the presentment alone, without any information, and if he refuses to answer the presentment, judgment by default may be rendered against him. *Com.* v. *Maddox*, 2 Vir. Cas. 19.

260. Where a demurrer to an indictment for unlawful gaming was overruled, it was held that the defendant could not have leave to plead not guilty, unless he offered to withdraw his demurrer, that the Court might in its discretion give him leave to withdraw his demurrer, and to plead; but that in case he did not withdraw his demurrer, and obtain leave to plead, judgment should be given for the fine and costs, not that the defendant should answer over. *Foggy's case*, 6 Leigh 538.

261. Where one was indicted for playing at an unlawful game, the Court immediately awarded a capias against him, returnable the next day; at the return day he moved to quash the capias as improper process, which motion was overruled, and he was compelled to plead forthwith; held that the irregularity, if any, in the proceeding, was not sufficient cause for the reversal of judgment against the defendant. *Wright's case*, 2 Robinson 800.

262. In Massachusetts, on the trial of an indictment for gaming, the precise day need not be proved, if the offence be shown to have been committed before the finding of the indictment. *The Commonwealth* v. *Hyde*, Thacher's Crim. Cas. 19.

263. Where one was indicted who was keeper of the tavern at the time of such playing, his having a license at the time is not essential to his conviction. *Price's case*, 8 Leigh 757.

264. Where one is convicted upon such indictment, judgment cannot be rendered for the revocation of the defendant's license obtained since the commission of the offence. *Ib.*

265. The judge had authority under the 7th section of the act of 1833, against gaming, to order the defendant to prison, he being in court, and failing to pay the fine adjudged against him. *Faris* v. *Commonwealth*, 3 Kentucky Rep. 79.

266. It cannot be doubted that a faro bank is within the words of the act of Alabama of eighteen hundred and twenty-eight, and whether it be a gaming table or bank is immaterial, both are equally within the inhibition of the statute, and the only matter to be ascertained by the jury is the exhibition for the purpose of gaming. *State* v. *Whitworth*, 8 Port. 434.

267. It is not error to charge the jury "that if they believe from the testimony that the defendant played cards at the house mentioned by the witness, and that it was at the time a house to which people did resort, then the defendant was guilty." *Cameron* v. *State*, 15 Ala. 383.

268. Where, in an indictment for gaming, the time at which the offence was committed as laid in the indictment was within the six months before the commencement of the prosecution, and the jury found the defendant guilty, and that the gaming took place more than six months before the commencement of the prosecution; held that the uncertainty of the finding as to the time at which the offence was committed was no ground for arresting the judgment. *Ib.*

269. An indictment against the plaintiff in error for knowingly suffering a gaming-table called a faro bank to be exhibited in the house occupied

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by him. *Mount* v. *State*, 7 Smed. & Marsh. 278.

270. The Court below declined to instruct the jury to the effect that if the accused had let the rooms of his house in which the exhibition of the faro-bank is proved to have taken place, to certain persons, and that at the time when he let them he had no knowledge or expectation that they would be used for the purpose of such an exhibition, the jury must find for the defendant, held that the charge was properly refused. *Ib.*

271. A defendant indicted as a common gambler is not entitled to a bill of particulars or specification of acts intended to be proved against him. *Commonwealth* v. *Moore*, 2 Dana 402.

272. In South Carolina, a prosecution for gaming, though barred as to the fine, is not barred as to the imprisonment, if not commenced within six months. *State* v. *Dent*, 1 Richard. 469.

273. Where, on the trial of an indictment for gaming, the Court instructed the jury that it was not necessary for the State in order to sustain the prosecution, to show that the defendant either won or lost, of or to all persons named in said indictment, but that it was only necessary for her to prove a winning or losing from or to one or more of them; held that this instruction was wrong. *Isely* v. *State*, 8 Blackf. 403.

274. But the Court further instructed the jury that it was not necessary for the State to prove that the defendant invested his own money in the shooting match, but it was sufficient for her to show that he shot according to the rules of the match, while another person furnished the money to enable him to do so; this was held proper. *Ib.*

275. In Tennessee, by the act of 1834, ch. 5, § 2, an inquisitorial power is given to grand juries in cases of gaming; and they are authorized and empowered, and it is made their duty, where they have a well-grounded belief that such offence has been committed, to apply for subpœnas for witnesses, whom they may believe to have any knowledge of such offence, and such witnesses are required, when they appear before the grand jury, to give evidence of any such offence or offences as may be known to them. *State* v. *Parish*, 8 Humph. 80.

276. No prescribed form of words is necessary to make it appear that a prosecution for gaming was carried on "in the name and by the authority of the Republic of Texas;" it is enough if the prosecution be conducted by the proper law officer, acting under the authority and conducting the prosecution in the name of the government. *Drummond* v. *State*, 2 Texas 156.

HABEAS CORPUS.

I. When a party is entitled to a writ of Habeas Corpus.
II. Jurisdiction.
III. Statutes respecting the writ of Habeas Corpus.
IV. The return to the writ.
V. Miscellaneous.

I. When a Party is Entitled to a Writ of Habeas Corpus.

1. As to forms of writs of habeas corpus and certiorari, the allowance thereof, and the return thereto. *People* v. *Tompkins*, 1 Parker's Crim. R. 224.

2. Where it appears from a petition for a writ of habeas corpus, that the petitioner, if brought before the Court, could not be discharged, the writ will not be issued. *Sims' case*, 7 Cush. 285.

3. How far it is lawful for one court, by a writ of habeas corpus, to the executive officer of another court, to take a prisoner from the custody of the latter, *quere*. *Ib.*

4. Where a person who is imprisoned under a writ of ne exeat, petitions for a writ of habeas corpus, a copy, not only of the writ, but of the bill upon which it is founded, and the judge's order directing the writ of ne exeat to issue, must be annexed to the petition, or a legal excuse must be shown for the omission. *Ex parte Royster*, 1 Eng. 28.

5. An affidavit by a person that he is illegally detained, will be sufficient

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to entitle him to the writ of habeas corpus, and all other allegations will be superfluous. *White* v. *the State*, 1 Smed. & Marsh. 149.

6. A State court will not allow a habeas corpus to discharge a person who stands committed under an act of Congress. *The State* v. *Paine*, T. U. P. Charlt. 142.

7. In Pennsylvania, habeas corpus does not lie returnable to the Supreme Court, to bring up a person bound over by the Court of Quarter Sessions, to answer to the charge of misdemeanor during the session of the latter Court. *The Com.* v. *the Sheriff*, 7 Watts & Serg. 108.

8. Where one is imprisoned on a criminal charge, he is entitled to the allowance of a writ of habeas corpus, as a matter of right, except when he is committed or detained by virtue of the final judgment of a competent tribunal. This question must be decided by the officer to whom the writ is presented for allowance, and if he decides that the prisoner is not entitled to it, such decision is held to be a proper subject of review. *The People* v. *Mayer*, 16 Barb. 362.

9. Although the writ of habeas corpus may sometimes be appropriately used as a writ of error, yet *it seems* that it cannot be converted into a quo warranto in order to decide a question of usurpation of office. *Matter of Phillip Walker*, 3 Barb. 162.

10. Though this Court has power at Common Law to grant relief against all illegal imprisonments in civil or criminal cases, yet a habeas corpus is not the proper remedy for a defendant imprisoned on a ca. sa., so irregularly issued; but the party should make application to the Court, on motion and affidavit, for that purpose. *Yates' case*, 4 John. 314.

11. The adjudication of an officer having power to issue and decide upon a writ of habeas corpus, may be alleged as res adjudicata upon any subsequent writ of habeas corpus, and is conclusive upon the same parties, when the subject-matter is identical, and there are no new facts. *In re De Costa*, 1 Parker's Crim. R. 129.

12. The parties are the same, where the writ is issued on behalf of the same individuals, against the same respondent, although the relators are different persons. *Ib.*

13. Habeas corpus is not the proper mode for a guardian to obtain the custody of his ward, where the ward was under fourteen, and chose to remain with his mother. *State* v. *Cheeseman*, 2 South. 445.

14. Where a prisoner has been committed on a criminal charge, he is entitled to the allowance of a writ of habeas corpus, as a matter of right, unless he was committed or detained by virtue of the final judgment of a competent tribunal. *People* v. *Mayer*, 16 Barb. 362.

15. And the question, whether he was so committed, or is so detained, is one which the officer to whom the writ is presented for allowance is required to decide in order to determine whether or not the writ shall be allowed; and his decision, that the prisoner is not entitled to the writ, is a proper subject of review in the Supreme Court upon certiorari. *Ib.*

16. Although it may be the duty of the magistrate who commits a party in the city of Albany, to try him upon his request, the Court of Special Sessions is not deprived of jurisdiction; and that jurisdiction having been exercised in a lawful manner, and the defendant imprisoned by virtue of the final judgment of such Court of Special Sessions, he is not entitled to the allowance of a writ of habeas corpus to inquire into the cause of his imprisonment. *Ib.*

17. Where the prisoners were in confinement two terms, were ready for trial at each term, and at the second term did, by their counsel, petition to be brought to trial, they were properly discharged on habeas corpus. *The State* v. *Segar*, T. U. P. Charlt. 24.

18. In Mississippi, under the 14th section of the habeas corpus act, a prisoner charged as accessory to a murder, cannot be discharged, because he has not been indicted, although the stated times for holding two terms of court has elapsed; to bring the prisoner within the terms of that statute, it must appear that the State has been in default; that two terms has actually been

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holden without his being indicted ; for, if no terms are holden, the State cannot be in default. *Byrd* v. *the State*, 1 How. Miss. 163.

19. One duly committed upon a regular indictment for murder, cannot be discharged upon habeas corpus, by establishing his innocence merely, however clear the proof may be, but must abide the event of a trial by jury. *People* v. *McLeod*, 1 Hill 377.

20. Mere evidence of innocence cannot be used on habeas corpus, as an argument for letting the prisoner out on bail, if the application is *after indictment* found ; and even where the application to bail is before indictment, the right of inquiry as to guilt or innocence is confined to the depositions or proofs on which the commitment was ordered. *Ib.*

21. *Semble*, that under the statute, 31 Car. 2, c. 2, where the warrant of arrest or commitment contained a specific charge of an offence not bailable, the prisoner, on habeas corpus, could not obtain any relief whatever. *Ib.*

22. Where there are formal defects in process, the remedy is either in the same court out of which it issued, by motion to set it aside, or by certiorari to the Supreme Court. Such defects cannot be corrected by habeas corpus. *Miles* v. *Brown*, 3 Barb. 37.

23. In New York, the first judge of a county of the degree of Counsellor at Law in the Supreme Court, may grant a habeas corpus ad testificandum to bring up a prisoner charged in execution upon a ca. sa. *Wattles* v. *Marsh*, 5 Cow. Rep. 176.

24. This writ may be allowed to bring up a prisoner under a ca. sa. to give testimony in relation to his own application to a first judge for a discharge pursuant to an act of insolvency. *Ib.*

25. And if valid on its face, though irregularly or erroneously granted, the sheriff will be protected in his obedience to it, from the writ. *Ib.*

26. Where the warrant upon which a prisoner has been arrested, was issued by a person who was acting as a police justice de facto, under color of an election in pursuance of an act of the legislature, this is enough, on habeas corpus, to justify the Court in deciding whether the prisoner is rightfully held in confinement, without going into the inquiry whether the magistrate was a police justice de jure. *Matter of Philip Wakker*, 3 Barb. 162.

II. Jurisdiction.

27. The Supreme Court of the United States have no jurisdiction of a writ of habeas corpus, where the writ is under the seal of the Circuit Court, issued and tested by an Associate Judge of the Supreme Court, returnable before him at chambers, and adjourned by him into the Supreme Court in bank. *In re Kaine*, 14 How. U. S. 103.

28. It seems that the Supreme Court of the United States have authority to issue a writ of habeas corpus to discharge a person who stands committed by a Commissioner of the Circuit Court of the United States, as a fugitive from justice in Great Britain, after the Circuit Court has directed that a writ of habeas corpus, issued by itself, should be dismissed, and the prisoner remanded to the custody of the marshal under his original commitment ; Curtis, J., dissenting. *Ib.*

29. In Missouri, a judge of the Circuit Court, during term time or vacation, has the power to issue a writ of habeas corpus, and if he discharge the prisoner, though improperly, the jailer or other officer who has him in custody, can discharge the prisoner, and will not make himself liable for so doing. *Martin* v. *State*, 12 Miss. 471.

30. In Alabama it is competent for a court, under the constitutional provision which gives it "a general superintendence and control of inferior jurisdiction," to award a writ of habeas corpus upon the refusal of a judge of the Circuit Court or Chancellor sitting in vacation or in term time, and to hear and decide upon the application for the prisoner's release, or adopt such course of proceedings as would make its control complete. *Chaney ex parte*, 8 Ala. 424.

31. The allowance of a writ of habeas corpus in term time, is a matter within

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the sound legal discretion of the Court; and when it appeared on an application for the allowance of such a writ, that the party was a *soldier* in the army of the *United States*, enlisted by one of the officers of the *United States* army, the Court refused to grant the writ, as it was a matter arising under or by color of the authority of the *United States*, and a judge of the *Supreme Court* of the *United States*, or the *District Court* of the *United States* had clear and unquestionable jurisdiction in the matter, and could grant the party the requisite relief. *Matter of Ferguson*, 9 Johns. 239.

32. Whether a State court has jurisdiction to grant a habeas corpus in such a case? dubitatur. *Ib.*

33. A habeas corpus under the authority of this State, runs at West Point. To take away the jurisdiction of the State courts on habeas corpus within State territory ceded to the United States, it is necessary that such jurisdiction should be expressly surrendered by the State. *Matter of Carleton*, 7 Cow. 471.

34. An order discharging a prisoner from custody, made by a commissioner or other officer, on habeas corpus, is good until reversed, provided the case be within his jurisdiction; but if he has not jurisdiction, the order may be treated as if void. *Spalding* v. *People*, 7 Hill 301.

35. The act of 1853, c. 238, so far as it confers upon the Court of Common Pleas for the city of Baltimore the power to issue the writ of habeas corpus, cum causa, is unconstitutional, the powers *specially enumerated* in the 10th section of the 4th act of the Constitution being all that are conferred upon that Court, and it is not competent for the legislature to add or to abstract from them. *State* v. *Mace*, 5 Md. 337.

36. The *appellate* power given to the Court of Common Pleas to revise the judgments of justices of the peace, does not authorize that Court to do so on habeas corpus; for where a judgment is liable to be reviewed by an appeal from it, the writ of habeas corpus cannot be applied. *Ib.*

37. The Court of Common Pleas having no power to review the judgment of a justice of the peace on habeas corpus, but having done so, this Court has the right to review, on appeal, its action in such case. *Ib.*

III. Statutes respecting the Writ of Habeas Corpus.

38. The protection of the English habeas corpus act (31 Car. R. c. 2) against unlawful impeachment, extended no farther than the enlargement of the prisoner on bail, if the offence were bailable. *People* v. *McLeod*, 1 Hill 377.

39. The provision in the Revised Statutes (2 R. S. 471, § 50, 2d ed.) permitting a party on habeas corpus *to deny the truth of the return and allege matters showing that he is entitled to be discharged*, &c., was not designed to give him the right of summary trial as to the question of guilt or innocence, but merely to enable him by evidence *aliunde* the return, to dispute the fact of his being detained on the process or proceeding set forth, or to impeach it for lack of jurisdiction, or *semble*, to prove that by some subsequent event, *e. g.*, a pardon, reversal of judgment, &c., it has ceased to be lawful cause of detention. *Ib.*

40. The general provisions of the habeas corpus act show that it was not intended as a writ of review to correct the errors of inferior tribunals. *Matter of Prime*, 1 Barb. 340.

41. Neither the original habeas corpus act (J. R. L. 354, § 2) affixing a penalty for not delivering a copy of a warrant of commitment or detainer, nor the amendatory act (sess. 41, ch. 277) so far as it refers to that penalty, extend to a commitment or detainer under the warrant of a military officer for a military offence. *Cole* v. *Thayer*, 8 Cowen R. 249.

42. *Semb.* In this respect the two statutes are limited to warrants or process of commitment or detainer by the civil magistrate, issuing or purporting to be issued for a criminal or supposed criminal offence. *Ib.*

43. Where a free negro, who had been duly tried and committed under the 21st and 22d sections of the "act

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concerning free negroes and mulattoes," was brought before the Supreme Court on a habeas corpus, that court declined looking into the correctness of the decision made by the Committing Magistrate, the legislature having provided other modes for reviewing, and, if necessary, correcting the same; and neither the letter nor spirit of the habeas corpus act having any reference to commitments, after regular trial by competent judicial officers. *Stoner* v. *the State*, 4 Mo. 614.

44. Where a person is committed for any offence before any court or magistrate under the habeas corpus act, he cannot be discharged for any "informality, insufficiency, or irregularity of the commitment;" therefore, where a person was charged in the commitment with the commission of manslaughter, and it appeared that the offence was only an assault with intent to kill, the magistrate before whom the prisoner was brought properly described the offence in the recognizance as an assault, &c. Rev. Stats, 1835, "Habeas Corpus," art. 3, § 13, p. 303. *Ib.*

IV. The Return to the Writ and Proceedings thereon.

45. Where a habeas corpus was allowed by a Commissioner of this Court, and directed to J. C., commander of the navy of the *United States* on *Lake Ontario*, and to M. L., commanding the troops of the *United States* at *Sackett's Harbor*, and to each and every subordinate officer under the said commandants, or either of them, commanding them to bring the body of *Samuel Stacy*, Junr., &c., immediately, &c., together with the cause, &c., before the *commissioner*, &c. and the following return was endorsed on the writ: *I, Morgan Lewis*, general of division in the army of the *United States*, do return to the within writ that the within named *Samuel Stacy*, Junr. is not in my custody. This was held to be an evasive and insufficient return, and that the officer, to excuse himself for not producing the body of the prisoner, ought to have returned that he was not in his custody, *possession*, or *power;* and it appearing from affidavits that the party was in fact in the custody of the subordinate officer acting under the order of General M. *Lewis*, and that the return was intentionally eluded and disregarded, the Court ordered an *attachment* immediately against General Lewis for a contempt. *Matter of Stacy, Junr.*, 10 John. 327.

46. A rule to appear upon a habeas corpus cannot be taken previous to the return day, though the writ be actually returned when the rule is entered. *Jones* agt. *Spicer*, 6 Cow. Rep. 391.

47. The material facts set forth in the return, which are not denied by the party, brought up, must be taken as true. *In re De Costa*, 1 Parker's Crim. R. 129.

48. Where a sheriff returned to a writ of habeas corpus that he held the prisoner by virtue of an order of the Court of Chancery, which order referred to a former attachment stating the grounds of commitment, and from which the prisoner had been discharged by a Judge of this Court in vacation on another habeas corpus, and the sheriff also returned the attachment and proceedings prior to the last order of commitment, it was held that the sheriff could not return the true cause of caption without also setting forth the original attachment and subsequent orders, and that the whole return might be received and inquired into by the Court. *Yates' case*, 4 John. 314.

49. A discharge of a prisoner, who was committed by an order of the Court of Chancery, by a Judge of this Court in vacation, on habeas corpus, is not conclusive either upon the Court of Chancery or this Court, and the prisoner may after such discharge be again committed for the same charge. *Ib.*

50. On the return by a public officer to a habeas corpus alleging that he detains the prisoner by virtue of process, the existence and validity of the process are the only facts upon which issue can be taken. *Bennac* v. *People*, 4 Barb. 31.

51. The sufficiency of the evidence on which the process issued cannot be inquired into on the return to a habeas corpus. *Ib.*

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52. If the warrant contains matter sufficient on its face to protect the magistrate by whom it was issued, the prisoner is not to be discharged on the habeas corpus. *Ib.*

53. If the warrant is *void*, the prisoner is entitled to his discharge. *Ib.*

54. Upon a writ of habeas corpus, the Court cannot inquire beyond the colorable authority of the judge who issued the warrant on which the defendant was imprisoned. It cannot look into the technicalities nor the strict regularity of the proceedings before that officer. *Matter of Prime*, 1 Barb. 340.

55. The writ of habeas corpus is not designed to review the regularity of the proceedings in any case, but rather liberate the citizen who is imprisoned without color of law. *Ib.*

56. Upon a writ of habeas corpus, the Court will merely inquire into the sheriff's return containing the warrant by virtue of which he detains the relator, and into the affidavits upon which the warrant was issued, so far as to ascertain whether the officer issuing the warrant had colorable jurisdiction. *Ib.*

57. And if the Court ascertains that the officer had jurisdiction of the process, and assumed to take proof upon the issuing of the same, which proof he adjudged to be sufficient, it will not review his adjudication upon that question, nor undertake to say whether he erred in deciding the proof to be sufficient. *Ib.*

58. If the Court discovers that the warrant under which the relator is imprisoned is, prima facie, sufficient to warrant the imprisonment, and if on inquiring beyond the warrant and examining the affidavit upon which the same was issued, it is satisfied that there was at least colorable proof before the officer issuing the warrant, on which he might exercise his judgment in awarding the process, that is as far as the Court will inquire upon a writ of habeas corpus; and where these facts appear, it will not discharge the person imprisoned. *Ib.*

59. It *seems* that nothing is properly a subject of inquiry before the Court, upon the return of a habeas corpus, except the warrant upon which the relator is imprisoned. If that is regular on its face, and if the sheriff would be protected in an action of trespass, it is sufficient, and the relator cannot be discharged. *Ib.*

60. On a traverse to a return upon a writ of habeas corpus, the process whereby the prisoner is held being regular on its face, the burden of showing the defects alleged in the traverse or the facts therein set forth, rests upon the prisoner. *Matter of Hayward*, 1 Sandf. Sup. Ct. R. 701.

61. To enable the judge to remand a prisoner brought before him by habeas corpus, and who is held on an irregular commitment, the testimony must be before the judge on the return of the writ, or at the hearing thereon. It is not in time to present the necessary testimony on a subsequent day, when the judge announces his decision to discharge the prisoner. *Ib.*

62. The inquiry on the traverse of the return to a habeas corpus, is summary, and the prisoner may prove the documents on which the arrest was founded, by the best testimony at hand, or which he can procure with reasonable diligence, without reference to the ordinary rules of evidence. *Ib.*

63. On a habeas corpus, when there is a question of conflict between State and federal process, counsel have no right to appear in defence of the State process, unless in some way authorized by the State, or its proper officers; and after return made, the Court refused to hear as counsel a member of the bar who showed no such authority, nor any authority beyond that of the person who executed the State writ. *Ex parte Jenkins*, 2 Wallace Jun. 521.

64. The Court has the right to issue a habeas corpus to bring before it one of its deputy marshals, arrested and put in jail under State process, whether of a justice of the peace, or of the courts or Supreme Court, whether criminal or civil, for his conduct in executing a writ issued under the fugitive slave law; may inquire into the ground of committment, and, if illegal, direct a complete discharge. And in the case of an arrest on State process of an officer of the United States, for an alleged abuse of his powers, the Court will not

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only hear evidence to disprove the truth of the affidavits upon which the State authorities proceeded, but will, independently of such evidence, consider these affidavits; and if, in the judgment of the Court, these affidavits do not contain a prima facie cause for arrest, will discharge the federal officer without hearing any counter-evidence. In general, moreover, in the case of such an officer, the Court will discharge him, unless there is a positive oath of merits from the plaintiff, or a sworn detail of circumstances from others to supply its place. *Ib.*

65. Where an officer of the United States has been arrested to answer an indictment found by a State court for riot, assault and battery, and assault with attempt to kill, the indictment not stating that the alleged offences were committed while the officer was professing to act under a law of the United States, or under some order, process, or decree of some judge or court thereof, the Court on a habeas corpus, where the petition of the officer denies the offence, and says that what is alleged as offence was done in proper execution of an order, process, or decree of a federal court, will go outside the indictment, and hear proof to show the truth of the facts set forth by the officer. *Ib.*

66. On habeas corpus, how far the court or officer allowing it, are bound by the return, or may go behind it, vide the case of *People* v. *Martin*, 1 Parker's Crim. R. 187.

67. In criminal cases, where an indictment has been found, the Court cannot go behind the indictment, because there are no means of finding out upon what the indictment was founded. *Ib.*

68. But, on a commitment before an indictment is found, the whole question of guilt or innocence is open for examination on the return to the writ of habeas corpus, and the inquiry is not necessarily limited to an examination of the original depositions. *Ib.*

69. In such cases, under the Revised Statutes of New York, the proceedings on a habeas corpus are in the nature of an appeal from the decision of the committing magistrate. *Ib.*

70. Where there are two causes of imprisonment, one good and the other bad, the Court may, on habeas corpus, discharge the prisoner as to the invalid cause; remanding him as to the other. *Ex parte Badgley*, 14 Wend. 472.

71. On a habeas corpus, the Court cannot go behind the sentence of the Court where it had jurisdiction over the case. *Johnson* v. *U. States*, 3 McLean 89.

72. In Virginia, where a Court having jurisdiction of the case has tried a negro as a free man and sentenced him to imprisonment in the penitentiary, the General Court cannot, on the application of persons who claim the negro as a slave, discharge him from imprisonment, by a proceeding by habeas corpus. *Ex parte Ball*, 2 Gratt. 588.

73. Where on a return to a writ of habeas corpus, it appears that the prisoner was kept in custody by virtue of a warrant issued by a police justice upon a complaint on oath, the officer before whom the habeas corpus is pending, has the power to go behind the warrant and inquire into the legality of the imprisonment. *The People* v. *Tompkins*, 1 Parker's Crim. R. 224.

74. Where a habeas corpus issues on a complaint of illegal imprisonment, the judge who issues the writ may, if the authority by which the prisoner is held is defective, call before him witnesses, inquire into the guilt of the prisoner, and remand, recognize or discharge him, as he may think just. *State* v. *Best*, 7 Blackf. 611.

75. The District Attorney is the proper person to procure a certiorari to be used for the purpose of removing into the Supreme Court proceedings commenced by habeas corpus; and to act as Attorney for the people, upon such certiorari. *People* v. *Hicks*, 15 Barb. 153.

V. Miscellaneous.

76. Where a commissioner of the Supreme Court has become possessed of jurisdiction of the subject-matter, and of the parties, the law invests him with judicial powers; and in analogy to other proceedings his decisions cannot be impeached in a collateral way. *Wiles* v. *Brown*, 3 Barb. 37.

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77. Therefore where a person committed to the custody of the sheriff upon a *ca. sa.* was brought before a commissioner of the Supreme Court upon habeas corpus, and was discharged by him from imprisonment; held that such discharge was a protection to the sheriff in an action brought against him for the escape of the prisoner, although the discharge was erroneously granted. *Ib.*

78. Where the chancellor committed one of the officers of the Court of Chancery for malpractice and contempt, and a judge of the Supreme Court in vacation on a habeas corpus discharged the prisoner, and the chancellor subsequently recommitted him for the same cause, it was held that the chancellor was not liable to be sued by an officer for the *penalty* given by the *fifth* section of the habeas corpus act. (Sess. 24. c. 65, 2 R. S. 571, §§ 59, 60.) *Yates*, agt. *Lansing, Jr.*, 9 John. 395.

79. Notice of application for a habeas corpus to relieve a party from imprisonment must be given to the party who is interested in continuing the imprisonment, although the latter do not reside in the county where the former is imprisoned, or where the proceeding is had for a habeas corpus; it must be given without reference to residence. *People* v. *Pelham*, 14 Wend. 48.

80. In South Carolina, although the act requires the concurrence of two justices to grant the writ of habeas corpus, a single justice is liable if he refuses to sign it; evidence of the motives of the justice for refusing the writ is admissible. *Ashe* v. *O'Driscoll*, 2 Const. Rep. S. C. 698.

81. *Quere.* In an action on the habeas corpus act for refusing to grant the writ of habeas corpus, the original warrant of commitment need not be produced. *Ib.*

HOMICIDE.

I. Murder. Under what circumstances it takes place.
II. Manslaughter. Circumstances under which it occurs.
III. Justifiable and excusable Homicide.
IV. Of the indictment for Murder and Manslaughter; its requisites, &c.
V. Evidence in cases of Murder, &c. Competency and admissibility &c.
VI. Evidence requisite to sustain an indictment for Murder, &c.
VII. Evidence of Character.
VIII. Circumstantial Evidence.
IX. Insanity. Evidence of.
X. Charging the jury in cases of Murder and Manslaughter.
XI. Malice.
XII. Presumption in cases of Murder, &c.
XIII. The verdict in cases of Murder, &c.
XIV. Judgment and Sentence. Record. Place of trial. Miscellaneous.

I. Murder—Under what Circumstances it takes place.

1. Recent provocation, and the fact that the passions have not had time to cool, do not under the statute of New York, mitigate a killing with a design to effect death from murder to manslaughter; such killing is murder, whether the design to effect death was formed on the instant, or had previously been entertained. *People* v. *Austin*, 1 Parker's Crim. R. 154.

2. The intention to take life constitutes, under the statute of New York, the main distinction between murder and manslaughter. *Ib.*

3. Implied malice, constituting killing without an intention to kill, murder is not recognized in the law of the State of New York. *People* v. *Austin*, 1 Parker's Crim. R. 154.

4. In case a man is intentionally killed, without provocation or in sudden combat, though in the heat of passion, it does not constitute the crime of murder. *The People* v. *Sullivan*, 3 Seld. (N. Y.) 396.

5. To constitute murder there must be an intent to kill, in all cases, except where the accused is at the moment engaged in perpetrating a felony. *People* v. *Austin*, 1 Parker's Crim. R. 154.

6. A bare trespass against the property of another, not his dwelling-house, is a provocation not such as to warrant the owner in using a deadly weapon in its defence; and if he do, and with it kill the trespasser, he will be guilty of murder. *Com.* v. *Drew*, 4 Mass. 391.

7. If the beating, however, be wit

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an instrument, and in a manner not likely to kill, it will amount to no more than manslaughter. *Ib.*

8. So if any one, under color or claim of legal authority, unlawfully arrest or actually attempt or offer to arrest another, and this latter in his resistance kill the aggressor, it amounts to no more than manslaughter. *Ib.*

9. So if one not a stranger aids the injured party by trying to rescue him or to prevent an unlawful arrest where actually attempted. *Ib.*

10. Every deliberate and intentional killing is murder in the first degree, by the law of Missouri, although the design to kill was formed but a moment before it was executed. *The State* v. *Dunn*, 18 Mo. (3 Bennett) 419. *The State* v. *Jennings*, 18 Mo. (3 Bennett) 435.

11. It is sufficient to make out a case of murder, if it appear that malice existed at the time of the killing, without regard to the time which it had before existed. *Green* v. *the State*, 13 Mo. 382.

12. Deliberate premeditation and malice, are matters which may be inferred from the circumstances connected with the killing. *Ib.*

13. To constitute murder in the first degree, a premeditated design to kill need not have existed for any particular length of time; and when, therefore, the prisoner, as he approached the deceased, and first came in view of him, at a short distance, there formed a design to kill him, and walked up with a quick pace and killed him, without any provocation there or recently received, it will be murder in the first degree. *Whiteford* v. *Com.*, 6 Rand. 721.

14. Where a seaman is in a state of great debility and exhaustion, so that he cannot go aloft without danger of death or enormous bodily injury, and the facts are known to the master, who nevertheless compels the seaman, by moral or physical force, to go aloft, persisting with brutal malignity in such case, and the seaman falls from the mast and is drowned thereby, and his death was occasioned by such misconduct in the master, under such circumstances, the master will be guilty of murder. *United States* v. *Freeman*, 4 Mason 505.

15. Where several individuals conspire to seize with force a vessel and run away with her, and death ensue to another party opposing the design, it is murder in those who are present aiding and abetting. *United States* v. *Ross*, 1 Gallis 624.

16. Where one advises another to commit suicide, and the other through the influence of the advice, kills himself, held that the adviser is guilty of murder as principal. *Commonwealth* v. *Bowen*, 13 Mass. 359. The presumption of law in such case is, that the advice had the effect intended by the adviser, unless the contrary is proven. *Ib.*

17. In Tennessee, the employment of a deadly weapon, such as an axe, whereby death is produced, although it implies malice at Common Law, does not under the law of the State imply that the act was done with such premeditation as constitutes it murder in the first degree. *State* v. *Peter*, Geo. Decis. (Part 1) 146.

18. The nature of the intention with which the criminal act is committed, constitutes the great distinguishing feature between murder as it exists at the Common Law, and murder as it is understood and defined in Pennsylvania by the act of the assembly of 1794. *Com.* v. *Keeper*, 2 Ashmead 227.

19. Where provoking language is used, it does not justify a blow; and where an instrument calculated to produce death is used, the slayer is guilty of murder. *The State* v. *Merrill*, 2 Dev. 269.

20. Where the illegal act producing death is malicious, and perpetrated with an intent to take life, the offence is murder in the first degree; but where no such intent appears, the crime is reduced to murder of the second degree. *The Commonwealth* v. *Keeper of the Prison*, 2 Ashmead 227.

21. Where one shoots at another with a gun or pistol, such an act must be held dangerous; and where death ensues, and the circumstances of the case show express malice, the offender will be considered as guilty of murder. *The State* v. *Sisson*, 3 Brevard 58.

22. As to what constitutes murder by the Common Law, and what changes

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have been made in it by statute in Pennsylvania, see the *Commonwealth* v. *Gross*, 1 Ashmead 281.

23. Where ordinary provocation is given by a woman or child, to a man of average strength, even though it amounts to giving a blow, does not, it seems, reduced a homicide from murder to manslaughter. *Commonwealth* v. *Mosler*, 4 Barr 264.

24. How murder and manslaughter are distinguished and defined. *McWhite's case*, 3 Gratt. 594.

25. Where a father was informed on the evening of one day, that his son, a small boy, had been wantonly whipped by a man, and met the man on the evening of the next day, and there with his fist and feet beat and stamped him while he was unresisting, with so much violence that the man died from the effect of the beating on the next night; held that this was murder, since there was evidence of deliberation. *Ib.*

26. As to what constitutes the crime of murder, vide *Commonwealth* v. *Crane*, 1 Virg. Cas. 10; *Respublica* v. *Bob*, 4 Dall. 145.

27. To constitute murder in the first degree, the act of killing should not only be wilful, premeditated, malicious, legally unjustifiable and inexcusable, but the act of violence must be specifically directed against life. *The Commonwealth* v. *Murray*, 2 Ashmead 41; *The Commonwealth* v. *Williams*, 2 Ashmead 69.

28. The distinction between murder in the first degree, and murder in the second degree, within the meaning of the Virginia statute (1 R. C., c. 1713, § 2) explained. *Jones' case*, 1 Leigh 598.

29. Where an intent to kill accompanies an act which produces death, it is murder. *State* v. *Anderson*, 2 Overt. 6.

30. In Maryland, murder is a felony within the meaning of the act of 1793, c. 57, § 13. *State* v. *Ben*, 1 Har. & J. 99.

31. The right to obedience and submission in all lawful things, on the part of the slave, is perfect in the master; and the power to inflict any punishment, not affecting life or limb, which he may consider necessary for the purpose of keeping him in such submission, and enforcing such obedience to his commands, is secured to him by law; and if in the exercise of it, with or without cause, the slave resist and slay him, it is murder, and *not* manslaughter; because the law cannot recognize the violence of the master as a legitimate cause of provocation. *Jacobs* v. *State*, 3 Humph. 493.

32. The same matters which would be deemed, in law, a sufficient provocation to a free white man, who has committed a homicide in a moment of passion, to clear him from the guilt of murder, will not have the same effect where the party slain is a white man, and the offender is a slave. *Ib.*

33. It is a capital offence for a slave to assault a white person with intent to kill, although if the intention had been consummated, the killing would have been manslaughter only. *Nancy* v. *State*, 6 Ala. 483.

34. The rule, that where parties become suddenly heated, and engage in mortal conflict, fighting upon equal terms, and one kills the other, the homicide is mitigated to manslaughter, *applies* only to equals, and not to the case of a white man and a slave, if the slave kills the white man under such circumstances. *Ib.*

35. And an ordinary assault and battery committed by a white man upon a slave, will not be a sufficient provocation to mitigate a homicide of the former by the latter, from murder to manslaughter. *Ib.*

36. "The Common Law on the subject of murder, has application to a case of killing as arising from the chastisement of a slave, by his master, or overseer, or both." *Kelly* v. *State*, 3 Smed. & Marsh, 518.

37. In Mississippi, murder may be committed by killing a slave, as well as by killing a freeman. *State* v. *Jones*, Walker's Rep. 83.

38. The prisoner in a case of murder, should be furnished with a list of the witnesses examined as to his case before the grand jury. *Commonwealth* v. *Locke*, 14 Pick. 485.

39. The designed killing of another without provocation, and not in sudden combat, is certainly none the less murder, because the perpetrator of the

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crime is in a state of passion. *People* v. *Sullivan*, 3 Seld. 396.

40. Where after mutual combat a question arises whether there has been time for *excited* passions to subside, the question always takes this form: Whether there had been sufficient time to cool, and not whether, in point of fact, the defendant did remain in a state of anger. *Ib.*

41. If a wound is inflicted not dangerous in itself, and the death which ensues was evidently occasioned by the grossly erroneous treatment of it, the original author will not be accountable. *Parsons* v. *State*, 21 Ala. 300.

42. But if the wound was mortal, or dangerous, the person who inflicted it cannot shelter himself under the plea of erroneous treatment. *Ib.*

43. It is no defence to an indictment for murder, that the accused was intoxicated at the time of the commission of the offence. The law holds a party responsible for a criminal act, though, at the time, he was intoxicated to such an extent as to be unconscious of what he was doing. *The People* v. *Robinson*, 1 Parker's Crim. Rep. 649.

44. The Revised Statutes (2 R. S. 656, 657, §§ 4 and 5) declare "the killing of a human being, without the authority of law (unless it be manslaughter, or excusable or justifiable homicide, as thereinafter defined), to be murder, when perpetrated from a premeditated design to effect the death of the person killed, or of any human being." *People* v. *Clark*, 3 Seld. 385.

45. To constitute murder, there should be an express design to take life, or such circumstances as to induce a very strong presumption of such a design, or such facts occurring in a transaction as would ordinarily lead to the result of taking life. *Ib.*

46. In cases of deliberate homicide, where there is a specific intention to take life, the offence, if consummated, is murder in the first degree. *Ib.*

47. If there be sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow, or whether it be contemplated for months. *Ib.*

48. If an action, unlawful in itself, be done deliberately and with intention of mischief, or great bodily harm to particulars, or of mischief indiscriminately, fall where it may, and death ensue, against or beside the original intention of the party, it will be murder. *Ann* v. *State*, 11 Humph. 150.

49. But if such mischievous intention do not appear (which is matter of fact to be collected from the circumstance), and the act was done heedlessly or incautiously, it will be manslaughter only. *Ib.*

50. But if the death ensue in the performance of a lawful act, it may amount either to murder, manslaughter, or misadventure, according to the circumstances by which it is accompanied. *Ib.*

51. The law often implies malice from the manner in which the killing was done, or the weapon with which the blow was stricken. In such case it is murder, though the perpetrator was drunk; and no degree of drunkenness will excuse in such case, unless by means of drunkenness an habitual or fixed madness be caused. *Hale* v. *State*, 11 Humph. 154.

52. The law, in such cases, does not seek to ascertain the actual state of the perpetrator's mind, for the fact from which malice is implied having been proved, the law presumes its existence; and proof, in opposition to this presumption, is irrelevant and inadmissible. Hence, a party cannot show that he was so drunk as not to be capable of entertaining a malicious feeling, the conclusion of law is against him. *Ib.*

53. But when the question is whether a party is guilty of murder in the first degree, it becomes indispensable that the jury should form an opinion as to the actual state of mind with which this act was done. All murder in the first degree (except that committed by poison, and by lying in wait), must be perpetrated wilfully, deliberately, maliciously and premeditatedly. The jury must ascertain, as a matter of fact, that the accused was in this state of mind when the act was done. *Ib.*

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54. The drunkenness of a party might be looked to by the jury, with the other facts in the case, to enable them to decide whether the killing were done deliberately and premeditatedly. *Ib.*

55. Although drunkenness, in point of law, constitutes no excuse or justification for the crime of murder, still, when the nature and essence of the crime is made to depend by law upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness, as a matter of fact, affecting such state and condition of the mind, is a proper subject for consideration and inquiry by the jury. *Ib.*

56. The question in such case is, what is the mental status? Is it one of self-possession, favorable to fixed purpose, by deliberation and premeditation, or did the act spring from existing passion, excited by inadequate provocation, acting, it may be, on a peculiar temperament, or upon one already excited by ardent spirits? *Ib.*

57. In such case, it matters not that the provocation was inadequate, or the spirits voluntarily drank: the question is, did the act proceed from sudden passion, or from deliberation and premeditation? What was the mental status at the time of the act, and with reference to the act? To regard the fact of intoxication as meriting consideration in such a case, is not to hold that drunkenness will excuse crime, but to inquire whether the very crime which the law defines and punishes has been, in point of fact, committed. *Ib.*

58. When the question is, can drunkenness be taken into consideration in determining whether a party be guilty of murder in the second degree, the answer must be, that it cannot; but when the question is, what was the actual mental state of the perpetrator at the time the act was done, was it one of deliberation and premeditation, then it is competent to show any degree of intoxication that may exist, in order that the jury may judge in view of such intoxication in connection with all the other facts and circumstances whether the act was premeditatedly and deliberately done. *Ib.*

59. Murder is killing a reasonable being with malice aforethought. *State* v. *Zellers*, 2 Halst. 220.

60. The law presumes all homicide to be committed with malice aforethought. *Ib.*

61. The principal object of the provisions of the Revised Statutes of New York was to restore the Common Law of murder as it anciently existed, by discriminating between a felonious killing with malice aforethought, and a felonious killing without such malice, and thus restrict certain cases to the grade of manslaughter, which heretofore were held to be murder. *People* v. *Enoch*, 13 Wend. 159.

62. It seems, however, that under these provisions many cases will be hereafter considered murder, which previous to the revision fell under the head of manslaughter. *Ib.*

63. In a prosecution for murder, if the death of the deceased was accelerated by the violence of the prisoner, his guilt is not extenuated because death might and probably would have been the result of a disease with which the deceased was afflicted at the time of the violence. *State* v. *Morea*, 2 Ala. 275.

64. It is sufficient if the circumstances of wilfulness and deliberation are proved, though they arose and were generated at the period of the transaction. *Com.* v. *York*, Met. 93.

65. The 11th section of the Criminal Law declares that murder committed on the high seas shall be tried in the district where the offender is apprehended, or into which he shall be first brought, and of course in all such cases the Circuit Court has jurisdiction, being a case arising under the authority of the United States. The Legislature making use of a technical term without defining it, it must be inquired what, according to the Common Law, constitutes murder. It is the unlawful killing of another with malice. If murder, then, on the high seas is cognizable in the Circuit Court, it must be the case where there has been an unlawful killing on the high seas. *U. States* v. *Magill*, 1 Wash. C. C. 463.

66. A stroke at sea, if followed by death at land, may be declared felony,

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and the punishment may be such as Congress may direct. *Ib.*

67. There may be cases of homicide properly ruled murder, by implied malice, when there was no intention to take the life of the deceased party, as where one wantonly throws timber from a house into a street in a populous town regardless of consequences. *Com.* v. *York*, 9 Metc. 93. Or where one feloniously shoots at tame fowls, with intent to steal them, and the ball accidentally hits a man and kills him. *Ib.*

68. Or where one wantonly suffers a wild beast to go at large. *Ib.*

69. Or where one rides an unruly horse into a crowd, or where a mother exposes her infant child in a garden, and it is killed by a kite. *Ib.*

70. Or where the overseers of different parishes shift a pauper infant child from one parish to the other, in a contest which shall support it, until it dies of cold and hunger. *Ib.*

71. Or where a son wantonly exposes his sick father to the cold, so that he dies; or where a woman places her child in a hog-sty to secrete it, and it is destroyed. *Ib.*

72. The distinguishing characteristic of murder is homicide, with malice aforethought, express or implied, by law. *Ib.*

73. Where it was proved beyond reasonable doubt, that the defendant had wilfully and voluntarily inflicted a mortal wound upon the deceased, malice was to be inferred from this act, unless such facts were proved by such a preponderance of the evidence as would extenuate the homicide, and reduce it to manslaughter. *Ib.*

74. A sane man, a voluntary agent, acting upon motives, must be presumed to contemplate and intend the necessary natural and probable consequences of his own acts; if therefore one voluntarily or wilfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is, that he intended so to destroy such person's life. *Ib.*

75. So if the direct tendency of the wilful act is to do another some great bodily harm, and death in fact follows, as a natural and probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it. *Ib.*

76. So where a dangerous and deadly weapon is used with violence upon a person of another, as this has a direct tendency to destroy life, or do some great bodily harm to the person assailed, the intention to take life or do him some great bodily harm, is a necessary conclusion from the act. *Ib.*

77. But, however suddenly any act is done, the intent to do it precedes the doing of it, and the act is done in pursuance of the intent and formed design; however short the interval, the intent necessarily precedes. This is manifest from the ordinary case of a mortal blow given with a deadly weapon immediately upon words of provocation. *Ib.*

78. Words, however aggravating, not being considered sufficient provocation to extenuate the offence to manslaughter, it is uniformly held to be murder an act done with malice prepense, and it is not the less preconceived because the act immediately followed the guilty intent. *Ib.*

79. The wilful and voluntary act of destroying the life of another, is an act wrong and unlawful in itself, injurious in the highest degree to the rights of another, being the greatest wrong which can be done to him contrary to the laws of nature, as well as society, and in violation of the plainest dictates of conscience. *Ib.*

80. The natural and necessary conclusion and inference from such an act, wilfully done, without apparent excuse, is, that it was done malo animo in pursuance of a wrongful, injurious purpose, previously, though perhaps suddenly formed, and is therefore a homicide, with malice aforethought, which is the true definition of murder. *Ib.*

81. If deliberation implied time and reflection, a deliberate act could never be sudden; so it has been held in Pennsylvania, under a statute which requires premeditation to constitute murder in the first degree; that the intention to kill, though immediately executed, is still the true criterion of the crime, and that the intention of the party can be

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collected only from his words and actions. *Ib.*

82. To constitute the crime of murder, it is not necessary that the slayer should have a particular enmity or malevolence against the deceased; it is sufficient if there be either a deliberate malice in the act, or circumstances of cruelty and malignity, carrying in them the plain indications of a depraved, wicked, and malignant spirit. Nor is it necessary to constitute murder, that the party should himself inflict the mortal wound; it is sufficient if he is present aiding and abetting the act; in common sense and reason, as well as law, the ruffian who stands by and directs or encourages the bloody deed, is equally guilty with him who applies the poniard. *United States* v. *Ross*, 1 Gallison's R. 624.

83. If a number of persons conspire together to do any unlawful act, and death happens from anything done in the prosecution of the design, it is murder in all who take part in the same transaction. *Ib.*

84. If the design be to commit a trespass, the death must ensue in prosecution of the original design, to make it murder in all. *Ib.*

85. If to commit a felony, it is murder in all, although the death takes place collaterally or beside the principal design. *Ib.*

86. More especially will the death be murder if it happens in the execution of an unlawful design, which, if not a felony, is of so desperate a character, that it must ordinarily be attended with great hazard to life, and à fortiori, if death be one of the events within the obvious expectation of the conspirators. *Ib.*

87. Where it appeared that the prisoner and the deceased, after having been engaged in mutual combat, on sudden combat, fairly begun, were separated at the request of the prisoner, who was overcome and beaten in the contest; that the prisoner was held by one of the persons present; drew his knife and swore he would kill the deceased; that after releasing himself from the person holding him, he pursued the deceased, who had left the place of combat, and who, upon being apprized of the pursuit by a call from the person holding the prisoner, left the road on which he was walking, and provided himself with a rail from a neighboring fence; that on his return towards the road he met the prisoner; gave back and struck him several blows upon the head as he rushed on, with the rail, which breaking, some ten paces from the point where the deceased began to give back, the prisoner closed and inflicted the mortal blow; and that sufficient time had transpired, not only for the deceased to adjust himself after the fight, and walk deliberately two hundred and twenty-five yards, but for the prisoner afterwards to pass over the same ground, as also for a person at a neighboring house, within hearing of the noise of the second quarrel, to reach the place of strife. The Court, under this state of fact, were of opinion that both contests could not have constituted one combat; nor could the second, in which the prisoner rushed with his drawn knife upon his adversary, who had snatched the readiest means of defence at hand, but was neither equally armed nor willing to meet such a weapon, have been that fair struggle which the law denominates a mutual combat. The jury having found a verdict of guilty, the Court refused to disturb it. *State* v. *McCants*, 1 Spears 384.

88. If a man assault another with malice prepense, even though he should be driven to the wall, and kill his adversary there to save his own life, he is guilty of murder. *State* v. *Hill*, 4 Dev. & Batt. 491.

89. If death unhappily ensue from a master's chastisement of his slave, inflicted apparently with a good intent for reformation or example, and with no purpose to take life or to put it in jeopardy, the law would doubtless tenderly regard every circumstance which, judging from the conduct generally of masters towards slaves, might reasonably be supposed to have hurried the party into excess. But where the punishment is barbarously immoderate and unreasonable in the measure, the continuance, and the instruments, accompanied by other hard usage, and painful privations of food, clothing and

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rest, it loses all character of correction in foro domestico, and denotes plainly that the master must have contemplated a fatal termination to his barbarous cruelties; and in such case, if death ensue, he is guilty of murder. *State* v. *Hoover*, 4 Dev. & Batt. 365.

90. It is ordinarily true, that an actual intent to kill is involved in the idea of murder, but is not always so. If great bodily harm is intended, and that can be gathered from the nature of the means used and other circumstances, and death ensue, the party will be guilty of murder, although he may not have intended death. *Ib.*

91. Where one goes to the house of another in a peaceable manner, without offering or threatening violence to his person or dwelling, and upon being ordered off and not going immediately, is killed by the owner of the premises, the slayer is guilty of murder, although it be proved that he had previously forbidden the deceased from coming on his premises. *State* v. *Smith*, 3 Dev. & Batt. 117.

92. Where two were fighting, and while engaged the defendant rushed into the room, and without any provocation, inflicted on one of them a dangerous stab; held that he is no more excusable for this act committed on one who was fighting with a man not at all connected with him, than he would have been had he inflicted a like blow on one not engaged in the fight. *Conner* v. *State*, 4 Yerg. 137.

93. The characteristic quality of murder in the first degree, and that which distinguishes it from murder in the second degree, or any other homicide, is the existence of a settled purpose and fixed design on the part of the assailant, that the act of assault should result in the death of the party assailed—that the death being the end aimed at, the object sought for and wished. *Swan* v. *State*, 4 Humph. 136.

94. If a person that is drunk, kills another, this shall be felony, and he shall be hanged for it; and yet he did it through ignorance; for when he was drunk he had no understanding or memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby. *Pirtle* v. *State*, 9 Humph. 663.

95. Although he who is drunk, is for the time non compos mentis, yet his drunkenness doth not mitigate his act or offence, nor turn to his avail. *Ib.*

96. He who is guilty of any crime whatever through his voluntary drunkenness, shall be punished for it as much as if he had been sober. *Ib.*

97. As to artificial voluntarily contracted madness by drunkenness or intoxication, which deprives men of their reason and puts them into a temporary frenzy, our law looks upon this as an aggravation of the offence rather than an excuse for any criminal behavior. The law considering how easy it is to counterfeit this excuse, and how weak an excuse it is though real, will not suffer any man thus to privilege one crime by another. *Ib.*

98. With respect to a person non compos mentis from drunkenness, a species of madness which has been termed dementia affectata, it is a settled rule, that if the drunkenness be voluntary, it cannot excuse a man from the commission of any crime, but, on the contrary, must be considered as an aggravation of whatever he does amiss. *Ib.*

99. Voluntary drunkenness cannot excuse from the commission of crime; yet, when upon a charge of murder, the material question is, whether an act was premeditated, or done only with sudden heat and impulse, the fact of the party being intoxicated is a circumstance proper to be taken into consideration. *Ib.*

100. To constitute murder at Common Law, the killing must have been done with malice aforethought; the existence of this malice necessarily implies the absence of all circumstances of justification, excuse, or mitigation, arising from adequate provocation, and this malice is either express or implied; express, when it has been perpetrated by poison, lying in wait, or other deliberate and premeditated manner; implied, from the nature of the weapon, the violence of the assault, and the inadequacy of the provocation. *Ib.*

101. If the mental status required by the law to constitute crime, be one

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of deliberation and premeditation, and drunkenness or other cause excludes the existence of such mental state, then the crime is not excused by drunkenness or such other cause, but has not in fact been committed. *Pirtle* v. *State*, 9 Humph. 663; *Swan* v. *State*, 4 Humph. 136.

102. Where a lying in wait is established, all proof as to "intention" or "wilfulness" is irrelevant, if the stroke be given under circumstances that would make it murder at Common Law. *Riley* v. *State*, 9 Humph. 657.

103. If a party strike with a deadly weapon, without provocation, intending to inflict a stroke, as a matter of law which he cannot dispute, he shall be held to intend the consequences, and if death ensue it is murder. *Ib.*

104. And in such case, if a lying in wait exist, it is murder in the first degree. *Ib.*

105. In cases of murder by ordinary means, the circumstances of the transaction must show that it was done wilfully, deliberately, maliciously, and premeditatedly, or it is not murder in the first degree; but if murder be perpetrated by poison, or lying in wait, it shall be murder in the first degree. The fact of lying in wait shall, of itself, be evidence of a wilful, deliberate, malicious, and premeditated purpose. *Ib.*

106. If it be proved that the killing was of such a character that, under ordinary circumstances, it would have been murder at Common Law, and the fact of lying in wait exist, that fact will make it a case of murder in the first degree, under the statute. *Ib.*

107. If a drunken man commit wilful, deliberate, malicious, and premeditated murder, he is, in legal estimation, guilty as if he were sober. *Pirtle* v. *State*, 9 Humph. 663.

108. If he do it by means of poison, knowingly administered, or by lying in wait, these facts are as conclusive evidence against him as if he had been sober. *Ib.*

109. If from the proof, in the absence of lying in wait, or administering poison, it shall appear that the killing was wilful, deliberate, malicious, and premeditated, he is guilty as though he was sober. *Ib.*

110. But in ascertaining the fact of such intention, all the concomitant circumstances shall be heard, in order to enable the jury to judge whether such deliberate, wilful, malicious, and premeditated design existed, or whether the killing was not the result of sudden heat and passion, produced by a sudden and unexpected controversy between the parties, but of such a character as not to mitigate the slaying to manslaughter. *Ib.*

111. Where a person who was not insulted or threatened, gets down from the horse, arms himself with a club, interposes himself between two other persons who are about to engage in a fight, and kills one of them; held that it was murder. *Johnston's case*, 5 Gratt. 660.

112. Upon a quarrel, one of the parties retreated about fifty yards, apparently with a desire of avoiding a conflict, the other party pursued, with his arm uplifted, and when he reached his opponent, stabbed and killed him, the latter having stopped, and first struck with his fist; held that this was a clear case of murder. *State* v. *Howell*, 9 Iredell 485.

113. It is an ordinance, but is a rule of the Common Law now in full force in Maine, that where death occurs by the act of one, in pursuit of an unlawful design, without any intention to kill, it will be either murder or manslaughter, according as the intended offence is a felony, or only a misdemeanor. *State* v. *Smith*, 32 Me. 369.

114. But the rule touches those cases of homicide only in which there was no intent to kill. It was adopted without any view to perpetuate the ancient classification of offences, but with reference to such graduation of crimes as might from time to time obtain in Maine. *Ib.*

115. By the Revised Statutes, c. 167, § 2, any offence which *may be* punished by imprisonment in the State prison, is made a felony. If the offence be one *liable* to *such* a punishment, it is a felony, and its character in that respect does not at all depend upon the sentence which a court may pronounce. *Ib.*

116. If A., from previous angry feelings on meeting with B., strikes him with a whip, with the view of in-

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ducing B. to draw a pistol, or believing he will do so, in resentment of the insult, and determines, if he does so, to shoot B. as soon as he draws, and B. does draw, and A. immediately shoots and kills B., this is murder. *State* v. *Martin*, 2 Iredell 101.

117. If one seek another, and enter into a fight with him, with the purpose, under the pretence of fighting, to stab him; if a homicide ensues, it will be clearly murder in the assailant, no matter what provocation was apparently then given, or how the assailant's passion rose during the combat, for the malice is express. *State* v. *Lane*, 4 Iredell 113.

118. Although there be a legal provocation, yet a homicide will be murder, if committed under such circumstances of cruelty as manifest the thoroughly wicked heart; and cruelty, when the *facts* from which it is to be inferred all distinctly appear, is an inference of law, and therefore properly drawn by the Court. But where no more is stated than that several blows were struck with a stick of curled hickory of the ordinary size, and with the larger end thereof, without stating more of the nature of those blows than that one of them was mortal, the facts are not so set forth as to leave the question of cruelty as one for legal inference. *State* v. *Jarrott*, 1 Iredell 76

119. If the weapon with which a homicide was committed were not of the character called deadly, that is, likely to produce death, or great bodily injury, the homicide would not be murder, although committed without legal provocation. And there are many cases in which the Court can distinctly see, from the nature of the instrument used, whether it be of a deadly character or not, and therefore need not that the jury should directly find the fact for their information. But where it only appears that the weapon used was a stick of curled hickory of the ordinary size, and that the slayer struck with the larger end thereof, it falls peculiarly in the province of the jury to ascertain whether such a weapon, so used by the slayer, was likely to produce fatal consequences or not. *Ib.*

120. In a case of homicide, where it appeared that the deceased had threatened the prisoner about three weeks before, that he would kill him; that they met in the street on a star-light night, when they could see each other; that the deceased pressed for a fight, but the prisoner retreated a short distance; that when the deceased overtook him the prisoner stabbed him with some sharp instrument, which caused his death; and at the time of this meeting, the deceased had no deadly weapon. Held that this was murder. *State* v. *Scott*, 4 Iredell 409.

121. In such a case, to mitigate the offence from murder, it must appear from the previous threats, and the circumstances attending the rencontre, that the killing was in self-defence. *Ib.*

122. Where the deceased intended only a fight, without weapons, and that known to the prisoner, and the prisoner drew his knife without notice to the deceased; even if they actually engaged in the fight, the stabbing of the deceased by the prisoner, would be murder. *Ib.*

123. The belief that a person designs to kill me, will not prevent my killing him from being murder, unless he is making some attempt to exercise his design, or at least is in an apparent situation to do so, and thereby induces me reasonably to think that he intends to do it immediately. *Ib.*

124. Distinction between murder and manslaughter, considered: If one in sudden heat of passion, take the life of another, it is manslaughter, and not murder; but there must be a reasonable provocation; and what will constitute it is the principal difficulty in applying the distinction. The line which distinguishes between those provocations which will, and will not, extenuate the offence, cannot be certainly defined. Such provocations as are in themselves calculated to provoke a high degree of resentment, and ordinarily induce a great degree of violence when compared with those which are slight and trivial, and from which a great degree of violence does not actually follow, may serve to mark the distinction. *State* v. *Cheatwood*, 2 Hill S. C. 459.

125. But no provocation, however

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grievous, will excuse for the crime of murder, where, from the weapon or the manner of the assault, an intention to kill, or to do some great bodily harm, was manifest. *Ib.*

126. If one interfere in an affray to separate the combatants, and give notice of his intent, and is slain by one of the combatants, it is murder. *Ib.*

127. The prisoner and one W., engaged in a fight, and were separated by the deceased. Some time after, the fight was renewed, and the deceased again interfered, but being unable to take the prisoner off, called a negro to his assistance, who in the act of separating the combatants, threw the prisoner against the wall; the prisoner then made at the deceased (who endeavored to avoid him) with a knife, and inflicted the mortal blow. Held that this was a case of murder. *Ib.*

128. That part of the definition of murder, expressed in the terms "the King's peace," refers not to the place of the assault and death, but to the state and condition of the person slain, as being, or not being, entitled to the protection of the English laws; for example, whether he be a subject or an alien; enemy or traitor in arms; or in more ancient times, an infidel, or guilty of præmunire. *State* v. *Dunkley*, 3 Ired. 116.

129. In order to constitute murder in the first degree, a design must be formed to kill wilfully; that is, of purpose, with the intent that the act by which the life of a party is taken should have that effect; deliberately, that is, with cool purpose; maliciously, that is, with malice aforethought, and with premeditation; that is, the design must be formed before the act by which the death is produced, is performed. *Clark* v. *State*, 8 Humph 671; *Dale* v. *State*, 10 Yerg. 551.

130. If a design to kill be formed upon the sudden impulse of passion, disconnected with any previous design to kill, though it be executed wilfully and maliciously, it will constitute murder in the second degree only. *Clark* v. *State*, 8 Humph. 671.

131. When fresh provocation intervenes between the preconceived malice and the death, it ought clearly to appear that the killing was upon the antecedent malice, to make it murder; for if there be an old quarrel between A. and B., and they are reconciled again, then upon a new and sudden falling out, A. kills B., this is not murder. *Ib.*

132. The crime of an accessory before the fact to a murder, is held to be murder, and is not barred by the statute of limitations. *People* v. *Mather*, 4 Wend. 229.

133. In its definition of murder, the statute of Mississippi, instead of "malice aforethought," uses the words premeditated design; which, in legal effect, is regarded as the same. *McDaniel* v. *State*, 8 Smed. & Mar. 401.

134. The manner of procuring the death of another, with malice, is, generally speaking, no otherwise material than as the degree of cruelty or deliberation with which it is accompanied, may, in conscience, enhance the guilt of the perpetrator; with this reservation, however, that malice must be of corporal damage to the party; and, therefore, working upon the fancy of another, or treating him harshly or unkindly, by which he dies of fear or grief, is not such a killing as the law takes notice of; but he who wilfully and deliberately does any act which apparently endangers another's life, and thereby occasions his death, shall, unless he clearly prove the contrary, be adjudged to kill him of malice prepense. *Com.* v. *Webster*, 5 Cush. 295; *State* v. *Turner*, Wright 20.

135. Murder must be committed by an act applied to, or affecting the person, either directly, as by inflicting a wound or laying poison; or indirectly, as by exposing the person to a deadly agency or influence, from which death ensues. *Com.* v. *Webster*, 5 Cush. 295.

136. To constitute murder in the first degree, it would not be sufficient that the killing was wilful and malicious, it must also have been deliberate and premeditated; and in the absence of passion or provocation; the length of time during which the prisoner deliberated and premeditated, is immaterial; and if there is neither passion nor provocation, and the design to kill is formed, it will make no

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difference whether that design had been deliberated on but one moment, one day, or one week. *Anthony* v. *State*, 1 Meigs' R. 265.

137. If the design to kill is formed under the influence of passion, or upon provocation, and the killing ensues before the passion has time to subside, it will be only murder in the second degree, or manslaughter, if the provocation be a sufficient and legal one. *Ib.*

138. Where the prisoner shot at a person on horseback, and declared that he did so only with the intention to cause the horse to throw him, and the ball took effect on another person and produced his death, the Court held the crime to be murder. *State* v. *Smith*, 2 Strobh. R. 77.

139. The employment of a deadly weapon, whereby death is produced, although it implies malice at Common Law, does not imply that the act was done with such premeditation as to make it murder in the first degree, under the statute. *Clark* v. *State*, 8 Humph. 671.

140. Every indictment for murder, contains the charge that the prisoner did "feloniously, wilfully, and of his malice aforethought, kill and murder the deceased;" the fact of killing, and the intent, must both concur, to constitute the crime of murder. Therefore both charged by the State, and if from the whole evidence in the case, the jury doubt either the fact of killing, or the malice of the act, the prisoner is entitled to such doubt, and to be either acquitted, or convicted of a crime of less grade than murder, according to the circumstances. *McDaniel* v. *State*, 8 Smed. & Marsh. 401.

141. The distinction between murder and manslaughter is not in the slightest degree altered by our statute, nor is the nature or definition of murder, both remaining as at Common Law. *Bivens* v. *State*, 6 Eng. 455.

142. To constitute the crime of murder in the first degree, when the purpose to maliciously kill, with premeditation and deliberation, is found, the length of the time between the design as formed and its execution, is immaterial. *Shoemaker* v. *State*, 12 O. 43.

143. Homicide, of which murder is the highest and most criminal species, is of various degrees, according to circumstances. The term, in its largest sense, is generic, embracing every mode by which the life of one man is taken by the act of another. Homicide may be lawful, or unlawful: it is lawful when done in lawful war upon an enemy in battle; it is lawful when done by an officer in the execution of justice upon a criminal, pursuant to a proper warrant. It may also be justifiable, and of course lawful, in necessary self-defence. *Com.* v. *Webster*, 5 Cush. 295.

144. It is a settled rule of law, that no provocation by words only, however opprobrious, will mitigate an intentional homicide, so as to reduce it to manslaughter. *Ib.*

145. Therefore, if upon provoking language given, the party immediately revenges himself, by the use of a dangerous and deadly weapon, likely to cause death, such as a pistol discharged at the person, a heavy bludgeon, an axe, or a knife; if death ensues, it is a homicide not mitigated to manslaughter by the circumstances, and so is homicide by malice aforethought within the true definition of murder. *Ib.*

146. It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed; it is sufficient that the malicious intention precedes and accompanies the act of homicide. *Ib.*

147. It is manifest, therefore, that the words "malice aforethought" in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life, and the actual execution of that intent, but rather denote purpose and design, in contradistinction to accident and mischance. *Ib.*

148. Where a man, without justification or excuse, causes the death of another, by the intentional use of a dangerous weapon likely to destroy life, he is responsible for the consequences, upon the principle already stated, that he is liable for the natural and probable consequences of his act. *Ib.*

149. Suppose, therefore, for the pur-

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pose of revenge, one fires a pistol at another, regardless of consequences, intending to kill, maim, or grievously wound him, as the case may be, without any definite intention to take his life. Yet, if that is the result, the law attributes the same consequences to homicide so committed, as if done under an actual and declared purpose to take the life of the party assailed. *Ib.*

150. Murder is the voluntary killing of any person, of malice prepense or aforethought, either express or implied by law; the sense of which word malice is not only confined to a particular ill-will to the deceased, but is intended to denote an action flowing from a wicked and corrupt motion, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent upon mischief, and therefore malice is implied from any deliberate, cruel act against another, however sudden. *Ib.*

151. The implication of malice arises in every instance of homicide amounting, in point of law, to murder; and in every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him. *Ib.*

152. Words of reproach, how grievous so ever, are not provocation sufficient to free the party killing from the guilt of murder, nor are contemptuous or insulting actions or gestures, without an assault upon the person; nor is any trespass against lands or goods. This rule governs every case where the party killing upon such provocation made use of a deadly weapon or otherwise manifested an intention to kill, or to do some great bodily harm. But if he had given the other a box in the ear, had struck him with a stick, or other weapon not likely to kill, and had unluckily and against his intention killed him, it had been but manslaughter. *Ib.*

153. It is very clear that a person aiding and assisting another in committing a murder is to be regarded as a principal, and that he may be indicted and punished, although the principal who really gave the mortal blow, or was otherwise the immediate instrument by which the murder was effected, had not been taken. The immediate injury, from which death ensues, is considered as proceeding from all who are present and abetting the injury done, and the actual perpetrator is considered as the agent of his associates. His act is their act, as well as his own; and all are equally criminal. *State* v. *Rochelle*, 2 Brevard's R. 338.

154. Under the statute of Virginia, every homicide is, prima facie, murder in the second degree; and in order to elevate the offence to murder in the first degree, the burden is cast upon the Commonwealth to bring it by proof either within the specific class of cases, such as killing by poison, or by lying in wait, &c., enumerated in the statute, or within the general class of "wilful, deliberate, and premeditated killing." *Hill* v. *the Commonwealth*, 2 Gratt. 594.

155. "A man shall be taken to intend that which he does, or which is the immediate or necessary consequence of his act." *Ib.*

156. To illustrate this rule, let it be supposed that a man is seen within shooting distance of another, to raise his gun, take aim, and fire, and the man falls; the ball having inflicted a mortal wound; and these are all the facts proved: is this murder in the first or second degree? To respond to this inquiry, it is only necessary to apply the rule just quoted. The taking aim, and firing such a weapon, one from which death would most likely ensue, would itself be prima facie evidence that he intended it; and was, therefore, a wilful, deliberate, and premeditated killing. *Ib.*

157. A mortal wound given with a deadly weapon, in the previous possession of the slayer, without any, or upon very slight provocation, is prima facie wilful, deliberate, and premeditated killing, and throws upon the accused the necessity of proving extenuating circumstances. *Ib.*

158. There may be other circumstances besides the previous possession of a deadly weapon, which would

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manifest that premeditation and deliberation required by the statute to constitute murder in the first degree. *Ib.*

159. It is perfectly settled that no words, or gestures, nor anything less than the indignity to the person, of a battery, or assault at least, will extenuate a killing to manslaughter. *State* v. *Barfield*, 8 Iredell, 344. N C.

160. Where the wound is adequate, and calculated to produce death, it is no excuse to show that had proper caution and attention been given, a recovery might have ensued. Neglect or maltreatment will not excuse, except in cases where doubt exists as to the character of the wound. *State* v. *Baker*, 1 Jones N. C. 267.

161. The premeditation to kill must exist as a course deliberately fixed upon before the act of killing, and not formed by provocation received at the time of the act, or so recently before as not to afford time for reflection. *Bevins* v. *State*, 6 Eng. 455.

162. The fact of killing with a deadly weapon is prima facie evidence that the design to kill was formed in the mind of the party committing the act, and that the killing was in consequence of such design. *Ib.*

163. Where a surgical operation is performed in a proper manner, and under circumstances which make it necessary in the opinion of competent surgeons, upon one who has received a wound apparently mortal, and such operation is ineffectual to afford relief, and save the life of the patient, or is itself the immediate cause of death; it is held the party inflicting the wound will, notwithstanding, be responsible for the consequences. *Com.* v. *McPike*, 3 Cush. 181.

164. Where the death is caused by a wound received, the person who inflicts it is responsible for its consequences, although the deceased might have recovered by the exercise of mere care and prudence. *McAllister* v. *State*, 17 Ala. 434.

165. Premeditation as well as design, is now an indispensable ingredient in making out the crime of murder, under the first clause of the section of the statute defining that offence. *Sullivan* v. *People*, 1 Parker's Crim. R. 347.

166. The intent to do bodily harm to some one out of a number of persons, is essential, under the 2d subd. of sec. 5 of 2 Rev. Stat., p. 657, to constitute the crime of murder, even where the homicide is caused by an act imminently dangerous to others, indicating a depraved mind, regardless of human life. *The People* v. *Sheriff of Westchester*, 1 Parker's Crim. R. 659.

167. Dubitatur, whether there should not also be an intent to kill, though not directed towards any particular person. *Ib.*

168. Deaths effected by the burning of a steamboat, which results from the making of excessive fires for the purpose of creating excessive steam, in order to outrace another steamboat, held not to come under the denomination of murder, but parties held to bail for manslaughter in the first degree. *Ib.*

169. Where the facts of a case bring it within any of the degrees of manslaughter, it cannot come within any definition of murder. *People* v. *Johnson*, 1 Parker's Crim. R. 291.

170. If one assuming the character of a physician, through ignorance administer medicine to his patient, with an honest intention and expectation of a cure, but which causes the death of the patient, he is not guilty of felonious homicide. *Commonwealth* v. *Thompson*, 6 Mass. 134.

171. At Common Law, if a man killed another with an axe, with malice aforethought, and with an intent to rob him, or committed the same offence deliberately, but without the intent to rob, or committed it upon a sudden heat, but without any adequate provocation, so as to mitigate the crime to manslaughter; each of these cases, and numerous others that might be enumerated, would come under, and be included in the general definition of murder; and the mode of charging the offence in each case, would be precisely the same. *Mitchell* v. *State*, 8 Yerg. 514.

172. If each of these offences would be included in the general definition of murder at Common Law, it is impossible that they are not included in precisely the same definition given by the

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statute. It follows, then, as a necessary consequence, that the second section of the act of 1829, includes murder in both its degrees. *Ib.*

173. If, then, murder in both its degrees is included in the definition given in the second section of the act, an indictment, charging the offence according to said second section, must likewise include murder in both its degrees. *Ib.*

174. If the deceased, upon approaching the prisoner's path, repented of her intention, or became irresolute, and stopped, leaving the prisoner full and unobstructed right and liberty to pass, and she brought on the attack, with design to kill her, it would be murder in the first degree, according to the circumstances of the case; that is, if the killing was the result of the old grudge, and a previously premeditated malice, it would be murder in the first degree; if it were the result of malice suddenly produced by the sight of her rival, without previous meditation, it would be murder in the second degree. *Copeland* v. *State*, 7 Humph. 479.

175. Where an indictment is framed upon the 52d section of the act of 1829, ch. 23, which provides that "whoever shall feloniously and with malice aforethought, assault any person with intent to commit murder in the first degree, though death shall not ensue, shall undergo confinement in said jail or penitentiary house, for a period not less than three, nor more than twenty-one years." *Daine* v. *the State*, 2 Humph. 439.

176. Held that in order that the defendant should be found guilty of this charge, it must appear that the assault was of such a character, and made under such circumstances, that, had death ensued, he would have been guilty of murder in the first degree, and liable to be condemned by the law to suffer death. *Ib.*

177. And in order that a killing should be murder in the first degree, it must be done as defined in the 3d section of the act, wilfully, deliberately, maliciously, and with premeditation. *Ib.*

178. Proof must be adduced to satisfy the mind that the death of the party slain was the ultimate result which the concurring will, deliberation, and premeditation of the party accused sought. *Ib.*

179. The employment of a deadly weapon, although it implies malice at the Common Law, does not imply that the act was done with premeditation, so as to make it murder in the first degree, under the statute, if death ensues. *Ib.*

180. No gestures or words of affront however well calculated to arouse a just indignation, however furious the passion which they may actually excite, are an adequate provocation to alleviate homicide effected by a deadly weapon, from murder to manslaughter. *Beauchamp* v. *State*, 6 Blackf. 299.

181. To have that effect, the provocation must consist of personal violence. *Ib.*

182. Where a deliberate purpose to kill or to do great bodily harm is ascertained, and there is a consequent unlawful act of killing, the provocation, whatever it may be, which immediately precedes the act, is to be thrown out of the case, and goes for nothing, unless it can be shown that this purpose was abandoned before the act was done. *State* v. *Johnson*, 1 Iredell 354.

183. There is no such thing in law as a killing with malice, and also upon the *furor brevis* of passion, and provocation furnishes no extenuation, unless it produces passion. Malice excludes passion—passion pre-supposes the absence of malice—in law they cannot co-exist. *Ib.*

184. The great distinction between homicide committed with malice and that committed in a transport of passion, suddenly excited by a grievous provocation, is as steadily to be kept in view in the trial of a slave charged with the murder of a white man, as in that of a white man charged with the murder of his equal or of a slave; but the same matters which would be deemed in law a *sufficient provocation* to free a white man who has committed a homicide in a moment of passion, from the guilt of murder, will not have the same effect when the party slain is a white man and the offender a slave; for

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though, among equals, the general rule is, that words are not, but blows are, a sufficient provocation, yet there *may be* words of reproach so aggravating, when uttered by a slave, as to excite in a white man the temporary fury which negatives the charge of malice, and this rule holds without regard to the personal merit or demerit of the white man. *State* v. *Jarrott*, 1 Iredell, 76.

185. The owner of a slave, for the malicious, cruel and excessive beating of his own slave, cannot be indicted; yet it by no means follows when such malicious, cruel and excessive beating results in death, though not intended and premeditated, that the beating is to be regarded as lawful, for the purpose of reducing the crime to manslaughter, when the whipping is inflicted for the *sole* purpose of chastisement. *Souther* v. *Commonwealth*, 7 Gratt. 673.

186. It is the policy of the law, in respect to the relation of master and slave, and for the sake of securing proper subordination and obedience on the part of the slave, to protect the master from prosecution in all such cases, even if the whipping and punishment be malicious, cruel, and excessive. *Ib.*

187. But in so inflicting punishment for the sake of the punishment, the owner of the slave acts at his peril; and if death ensues in consequence of such punishment, the relation of master and slave affords no ground of excuse or palliation. The principles of the Common Law, in relation to homicide, apply to his case, without qualification or exception, and, according to those principles, the act of the prisoner amounts to murder. *Ib.*

188. By the first section of the fourth division of the penal code (Prince's Dig 622), homicide is declared to be the killing of a human being of any age or sex, and is of three kinds, murder, manslaughter, and justifiable homicide. *Reynolds* v. *State*, 1 Kelly's R. 222.

189. Under the statute of South Carolina, the greater offence includes the lesser, to the same extent and for the same reason that murder includes manslaughter at Common Law. *State* v. *Gaffney*, Rice 431.

190. Under the act of 1829, ch. 23, § 3, of Tennessee, which declares that "all murder which shall be perpetrated by means of poison, lying in wait, or any other kind of wilful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate, rape, arson, burglary or larceny, shall be deemed murder in the first degree;" it was held, to constitute murder in the first degree, there must exist, in the mind of a person who slays another, a specific intention to take the life of the person slain; and that if he with premeditated intent to slay one person, against his intention slay another, it will not be murder in the first degree. *Bratton* v. *State*, 10 Humph. 103.

191. In cases of murder by means of poison, or lying in wait, the most atrocious and detestable of all kinds of homicide, and the least to be guarded against either by resistance or forethought, the crime is made to depend exclusively upon the "means" causing death. *Ib.*

192. So, likewise, in respect to cases of murder committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, or larceny; a class of felonies most dangerous in their consequences to public safety and happiness, which may be most frequently and easily committed, and to which there are the strongest temptations. *Ib.*

193. In all these cases, the mode or "means" of destroying life, supplies a conclusive legal presumption of malice and guilty intention; the *crime*, as well as the legal guilt of the agent, is made to depend alone upon the fact of taking life in either of the specific modes. *Ib.*

194. In such cases, the question of malice or intention, as a matter of fact, is wholly irrelevant: it need not be proved, and cannot be controverted by the accused. *Ib.*

195. But the remaining species of murder defined in the statute, namely, murder "by any other kind of wilful, deliberate, malicious and premeditated killing," falls within the operation of a directly contrary principle. Here, the character of the crime, and guilt of the agent, are made to depend exclu-

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sively upon the mental status at the time of the act, and with reference to the act which produces death. *Ib.*

196. Where a homicide has been committed with deadly weapon, in the attempt to perpetrate a felony, by taking the life of another person without legal justification or excuse; in such case, from the circumstances and deadly weapon, the law conclusively presumes malice and the intent to murder; and, in like manner, the law conclusively presumes that the party contemplated the probable consequences of his own act. *Ib.*

197. If one shoots at A. and misses him, but kills B., this is murder; because of "the previous felonious intent, which the law transfers from one to the other." *Ib.*

198. If the prisoner's "intent was to kill his wife, and killing her would have been murder in the first degree, killing his child will also be murder in the first degree." *Ib.*

199. Where, on the trial of an indictment for murder, it becomes material to inquire whether a homicide committed in a second, after a previous combat, in which it might have been manslaughter, was in course of the first or a continuance of it, or after such interval of time as would imply premeditation, the proper inquiry in such case is, not whether the suspension of reason continued down to the moment of the mortal stroke given, but, did the prisoner cool, or was there time for a reasonable man to have cooled. *State* v. *McCants*, 1 Spears 384.

200. Any signs of deliberation or reflection, would be evidence of cooling; and where a reasonable time has elapsed, cooling and malice will be inferred. *Ib.*

201. In inquiring whether the indulgence of passion has been excessive and unreasonable, the standard of what is reasonable, is ordinary human nature, to be applied by the Court, if all the facts and circumstances be found by a special verdict, or to be applied by the jury in giving a general verdict. *Ib.*

202. As to the reasonable time in which cooling should ensue after provocation, no precise rule can be given. *Ib.*

203. In all cases where the time of cooling may be considered, whether the time be regarded as evidence of the fact of cooling, or as constituting of itself, when reasonable, legal deliberation, the whole circumstances are to be taken into the estimate in determining whether the time be reasonable. And the time in which an ordinary man, in like circumstances, would have cooled, is the reasonable time. *Ib.*

204. It is no defence on the trial of an indictment for murder, that the accused was intoxicated at the time of the commission of the offence. The law holds a person responsible for a criminal act, though, at the time, he was intoxicated to such a degree as to be unconscious of what he was doing. *The People* v. *Robinson*, 1 Parker's Crim. R. 649.

II. MANSLAUGHTER—CIRCUMSTANCES UNDER WHICH IT OCCURS.

205. In Ohio, an intent to kill may be an ingredient of the crime of manslaughter; but under the statute it is not a necessary ingredient. *Montgomery* v. *State*, 11 O. 424.

206. Nothing but finding a man in the very act of adultery with one's wife, can mitigate the homicide from murder to manslaughter. *State* v. *John*, 8 Iredell 330.

207. The felonious killing of a slave without malice, by a free white person, is manslaughter. *Chandler* v. *State*, 2 Texas R. 305.

208. Any killing of a slave by undue or excessive correction, is that kind of manslaughter described in the act of 1821, by the words "sudden heat and passion." *State* v. *Fleming*, 2 Strob. 464.

209. Manslaughter, when applied to the killing of a slave, must have a more restricted sense than when applied to the killing of a freeman; in the former case it can only mean a killing in "sudden heat and passsion." *Ib.*

210. If an act amounting to manslaughter be *voluntarily* committed, the statute, without regard to the circumstances of provocation, fixes the grade of the offence and pronounces it man-

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slaughter in the first degree. *Oliver* v. *State*, 17 Ala. 587.

211. Where a party without necessity kills another with a deadly weapon, the law, in the absence of proof to show that it was accidental, will imply that the act was voluntarily done. *Ib.*

212. Homicide caused by committing or attempting to commit a misdemeanor, though murder at the Common Law, is, by the Revised Statutes of New York, reduced to manslaughter in the first degree. *People* v. *Rector*, 19 Wend. 569.

213. If the accused, upon meeting her adversary unexpectedly, who had intercepted her upon her lawful road, and in her lawful pursuit, accepted the fight when she might have avoided it by passing on, the provocation being sudden and unexpected, the law will not presume it to be upon the old grudge, but upon the first insult by stopping her on her way, and it would be manslaughter. *Copeland* v. *State*, 7 Humph. 479.

214. Manslaughter is the unlawful killing of a human creature, without malice, either express or implied, and without any mixture of deliberation whatever, and is homicide, inferior in degree to that of murder. *Reynolds* v. *State*, 1 Kelly 222.

215. If a party be engaged in an unlawful act, and another assist him and actually perpetrate the mischief, the first party shall be held responsible as though he had been the sole perpetrator himself. *Beets* v. *State*, 1 Meigs' R. 106.

216. If a man is fighting with another, not intending to kill, but by some unucky blow death ensues, he is guilty of manslaughter. *Ib.*

217. Not because he intended to inflict death, but because he was engaged in an unlawful act, and the blow and the death were the consequences of that act, and he must be responsible for it as though he had designed the result. *Ib.*

218. Where A. seeks B. and threatens his life, and they meet and quarrel, and B. strikes A. with his fist, and they separate, and A. attempts to arm himself with a stick, which he is unable to do, and again stoops to raise another stick or billet of wood of a dangerous kind, and while stooping, B. stabs him; held that this was not murder, but manslaughter. *Allen* v. *State*, 5 Yerg. 453.

219. Whenever death ensues from a sudden transport of passion or heat of blood, upon a reasonable provocation, and without malice, it is solely imputable to human infirmity, and the offence will be manslaughter. *Clark* v. *State*, 8 Humph. 671.

220. Manslaughter consists in the felonious and wilful or voluntary killing of another, without malice aforethought, which would make the killing murder, but without necessity to justify the deed, or accident to excuse it. *Com.* v. *Riley*, Thach. Crim. Cas. 471.

221. Any killing without an intention to effect death, unless it is justifiable or excusable, is manslaughter only. *People* v. *Austin*, 1 Parker's Crim. R. 154.

222. Where it is clear the prisoner is guilty of the slaying in heat and passion upon a sudden quarrel, he is guilty of the crime of manslaughter. *Short* v. *State*, 7 Yerg. 513.

223. What provocation is sufficient to make what would otherwise be murder, a less offence, is a question of law. *State* v. *Dun*, 18 Mo. (3 Bennett) 419.

224. The use of a deadly weapon in resisting an illegal arrest, is not enough to make the killing murder. *Roberts* v. *State*, 14 Mo. 138; *Jones* v. *State*, ib. 409.

225. Where the killing is in resisting an illegal arrest, it is manslaughter in the absence of proof of express malice. *Ib.*

226. The distinction between murder and manslaughter explained, in the case of *King* v. *Commonwealth*, 2 Virg. Cas. 78.

227. It is manslaughter to inflict wounds in rude sport which are the cause of death. *Pennsylvania* v. *Levin*, Addis. 279.

228. In North Carolina, manslaughter committed on a slave is not punishable by the laws of that State. *State* v. *Price*, 2 Hayw. 79.

229. As to what constitutes manslaughter only, vide *Commonwealth* v. *Biron*, 4 Dall. 125; *Commonwealth* v. *Mitchell*, 1 Virg. Cas. 116.

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230. In a case where the jury are of opinion that the killing happened in the manner stated, but of the malice they are not convinced, and upon the foregoing facts the law and malice are submitted to the Court; held that the defendant was not guilty of murder by the Common Law, but of manslaughter. *Short* v. *the State*, 7 Yerg. 510.

231. Where a slave, without authority, with a design to produce harmless sleep, administers laudanum to an infant, and, contrary to her expectation, it causes death, she will be held guilty of manslaughter, and not of murder. *Ann* v. *the State*, 11 Humph. 159.

232. Where a female is with child, and a potion is administered to her for the purpose of destroying the child, which results in the death of the mother, it is murder in the second degree, unless the perpetrator of the mischief intended to take away the life of the mother as well as to destroy her offspring, in which case it is murder in the first degree. *The Com.* v. *Keeper of the Prison*, 2 Ashmead, 227.

233. Whether the circumstances of the case constituted murder in the second degree, or manslaughter, see *Slaughter's case*, 11 Leigh 681.

234. Manslaughter is "the unlawful and felonious killing of another, without any malice, express or implied;" as, where upon a sudden quarrel, two persons fight, and one of them kills the other; or where a man greatly provokes another by some personal violence, and the other immediately kills him. *Jacob* v. *State*, 3 Humph. 493.

235. Manslaughter in the first degree, except by aiding one to commit suicide, or by killing an unborn or quick child, by an injury to the mother, must be committed without a design to effect death. *People* v. *Clark*, 3 Seld. 385.

236. The same absence of a design to effect death, belongs to manslaughter in the second and third degrees, except in certain cases named in the statute. *Ib.*

237. Wherever death ensues from sudden transport of passion, or heat of blood, if upon reasonable provocation and without malice, or on sudden combat, it will be manslaughter. *Young* v. *State*, 11 Humph. 200.

238. There must be sudden passion upon reasonable provocation, to negative the idea of malice. *Ib.*

239. Involuntary manslaughter consists in the killing a human being without intention to do so; but in the commission of an unlawful act or a lawful act, which probably might produce such a consequence in an unlawful manner. *Studstill* v. *the State*, 7 Ga. 2.

240. Manslaughter is the unlawful killing of another without malice, either express or implied. It differs from murder in the important particular of the absence of malice; as, where it happens in a sudden heat, where passion has obtained the dominion over reason and the gentler feelings of the heart. *United States* v. *Wiltberger*, 3 Wash. C. C. 515; *State* v. *Zellers*, 2 Halst. 220.

241. Where persons fight on fair terms, and, after an interval, blows having been given, a party draws, in the heat of blood, a deadly instrument, and inflicts a deadly injury, it is manslaughter only; but if a party enter a contest dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder. *State* v. *Hildreth*, 9 Iredell 429.

242. In order to mitigate a homicide, committed in a second combat, by what occurred at a previous one, on sudden occasion, fairly begun, both contests must be considered as making one combat, or the first, as a separate combat, must be considered as a sufficient sudden provocation for either a second combat, or for a subsequent attack, producing a contest not entitled to be called a mutual combat. *State* v. *McCants*, 1 Spears 384.

243. Either a new combat, for a provocation received at a former one, or a subsequent attack for provocation had at a previous combat, would, if not really sudden and unpremeditated, be malicious; and as either, if really sudden and unpremeditated, would not be malicious, the question of reasonable time would be material. *Ib.*

244. Where a man makes an assault, which is returned with a violence manifestly disproportionate to that of the

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assault, the character of the combat is essentially changed, and the assaulted becomes, in his turn, the assailant; and if the person who made the first assault, in the transport of passion thus excited, and without previous malice, kill his adversary, the proper inquiry as to the degree of his guilt, is not whether he was possessed of deliberation or reflection, so as to be sensible of what he was then about to do, and intentionally did the act; but whether a sufficient time had elapsed after the violent assault upon him, and before he gave the mortal wound, for passion to subside and reason to reassume her sway; for if there had not, he would be guilty of manslaughter only. *State* v. *Hoover*, 4 Dev. & Batt. 365.

245. At Common Law, and between white persons, a slight blow will not excuse a homicide; for that must be on mere necessity. *State* v. *Tackett*, 1 Hawks 210.

246. Nor will words extenuate it to manslaughter; but it is not correct to say that a slight blow, not threatening death or great bodily harm, will not extenuate, if the weapon used by a slayer be a deadly one, because that authorizes the inference, that a blow, to constitute a legal provocation, must threaten death. *Ib.*

247. The true principle of the law is, that if he, on whom an assault is made with violence or circumstances of indignity, resent it immediately by killing the aggressor, and act therein in heat of blood and under that provocation, it is but manslaughter. *Ib.*

248. The general rule should, therefore, be laid down, that words are not, but blows are a sufficient provocation to lessen the crime of homicide to manslaughter. From this there a few cases which appear to be exceptions, but they depend on very particular circumstances. *Ib.*

249. But it exists in the very nature of slavery, that the relation between a white and a slave is different from that between free persons; and, therefore, many acts will extenuate the homicide of a slave, which would not constitute a legal provocation if done by a white person. *Ib.*

250. A boy, who, from being provoked wantonly and improperly by a man, becomes excited and throws a stone at him, and it accidentally so falls, as in violation of all reasonable calculation of chances to kill him, is not to be held guilty of murder, and punished as a murderer. *Holly* v. *State*, 10 Humph. 141.

251. Whether he be guilty of manslaughter or not, is a question depending upon other propositions for its solution, and to be submitted to a jury, with all other matters in connection with the transaction. *Ib.*

252. Green, J., held that the throwing the stone by the defendant was clearly unlawful; and, as death ensued, it is a clear case of manslaughter. *Ib.*

253. A killing on sudden quarrel, to avoid great bodily harm, places a man under circumstances amounting to legal provocation; and though such circumstances cannot justify or excuse the act, yet on account of human frailty the homicide is extenuated, and is but manslaughter. *State* v. *Roberts*, 1 Hawks 349.

254. A well-grounded belief that a known felony is about to be committed, will extenuate a homicide committed in prevention of the felony, but not a homicide committed in pursuit, by an individual of his own accord. *State* v. *Rutherford*, 1 Hawks 457.

255. Where upon words of reproach on both sides, between Y. and B., the latter approached the former and struck him a violent blow with his fist, which staggered him, and the company separated them, and were taking B. away, when Y., within one minute, advanced upon B., who extended his arm to take hold of him, and Y. immediately stabbed him with a knife, which he had not shown before; held that if death had ensued it would not be murder, but manslaughter, notwithstanding the separation for a minute, and the weapon; for the wrath of the accused, kindled in the highest degree by the blow, would not reasonably subside within that period; and, in such case, the instrument makes no difference. *State* v. *Yarborough*, 1 Hawks 78.

256. Necessity distinguishes between manslaughter and excusable homicide,

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and not between the former and murder; its absence is common to both murder and manslaughter. *Ib.*

257. It is laid down that the law, having a regard for the frailty of human nature, will not put an act done upon a sudden impulse, and in the heat of passion, on the same footing in regard to guilt with a deed deliberately performed. The indulgence shown by the law, in such cases, proceeds on the supposition that the reason or judgment of the party perpetrating the act has been temporarily suspended or overthrown by the sudden access of violent passion. But a high degree of sudden and resentful feeling will not alone palliate an act of homicide committed under its influence. It is essential that the excited and angry condition of the party committing the act, which would entitle him to the milder consideration of the law, should be superinduced by some insult, provocation, or injury, which would naturally and instantly produce in the minds of ordinarily constituted men the highest degree of exasperation. *Preston* v. *State*, 22 Miss. 383.

258. "If a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable, se defendendo, since there is no absolute necessity for doing it to preserve himself; yet it is neither murder, for there is no previous malice, but it is manslaughter." *Ib.* So, also, if a man takes another in the act of adultery with his wife, and kills him upon the spot, it is not at Common Law ranked in the class of justifiable homicide, but is held to be manslaughter in the lowest degree. *Ib.*

259. It is therefore true that an act of homicide, committed under the influence of sudden, great, or violent resentment, will be looked upon by the law with less disfavor than a similar deed perpetrated with deliberation; but it is equally true, that the cause of provocation must be one deemed by the law sufficient. *Ib.*

260. A man might be subjected to great indignities, and be greatly provoked, and still not stand acquitted of murder, if he should instantly slay the aggressor. *Ib.*

261. If a slave, in defence of his life, and under circumstances strongly calculated to excite his passions of terror and resentment, kills his overseer, the homicide is, by such circumstances, mitigated to manslaughter. *State* v. *Will*, 1 Dev. & Batt. R. 121.

262. It seems that the law would be the same with respect to killing a master or temporary owner, under similar circumstances. *Ib.*

263. As between the two offences of murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry; the killing being voluntary, the offence is necessarily murder in the second degree, unless the provocation were of such a character as would, at Common Law, constitute it manslaughter, and for which latter offence a drunken man is equally responsible as a sober one. *Pirtle* v. *State*, 9 Humph. 663.

264. The rule that where parties become suddenly heated, and engage immediately in mortal conflict, fighting upon equal terms, and one kills the other, the homicide is mitigated to manslaughter, applies only to equals, and not to the case of a white man and a slave, if the slave kill the white man while fighting under such circumstances. *State* v. *Jarrott*, 1 Iredell 76.

265. An ordinary assault and battery, committed by a white man upon a slave, will not be a sufficient provocation to mitigate a homicide of the former by the latter, from murder to manslaughter; but a battery which endangers the slave's life will be a sufficient provocation to produce that result. In the cases between these extremes, that is a legal provocation of which it can be pronounced, having due regard to the relative condition of the white man and the slave, and the obligation of the latter to conform his instinct and his passions to his condition of inferiority, that it would provoke well-disposed slaves into a violent passion. *Ib.*

266. The true nature of manslaughter is, that it is homicide mitigated, out of tenderness to the frailty of human nature. Every man, when assailed with violence, or great rudeness, is inspired with a sudden impulse of

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anger, which puts him upon resistance before time for cool reflection, and if, during that period, he attacks his assailant with a weapon likely to endanger life, and death ensues, it is regarded as done through heat of blood or violence of anger, and not through malice, or that cold-blooded desire of revenge, which more properly constitutes the feeling, emotion, or passion of malice. *Com.* v. *Webster*, 5 Cush. 295.

267. The same rule applies to homicide in mutual combat, which is attributed to sudden and violent anger, occasioned by the combat, and not to malice. When two meet, not intending to quarrel, and angry words suddenly arise, and a conflict springs up, in which blows are given on both sides, without much regard to who is the assailant, it is a mutual combat; and if no unfair advantage is taken in the outset, and the occasion is not sought for the purpose of gratifying malice, and one seizes a weapon and strikes a deadly blow, it is regarded as homicide in heat of blood; and though not excusable, because a man is bound to control his angry passions, yet is not the higher offence of murder. *Ib.*

268. If a person assume to act as a physician, however ignorant of medical science, and prescribe with an honest intention of curing the patient, but through ignorance of the quality of the medicine prescribed, or of the nature of the disease, or both, the patient die in consequence of the treatment, contrary to the expectation of the person prescribing, he is not guilty of murder or manslaughter. But if the party prescribing have so much knowledge of the fatal tendency of the prescription that it may be reasonably presumed that he administered the medicine from an obstinate, wilful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter, at least, though he might not have intended any bodily harm to the patient. *Rice* v. *State*, 8 Mo. 561.

269. If poison were wilfully administered, that is, with intent that it should have the effect of destroying the life of the party, or if the act were done deliberately and with the intention of mischief, or great bodily harm, and death ensue, it will be murder. *Ann* v. *State*, 11 Humph. 150.

270. But if it were not wilful, and such deliberate mischievous intention do not appear, and the act was done heedlessly and incautiously, it will be only manslaughter at most. *Ib.* If a prisoner administer laudanum in violation of her master's order, for the purpose of producing unnecessary sleep, and death ensued, contrary to her intention, she is not guilty of murder. This is not law. In the first place, the charge puts the disobedience of the master's order on the same footing with the violation of a command, a prohibition of the law. This is a great mistake. Such violation of the master's order is not an unlawful act in the sense of the rule above stated; it is no offence against the law of the land, nor is it cognizable by any tribunal created by law. It is an offence simply against the private authority of the master, and is cognizable and punishable alone in the domestic forum. Again, the criminality of the act is made to depend upon an intent with reference to the deceased infant, which may be in law, if not positively innocent, at least comparatively so. *Ib.*

271. In such case the laudanum may have been given by the prisoner in utter ignorance of the fact that it possessed any poisonous quality, and there may have been a total absence of any intention to do serious injury, or indeed injury of any sort, much less to destroy the life of the child. *Ib.*

272. If the prisoner's purpose really was to superinduce a state of quietude or sleep, without more, in order to afford better opportunity or greater facility for carrying on her own illicit intercourse with a man; this, however culpable in morals, would not involve her in the guilt of murder. *Ib.*

273. The question of fact, whether or not the prisoner had knowledge of the poisonous quality of laudanum, and whether or not there existed in the mind of the prisoner any intent to kill or to do serious injury to the deceased, was a proper subject to be left to the jury. *Ib.*

274. In general, if a party that is

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struck, strikes again, and death ensues, it is only manslaughter. The law regards the blow as a sufficient provocation to excite the passions, so that the party acts under the influence of the sudden heat, and not from malice. But a slight assault will not always extenuate a killing to manslaughter; much depends upon the character of the weapon used in reference to the provocation. There must be a reasonable proportion between the mode of resentment, and the provocation, to reduce the offence of killing to manslaughter. *Nelson* v. *State*, 10 Humph. 518.

275. So if there be proof of malice, at the time of killing, the existence of provocation will not reduce it to manslaughter. For, although the provocation usually repels the presumption of malice, yet, if its actual existence be established, notwithstanding the provocation, it is murder, and not manslaughter. *Ib.*

276. The Common Law cannot hold that an act constituting a provocation, which would mitigate a homicide, committed by a white man, to manslaughter, shall have a like effect when the homicide is committed on a white man by a slave. *Ib.*

277. It does not, however, follow that a provocation may not be so grievous as that, if the slave slay the white man, it will be but manslaughter, although the life or limb of the party killing is not endangered. *Ib.*

278. On the contrary, cases may exist where the slave committing the homicide, although not excusable, as having acted in self-defence, yet he cannot be deemed to have done the act with malice aforethought. *Ib.*

279. The Court cannot point out with precise accuracy, what particular extent of provocation will reduce such homicide to manslaughter. Each case may depend very much on its own circumstances, and must be left to the enlightened judgment of the jury. *Ib.*

280. If the slave has misbehaved, and by his insolence has provoked merited chastisement, and punishment be *reasonably inflicted* upon him, it is his duty to submit; and if he resist, and slay the person chastising him, it will be murder. But if the punishment be unreasonable and excessive, the killing will only be manslaughter. *Ib.*

281. If a slave, not having misbehaved, or given cause for offence, is assaulted and beaten by a stranger, who has no authority over him, and he kill the person so beating him, such killing will be extenuated to manslaughter, in cases where such extenuation would not exist, if by insolence and misconduct the slave had provoked chastisement. *Ib.*

282. Where death is feloniously caused in a cruel and unusual manner, and in the heat of passion, the nature of the crime depends on the intent; if done without a design to cause death, it is manslaughter in the second degree; if done with premeditated design, it is murder under the first subdivision of the section defining murder. But if done in the heat of passion, it cannot, whatever may have been the design, be classed under the second subdivision of the section defining murder. Cases mentioned in illustration of the class supposed to be governed by the second subdivision of the section defining murder. *People* v. *Johnson*, 1 Parker's Crim. R. 291.

283. A high degree of sudden and resentful feeling, will not, by itself, palliate an act of homicide, committed under its influence; the excitement and anger should be the result of some insult, provocation, or injury, which would naturally and instantly produce in the minds of ordinarily constituted men, the highest degree of exasperation. *Campbell* v. *State*, 23 Ala. 44.

284. The words "killing in sudden heat and passion," are entirely synonymous with, "killing in sudden heat of blood, and transport of passion," which are usually employed in the books to define manslaughter. *State* v. *Gaffney*, Rice 431.

285. In order to inflict the punishment of death, the murder must have been committed wilfully, deliberately, maliciously, and premeditatedly; this state of mind is conclusively proven when the death has been inflicted by poison, or by lying in wait for that purpose; but if neither of these concomitants attend the killing, then the

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state of mind necessary to constitute murder in the first degree, by the wilfulness, the deliberation, the maliciousness, the premeditation, if it exist, must be otherwise proven; and if it appear that there was sudden provocation, though not of such a character as at Common Law to mitigate the offence of manslaughter, and the killing thereupon takes place by sudden heat and passion, and without deliberation and premeditation, although the Common Law would presume malice, yet it is, under the statute, murder in the second degree, and not to be punished by death. *Pirtle* v. *State*, 9 Humph. 663.

286. Manslaughter is principally distinguishable from murder in this, that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting; and the act being imputed to the infirmity of human nature, the correction ordained for it is proportionally lenient. *Com.* v. *Webster*, 5 Cush. 295.

287. Whenever death ensues from sudden transport of passion, or heat of blood, if upon a reasonable provocation, and without malice, or if upon sudden combat, it will be manslaughter; if without such provocation, or the blood has had reasonable time, or opportunity to cool, or there be evidence of express malice, it will be murder. *Ib.*

III. Justifiable and Excusable Homicide.

288. Whether a homicide is excusable or not, must depend in a great measure upon the nature of the weapon employed, and the way in which it was used. Killing by purposely firing a pistol into a crowd, cannot be said to be by accident or misfortune. *People* v. *Austin*, 1 Parker's Crim. R. 154.

289. Whether a homicide was justifiable under the statute, is to be determined by the jury, from their conviction whether there was reasonable ground for the prisoner to apprehend great personal injury, and not from the circumstance that the prisoner did in fact entertain such apprehension. *Ib.*

290. The degree of force, or the means to be employed, in protecting one's person, or personal liberty, must be determined by circumstances. To justify a person in taking the life of another, it must appear that his safety compelled him to do so. *The People* v. *Doe*, 1 Manning (Mich.) 451.

291. In Alabama, the Common Law on the subject of homicide is the same as the Common Law of England; and whenever that law requires the person assailed to decline the contest, or to retreat, before he will be excused in taking the life of his adversary, the law here also requires the same. *Pierson* v. *the State*, 12 Ala. 149.

292. A person who has reasonable apprehension of great personal violence, involving imminent peril to life or limb, may protect himself from violence even at the expense of his assailant's life, when necessary. *Holmes* v. *the State*, 23 Ala. 17.

293. Since an act performed by a quick, impulsive, blood-thirsty, abandoned man, may afford much stronger evidence that the life of the person assailed was in imminent peril, than if performed by one known to possess an entirely different character and disposition, and might very reasonably justify a resort to more prompt measures of self-preservation; and when such is the case, the act and the status of the actor must be taken together, in order to arrive at a just conclusion respecting its nature; and thus the character of the deceased may be legitimately inquired into, as connecting itself with the transaction which it may serve to explain. *Pritchett* v. *the State*, 22 Ala. 39.

294. Where homicide is committed under such circumstances as tend to show that the slayer acted in self-defence, the previous threats of the deceased, and his conduct upon the fatal occasion, construed with reference to his own character and peculiarities, relating to such conduct and tending to explain it, all enter into and form part of the transaction, and may legitimately be given in evidence. *Ib.*

295. Notwithstanding how bad and

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desperate the character of the deceased may have been, and how many threats he may have made, he forfeits no claim to his life, until by an actual attempt to execute his threats, or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief in his slayer that it is necessary to deprive him of life in order to save his own or to prevent some felony upon his person. *Ib.*

296. To justify the killing of a felon for the purpose of arresting him, the slayer must show both a felony actually committed and that he avowed his object and the felon refused to submit. *The State* v. *Roane*, 2 Dev. 58.

297. Whenever there is a reasonable ground to believe that there is a design to destroy life, to rob or commit a felony, a killing to arrest such design, is justifiable. *State* v. *Harris*, 1 Jones' N. Car. R. 190.

298. But it is for the jury, and not for the prisoner, to judge of the reasonableness of such apprehension. *Ib.*

299. Where one kills a bad drunken Indian se defendens, it is not manslaughter. *Pennsylvania* v. *Robertson*, Addis. 246.

300. If after words of anger, the slayer took up an axe, and approached the deceased with a present purpose and design to take away his life, or do him some great bodily harm, and the deceased had sufficient grounds to believe that such was the intention of the assailant, he had a right to strike in self-defence, although the assailant was not yet in striking distance; and such striking by the deceased will not amount to a legal provocation to mitigate the killing to manslaughter. *State* v. *Baker*, 1 Jones N. C. 267.

301. In Georgia, the 12th section of the 4th division of the penal code, justifies homicide which is committed in opposing any person who manifestly intends and endeavors in a riotous and tumultuous manner, to enter the habitation of another, for the purpose of assaulting, or offering personal violence to any person, dwelling or being therein. This clause contemplates the attack of more than one person, and does not have any application to a single individual. *Hudgins* v. *State*, 2 Kelly 173.

302. Whether a person who is assaulted by another will be justified in using, in the first instance, such violence in his resistance as will produce death, must depend upon the nature of the assault and the circumstances under which it was committed. It may be of such a character, that the party assailed may reasonably apprehend death or great violence to his person. *Young* v. *State*, 11 Humph. 200.

303. Where the prisoner was going her own road, and in a laudable pursuit, if she did nothing more in going that road than defending herself against a violent assault from a hickory stick, three and one-half feet long, and from three and one-half to four inches in thickness, the kiliing would be homicide se defendendo. *Copeland* v. *State*, 7 Humph. 479.

304. D. with his fist assaulted S. in the street. S. instantly stabbed him in five places, of which wounds he died. There was no evidence tending to prove that S., when he gave the fatal wounds, was in danger of loss of life or limb, or great bodily harm, or that he had a reasonable apprehension of such danger; held that the killing was not excusable homicide se defendendo. *Stewart* v. *State*, 1 Ohio 66.

305. When the slayer seeks and provokes an assault upon himself, in order to have a pretext for stabbing his adversary, and does, upon being assaulted, stab and kill him, such killing is not excusable homicide in self-defence. *Ib.*

306. A person assaulted may repel force by force; but it does not follow that he may, without necessity, use a deadly weapon for that purpose, and he is yet more unjustifiable if his weapon is concealed. *Ib.*

307. A man may oppose force to force, in defence of his person, his family, or property, against one who manifestly endeavors, by surprise or violence, to commit a felony, as murder, robbery or the like. *U. S.* v. *Wiltberger*, 3 Wash. C. C. 515.

308. The intent must be to commit a felony; if it be only to commit a tres-

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pass, as to beat the party, it will not justify the killing of the aggressor. No words, no gestures, however insulting and irritating, not even an assault, will afford such justification, although it may be sufficient to reduce the offence from murder to manslaughter. *Ib.*

309. In the next place, the intent to commit a felony must be apparent, which will be sufficient, although it should afterwards turn out that the real intention was less criminal, or was even innocent. *Ib.*

310. This apparent intent is to be collected from the attending circumstances, such as the manner of the assault, the nature of the weapons used, and the like; and lastly, to produce this justification, it must appear that the danger was imminent, and the species of resistance used, necessary to arrest it. *Ib.*

311. If one began an affray, or even if he did not begin it, but was assaulted in the first instance, and then a combat ensued, he could not excuse himself as for a killing in self-defence, unless he quitted the combat before the mortal blow was given, if the fierceness of his adversary permitted, and retreated as far as he might with safety, and had then killed his adversary of necessity, to save his own life. *State* v. *Hoover*, 4 Dev. & Batt. 365.

312. Where, upon the trial of an indictment for murder, the accused attempts to justify the homicide on the ground that it was committed in self-defence, he must prove to the satisfaction of the jury that he was in imminent danger, either of death or of some great bodily harm. It is not enough that the accused *believed* that it was necessary to take the life of his assailant, in order to protect himself from some great personal injury. Mullett, J., dissenting. *People* v. *Shorter*, 4 Barb. 460.

313. A homicide is not justifiable, as having been committed in self-defence, unless there was first a reasonable ground to apprehend an intention on the part of the person killed to commit a felony, or to do some great personal injury; and secondly, there was imminent danger of such apprehended intention being accomplished. That is, it must appear that there was imminent danger that a felony would in fact be committed, or that some great personal injury would be inflicted, unless the assailant was arrested by death. Mullett, J., dissenting. *Ib.*

314. Seamen will not be justified, even in cases of extreme peril to their own lives, in sacrificing the lives of passengers, for the sake of preserving their own; and they can in no circumstance claim exemption from the common lot of the passengers. *United States* v. *Holmes*, Wallace, Jr. 1.

315. Where a man who is in no great danger of bodily harm, through fear, alarm or cowardice, kills another, under the impression that great bodily injury is about to be inflicted upon him, he will not be guilty of manslaughter, nor of murder, but it will be self-defence. *Grainger* v. *State*, 5 Yerg. 459.

316. The necessity that will justify the taking of life, need not be actual, but the circumstances must be such as to impress the mind of the slayer with the reasonable belief that such necessity is impending. *Oliver* v. *State*, 17 Ala. 587.

317. Whether the circumstances are such as to create a reasonable belief in the mind of the slayer, that a necessity exists for taking the life of another, is a question for the jury, in solution of which they may consider the condition of both the parties. *Ib.*

318. In order to excuse homicide in self-defence, the act must not be premeditated. *People* v. *McLeod*, 1 Hill 377.

319. The act of resorting to force upon the principle of self-defence, does not arise while the apprehended mischief exists in machination only, nor does it continue so as to justify violence by way of retaliation or revenge for a past injury. *Ib.*

320. A mere trespass, or a larceny, will not justify an intentional killing; the statute of Mississippi declares homicide to be justifiable, when committed in resisting any attempt to murder such person, or to commit any felony upon him or her, or in any dwelling-house in which such person shall be. *McDaniel* v. *State*, 8 Smedes & Marsh. 401.

321. In the case of justifiable self-

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defence, the injured party may repel force by force in defence of his person, habitation, or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony upon either. It is justly considered that the right in such a case is founded in the law of nature, and is not, nor can be superseded by any law of society. There being at the time no protection from society, the individual is remitted to the law of nature for protection. *Com.* v. *Riley*, Thach. Crim. Cas. 471.

322. Where a known felony is attempted upon the person, be it to rob or murder, the party assaulted may repel force by force; and even his servant then attendant on him, or any other person present, may interfere to prevent mischief; and if death ensue, the party so interposing will be justified. *Ib.*

323. There is a species of self-defence known to the law, which, though involving fault to a certain extent, is yet excusable; the killing in such case is voluntary, the party having the intention to kill, or to do some great bodily harm at the time the death happened, at least, but to have done it for the preservation of his own life. It arises from a sudden casual affray commenced and carried on in the heat of blood; and supposes that the person, when engaged in such sudden affray, quits the combat before the mortal wound is given, and retreats or flies as far as he can with safety, and then, urged by mere necessity, kills his adversary for the preservation of his own life. *Ib.*

324. He, therefore, in the case of a mutual conflict, who would excuse himself upon the ground of self-defence, must show, that before a mortal stroke was given, he had declined any further combat, and retreated as far as he could with safety; and also, that he killed his adversary through mere necessity, and to avoid his own immediate death. If he fails in either of these circumstances, he will incur the penalty of manslaughter. *Ib.*

325. Where there is a mere civil trespass upon a man's house, such as entering it after a warning not to enter, unaccompanied by such force as amounts to a breach of the peace, it is not held such a provocation as will reduce the killing of the trespasser to manslaughter, if committed under circumstances from which the law would imply malice—as, for instance, with a deadly weapon. *Carroll* v. *State*, 23 Ala. 28.

326. Where a trespass is forcible, the owner may resist the entry, but has no right to kill the assailant, except when necessary to prevent a felonious destruction of property, or to defend himself against loss of life or great bodily harm. *Ib.*

327. Where an assault is made under circumstances creating a just apprehension of imminent danger to person or property in the mind of a reasonable man, the owner is at liberty to act upon appearances, and kill the assailant, and the danger need not be real. *Ib.*

328. Where, in an affray, A. knocked down and beat B., and C., who was present, believing that the life of B. was in danger, gave him a knife to defend himself from further mischief, and B. killed A. with the knife; held that C. was justified in giving B. the knife. *Short* v. *State*, 7 Yerg. 510.

IV. Of the Indictment for Murder and Manslaughter—Its Requisites, &c.

329. Where an indictment for murder charges A. in one count with giving the mortal wound, and B. with being present, aiding and abetting; and in another count, charges B. with giving the mortal wound, and A. with being present, aiding and abetting; it was held that there was no incongruity in the counts, and that both were thereby charged with being principals. *The State* v. *Cameron*, 2 Chand. (Wis.) 172.

330. Where an indictment for murder charged that the defendant, with a certain gun in both hands, which he then and there held, &c., feloniously did shoot, &c.; held that the omission of the word "his" before the word "hands," was no defect in the indictment. *Ward* v. *State*, 8 Blackf. 101.

331. Where, on an indictment for

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murder, the defendant was found guilty, it was held that error does not lie for words in the preamble and conclusion of the indictment that may be omitted without affecting the substance; nor will error lie for an uncertain or repugnant statement of the offence in the body of the indictment, provided it is properly alleged elsewhere. *State* v. *Bell*, Addis. 156.

332. In an indictment for murder where there is a positive allegation of a stab, &c., with a dirk; held, it appears sufficiently certain, that the mortal wound was given thereby, under the words "giving one mortal wound," &c. *Gibson* v. *Com.*, 2 Va. Cas. 111.

333. The word percussit (did strike) is not technical in an indictment for murder; but where the blow is given with a dirk, the words "stab," "stick," and "thrust," are of an equivalent import. *Ib.*

334. Where, on an indictment for murder, the prisoner has been convicted of murder in the first degree; held that the indictment is not defective in omitting to charge specially such facts as constitute murder in the first degree as contradistinguished from murder in the second degree. *Com.* v. *Miller*, 1 Virg. Cas. 310.

335. An indictment for murder need not charge it as murder in the first degree, nor is it necessary to use that description which, according to the statute, constitutes that degree of the offence. *Wicks* v. *Com.*, 2 Virg. Cas. 387.

336. Where an indictment is laid for murder, it is indispensably necessary that it should be charged to be done with malice aforethought; and it is not sufficient that the mortal wound is charged to have been done with malice aforethought, nor that the conclusion substitutes for those words, the word maliciously. *Com.* v. *Gibson*, 2 Virg. Cas. 70.

337. Where the crime of murder is committed in the perpetration of arson, rape, burglary, or robbery, the fact need not be stated in the indictment. *The Commonwealth* v. *Flanagan*, 7 Watts & Serg. 415.

338. Where an indictment for murder charged that the prisoner, of his malice aforethought, did make the assault, but the striking and wounding, and the killing and murder, were respectively charged to have been done of his malice aforesaid; it was held that the indictment was sufficiently certain. *Maile's case*, 9 Leigh 661.

339. Where an indictment for murder alleged that the mortal wound was inflicted on the 7th November 1845, and that the deceased languished on until 8th of November in the year aforesaid; and then said, on which 8th day of May in the year aforesaid the deceased died: to this indictment the prisoner pleaded not guilty; held that the insertion of May for November was a mistake apparent on the face of the indictment, and could not shut out evidence of the death subsequent to the 7th November, or be cause for arresting judgment. *Ailstuk's case*, 3 Gratt. 650.

340. Under the provisions of the Revised Statutes relative to homicide, the indictment for murder may be in the Common Law form, alleging the offence to have been committed feloniously, wilfully, and of malice aforethought, instead of alleging it to have been committed from a premeditated design to effect the death of the person killed; but the prisoner cannot be convicted on such an indictment of a felonious homicide with malice aforethought, unless the evidence be such as to bring the case within the statutory definition of murder. *People* v. *Enoch*, 13 Wend. 159.

341. It seems, in an indictment for murder, where the death is alleged to have been caused by a wound, the depth or breadth of the wound need not be described. *Dias* v. *State*, 7 Blackf. 20.

342. Where the charge for murder in an indictment is, that the persons indicted struck the deceased with an axe on the left side of the head and over the left temple, giving to him then and there with said axe over the right side of the head and over the right temple a mortal wound; held that the indictment was bad. *Ib.*

343. The part of the body to which the violence was applied, must be stated; and even if the wound be alleged to have been on the hand, arm, &c., without saying the right or left, the

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indictment is bad. The proof need not correspond in this respect with the allegation, but the allegation itself cannot be dispensed with in the indictment. *Ib.*

344. The defect cannot be remedied by treating the first statement as to the part of the head of the deceased which was struck, as superfluous, because that statement is sensible and consistent in the place where it occurs, and is not repugnant to antecedent matter. *Ib.*

345. Nor can the difficulty be removed by considering as superfluous the subsequent allegation, as to the persons indicted giving to the deceased on the opposite side of his head the mortal wound. *Ib.*

346. The averment that the persons indicted, feloniously, and wilfully, and of their malice aforethought, did kill and murder, without anything more, does not amount to any charge against them which the law can recognize. *Ib.*

347. The consequence is, that the Court is left without the technical allegation that the persons indicted feloniously, &c., murdered the deceased. *Ib.*

348. It is true that the previous part of the count charges that the persons indicted, feloniously and wilfully, and of their malice aforethought, did strike the said George Brick, &c., giving him, &c., three mortal wounds, &c.; but the law is well settled, whether wisely or otherwise we need not stop to inquire, that such description of the offence is not sufficient in a count of an indictment for murder. *Ib.*

349. There must be in an indictment for murder, an express allegation that the prisoner feloniously, &c., murdered the deceased; the word murder being a term of art which cannot be supplied by any other word. *Ib.*

350. No periphrasis or circumlocution whatsoever will supply those words of art which the law has appropriated for the description of the offence, as murdravit in an indictment for murder, cepit in an indictment for larceny, mayhemiavit in an indictment for maim, felonice, in an indictment of any felony whatever. *Ib.*

351. An objection to the want of a minute specification of the extent and character of the wounds charged in the indictment to have been inflicted, is purely technical. If it could prevail at all, it should be urged on a motion to quash the indictment, as provided in the 153d section of the Criminal Code. *Stone* v. *People*, 2 Scam. 326.

352. At Common Law, the party committing a criminal offence must be indicted in the county where the offence was committed. But in the case of homicide, if the wound was given in one county, and the death happened in another, it was said by some that the party was not indictable at all, because the offence was not complete in either county, and the jury could inquire of what happened only in their own county. 1 Hawk. P. C. 94; 1 East 361. But the common opinion was, that he might be indicted where the stroke was given, for that alone is the act of the party, and the death is but a consequence. *Riley* v. *State*, 9 Humph. 657.

353. Where the allegation in an indictment for murder, was, that the prisoner in and upon one M. F., &c., feloniously, &c., did make an assault with a certain gun called a rifle-gun, &c., then and there charged with gunpowder and two leaden bullets; which said gun, he, &c., had and held at and against the said M. F., then, &c., feloniously, &c., did shoot off and discharge, and that the said M. F. with the leaden bullets aforesaid, by means of shooting off and discharging the said gun so loaded, to, at and against the said M. F., as aforesaid, did, &c., feloniously, &c., strike, penetrate and wound the said M. F., in and upon the left side of the said M. F., &c., giving to her the said M. F., &c., with the leaden bullets aforesaid, by means of shooting off and discharging the said gun so loaded, to, at and against the said M. F., and by such striking, &c., the said M. F. as aforesaid, one mortal wound in and upon the left side of the said M. F., &c. *State* v. *Freeman*, 1 Spear's R. 57.

354. On a motion to arrest the judgment, on the ground that there was no sufficient averment that the gun was shot off, or that the contents were discharged; held that the inference seems to be one of absolute certainty, that the contents of the gun were shot off and

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discharged, for there is nothing else to which the words "did shoot off and discharge, with a gun charged with gunpowder and leaden bullets," could be applied. *Ib.*

355. All the facts necessary to constitute the crime of murder under the statute, so that judgment, in accordance with the law, could be rendered, must be stated in the indictment; and the statute only requires such facts to be stated in the indictment as are required to be proved on the trial. *Nash* v. *State*, 2 Green 286.

356. "It is necessary to state that the act by which the death was occasioned was done feloniously, and especially that it was done with malice aforethought." *Fairlee* v. *People*, 11 Ill. Rep. 1.

357. An act, apparently lawful in itself, when done with a felonious intent, becomes thereby unlawful. *Ib.*

358. An indictment on a statute must set forth the charge in the very words of the statute, but a superfluous description is not objectionable; and therefore an indictment, under the act of 1821, for the murder of a slave, charging that the prisoner "wilfully, deliberately and maliciously did kill and murder," was held good. *State* v. *Cheatwood*, 2 Hill 459.

359. The killing of a slave is made felony by the act of 1821, it was not such by the act of 1740; and an indictment for the murder of a slave, which concludes against the form of the act, will be good; for if it had charged the offence to have been done against both acts, it would have been bad, and judgment would have been arrested. *Ib.*

360. Where, on the trial of an indictment for murder, the prisoner's counsel objected that the name of the deceased, as mentioned in the indictment, was not his true name; that was a fact to be tried by the jury. *State* v. *Angel*, 7 Iredell 27.

361. The purpose of setting forth the names of the persons on whom an offence has been committed, is to identify the particular fact or transaction on which the indictment is founded, so that the accused may have the benefit of an acquittal or conviction, if accused a second time. The name is generally required as the best mode of describing the person; but he may be described otherwise, as by his calling, or the like, if he be identified thereby as the individual, and distinguished from all others; and if the name be not known, that fact may be stated as an excuse for omitting it altogether. *Ib.*

362. An indictment for murder, framed as at Common Law, and concluding against the form of the statute, will warrant the conviction, under the fifth section of the third chapter of the "Penal Code," of a person who shall, with malice aforethought, cause the death of a slave by cruel, barbarous, or inhuman whipping, &c.; or under the sixth section, of an overseer or manager who shall cause the death of a slave by barbarous or inhuman whipping or beating, &c. *State* v. *Flanigin*, 5 Ala. 477.

363. In an indictment against a slave for murder, it is necessary to allege the name of his owner. *Pleasant* v. *State*, 17 Ala. Rep. 190. Vide *Phereby* v. *State*, 16 Ala. 774.

364. In such case, an allegation that the slave is the property of the "late W. C.," is sufficient. *Pleasant* v. *State*, 17 Ala. 190.

365. An indictment for murder at the Common Law, viz., alleging the act to have been committed with malice aforethought, is not made defective by the addition of the words, that the act was done from a premeditated design to effect the death of the deceased. Such latter words may be rejected as surplusage. *People* v. *White*, 22 Wend. 167.

366. An indictment for murder, which charges that the homicide was committed on the "twefth day of August," instead of the twelfth day of August, is good; if not at Common Law, yet, at least, under the statutes of N. C. Rev. Stat. chap. 35, § 12. *State* v. *Shepherd*, 8 Iredell 195.

367. In an indictment for murder, if the time stated be anterior to the indictment, it is material, and only material in one respect; and that is, that the day of the death, as laid, is within a year and a day of that of the wounding. *Ib.*

368. If that appears, from the stating

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of the month, the day of the month is immaterial, according, at least, to the proper construction of the Act of Assembly of N. C., Rev. Stat. chap. 35, § 12. *Ib.*

369. In an indictment for an assault with intent to murder, it is sufficient to describe the intent in these words, "With intent in and upon him the said John F. Walton then and there feloniously, wilfully, and of his malice aforethought, to commit a murder." *Sharp* v. *State*, 19 O. 379.

370. An indictment does not lie at Common Law for the homicide of a slave; it is, in this State, purely a statutory offence. *State* v. *Fleming*, 2 Strob. 464.

371. In an indictment for murder, where the killing is charged to have been from a battery, it is necessary to aver an assault. *Lester* v. *State*, 9 Mo. 658.

372. The time of the stroke, and the death, must be given. The words, "instantly did die," do not sufficiently charge time and place. *Ib.*

373. An indictment is not bad, because it is the Common Law form, and does not charge, in the words of the statute, the offence of murder in the first degree. *Hines* v. *the State*, 8 Humph. R. 597.

374. In most cases where justice requires a man to be put upon his trial for killing another, it is usual and proper to charge him in the indictment for murder; because in many instances it is a complicated question, and no injury can thereby happen to the individual at all comparable to the evil of a lax administration of justice in this respect, for the verdict and judgment will still be adapted to the nature of the offence. *State* v. *Gaffney*, Rice 431.

375. Where the count charges an assault upon the deceased (a technical term, well understood in law, implying force applied to, or directed towards the person of another), in some way and manner, and by some means, instruments and weapons, to the jury unknown; and that the defendant did thereby, wilfully and maliciously, deprive him of life, it will be sufficient. *Com.* v. *Webster*, 5 Cush. 295.

376. Where an indictment is laid for murder, it is not necessary that it should appear in the caption that the jury were sworn; it is sufficient if it appear in the body of the indictment returned by them, that they were duly sworn. *State* v. *Long*, 1 Humph. 386.

377. As to form of an indictment for murder, with counts at Common Law, and under the statute and form of a writ of error, to remove a criminal case from the Oyer and Terminer to the Supreme Court. Opinions of medical witnesses upon a case of alleged insanity, with their statements of the symptoms and evidences of insanity. See the case of *Lake* v. *the People*, 1 Parker's Crim. R. 495.

378. Where it is alleged in an indictment for murder, that the wounds of which the murdered individual died, were inflicted on the 8th day of September, 1835; and that from that day he, the said L., until the 13th day of September, 1835, in said county, did languish, and languishing, did live; on which said 13th day of Sept., 1835, he died; and the said then and there, &c., was present, aiding, &c., the said, and in the felony and murder aforesaid, in the manner and form aforesaid; held that there was no ground for uncertainty, as to which of the antecedents reference is made in charging the accessory. *Woodsides* v. *State*, 2 Howard (Miss.) 655.

379. Where a count alleges that the homicide was committed feloniously, wilfully, and of malice aforethought, but in the conclusion omits the word murder; held that it was good without the word murder. The second count, where it charges the killing to have been done wilfully and wickedly, and in the conclusion alleges the defendant did kill and murder, was held to be good without the words "malice aforethought." *Anderson* v. *State*, 5 Ark. 444.

380. If several are present, and abet a fact, and one only actually does it, it may be laid generally in the indictment as done by them all, or specially as done by one only, and abetted by the rest. *Ib.*

381. In Tennessee, to warrant a conviction for murder in the first degree, the indictment need not charge the

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party according to the definition of murder in the first degree, as given in the 3d section of the act of 1829, ch. 23. *Mitchell* v. *State*, 5 Yerg. 340.

382. Although it is necessary to state in the indictment the manner of doing the injury which occasions the death of the party murdered; yet, if several be present, aiding and assisting in the perpetration of the act, it is not material whether it is correctly stated which of them did the act. *State* v. *Rochell*, 2 Brevard 338.

383. If A. be indicted as having given the mortal stroke, and B. and C. as present, aiding and assisting, and it should appear from evidence that B. gave the stroke, and A. and C. were aiding and assisting, this proof maintains the indictment. *Ib.*

384. The distinction of principal in the first and second degree being merely nominal, and no ways essential, it seems to be useless to preserve it in indictments. If the stroke of one be considered in law as the stroke of all, it is best to say that the party charged as principal, by the stroke so given by another, as stated in the indictment, did kill and murder. *Ib.*

385. In North Carolina, where the commencement of the indictment does not, as with us, contain the words "impanelled, sworn and charged," but where the English form of commencement is adopted, namely, "The jurors of the State, upon their oath, present," &c., it has been determined in the case of *the State* v. *Kimbrough*, 2 Dev. 431, since the case of *McClure* v. *the State*, in 8 Tennessee, that the omission to show in the caption that the jury had been sworn, does not constitute error. *State* v. *Long*, 1 Humph. 386.

386. In every criminal prosecution, two things must concur; first, a good and sufficient indictment, in which the criminal charge is set forth; and, secondly, such charge must be established by the legal proof. The sufficiency of the indictment, in substance and form, is a matter of law, upon which, if drawn in question, it is the duty of the Court to give an opinion. The general rule is, that no person shall be held to answer to a criminal charge, until the same is fully and plainly, substantially and formally described to him; a good indictment, therefore, is necessary, independent of proof. *Com.* v. *Webster*, 5 Cush. 295.

387. To a person unskilled and unpracticed in legal proceedings, it may seem strange that several modes of death, inconsistent with each other, should be stated in the same document; but it is often necessary, and the reason for it, when explained, will be obvious. The indictment is but the charge or accusation made by the grand jury, with as much certainty and precision as the evidence before them will warrant. They may be well satisfied that the homicide was committed, and yet the evidence before them may leave it somewhat doubtful as to the mode of death; but, in order to meet the evidence as it may finally appear, they are very properly allowed to set out the mode in different counts; and then if any one of them is proved, supposing it to be also legally formal, it is sufficient to support the indictment. *Ib.*

388. Take the instance of a murder at sea: a man is struck down, lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide by the blow, or by drowning, but leaves it uncertain by which. That would be a case for several counts, charging a death by a blow, and a death by drowning, and perhaps a third, alleging a death by the joint result of both causes combined. *Ib.*

389. In *Rains' case*, 3 McCord, 533, it was decided that in indictments under the statute, it was indispensable to describe the offence, with all its circumstances, constituting the manner of killing, the weapon, wounds, and the like, with the same minuteness as in indictments for homicide at Common Law. *State* v. *Gaffney*, Rice 431.

390. Where, upon the trial of an indictment for murder in the first degree, the jury found the following verdict: we, the jury, find the defendant guilty of manslaughter, and sentence him to imprisonment in the State prison for three years at hard labor; held that the verdict was not bad in failing to specify that the defendant was found

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guilty as charged in the indictment. *Moore* v. *the State*, 3 Ired. 438.

391. Where an indictment for murder in the first degree, was found in the Decatur Circuit Court, at the April term, 1851, and concluded contra formam statuti, and by the statute of 1843, the punishment of that crime was death, and by the act of 1846 the punishment is either death or imprisonment in the State prison at hard labor during life, at the discretion of the jury; held that the conclusion of the indictment in the singular, to wit, contra formam statuti, was good. *Bennett* v. *State*, 3 Ind. 167.

392. In an indictment for murder, where the wound was made in the breast, and the word breast misspelled, it was held to be a fatal defect. *Anonymous*, 2 Hayw. 140.

393. In a case of indictment for murder, where the constable neglected to make his return properly to a venue, which he served for one of the grand jurors who found the bill; held that being still in office, the constable could amend his return after the conviction of the prisoner. *Commonwealth* v. *Parker*, 2 Pick. 550.

394. Where an indictment for murder contained two counts; one charging the prisoner with shooting the deceased, and the other with aiding and assisting another man in stabbing him; held that the two counts in law contained but one charge against the prisoner; and evidence of the aid and assistance charged in the second count, was sufficient to support the charge of shooting set out in the first count. *Hudson* v. *State*, 1 Blackf. 317.

395. Where an indictment for murder does not state that the accused was a person of sound memory and discretion, nor that the killing was unlawful; held that the allegation of the accused's being of sound memory, &c., was not indispensable; and that if the indictment describes the manner of killing, so as to show clearly that it was unlawful, it was sufficient. *Jerry* v. *State*, 1 Blackf. 395.

396. Where it is charged in an indictment that the defendant "with a certain stone which he held, &c., feloniously did cast and throw and strike the deceased on the right side of the head," it was held that the charge was sufficiently clear that the prisoner threw the stone and hit the deceased. *White* v. *Commonwealth*, 6 Binn. 179.

397. It is not necessary to aver in an indictment for murder, that the offence is of the first or second degree, nor is it necessary that the indictment conclude against the form of the act of assembly. *Ib.*

398. Where an indictment for murder concludes "contrary to law" instead of contrary to the statute, it was held to be good. *Hudson* v. *State*, 1 Blackf. 317.

399. The word percussit (did strike), is not technical in an indictment for murder, but that when the blow is made with a dirk, the words "stab, stick, and thrust," are equivalent thereto. *Gibson* v. *Commonwealth*, 2 Virg. Cases 111.

400. Where there is a positive averment of the stab, &c., with a dirk, it sufficiently appears that the mortal wound was given thereby, under the words, giving one mortal wound, &c. *Ib.*

401. *Quere.* In an indictment for murder, if one count charges the killing to have been occasioned by beating with a stick, and the other count alleges it to have been occasioned by drowning, can the jury find a general verdict of guilty? It seems that it would be safer for the jury to specify under which count they find the defendant guilty. *Mary* v. *State*, 5 Mo. 71.

402. After the prosecuting attorney had closed the evidence on the part of the State, in an indictment for murder, the defendant's counsel moved the Court to instruct said attorney to call as witnesses two other persons, then in the Court-house, who were present at the affray in which the alleged murder was committed, in order that the defendant might have the benefit of their cross-examination; but the Court refused so to instruct the prosecutor, and the refusal was held proper. *Ward* v. *the State*, 8 Blackf. 101.

403. Where an indictment for murder, by giving poison, did not name the particular poison administered;

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held that it was not necessary, and had it, it would not have been necessary that the proof should correspond. *Carter* v. *the State*, 2 Carter's R. 617.

404. Where in an indictment for murder, the death is charged to be occasioned by a wound, a description of the wound must be set forth in the indictment; its length, breadth, depth, &c., where they are capable of description; and the omission of such description is fatal to the indictment. *State* v. *Owen*, 1 Murphy 452.

405. Where the death is charged to be occasioned by a bruise, a description of its dimensions, &c., is not necessary. *Ib.*

406. On the trial of an indictment, containing two counts, one for murder, and the other for manslaughter, and a general verdict of guilty be found by the jury, the defendant would be punished for the higher grade of the offence, for the reason that the jury having found the defendant guilty generally, the presumption of the law is, that they intended to find him guilty of the highest offence with which he was charged in the indictment. *Bullock* v. *State*, 10 Ga. 46.

407. Indictments for murder, under the act of 1829, ch. 23, are good, if the indictment is good at Common Law; and the verdict of the jury, and not the indictment, is to ascertain the degree of the crime, whether it be murder of the first or second degree. *Mitchell* v. *the State*, 8 Yerg. 514.

408. If upon an indictment for murder in the Common Law form, the jury find the defendant guilty of murder in the first degree, the sentence of death must follow, if there is nothing else in the case to obviate it. *Ib.*

409. In an indictment for murder, where the assault is alleged to have been committed in some county in this State, it is not necessary that the indictment should conclude against the form of the statute. *State* v. *Dunkley*, 3 Iredell 116.

410. The indictment must set forth an unlawful killing, or it will be defective. If it does describe the manner of the killing so as to show clearly that it was unlawful, the insertion of the word unlawful is unnecessary; and if it does not so describe the killing, the word unlawful would not aid the description. *Jerry* v. *the State*, 1 Blackf. 396.

411. An indictment against A., B. and C., for the murder of R., charged that the assault was committed by A., "feloniously, wilfully, and of his malice aforethought," that B. and C. "feloniously were present, aiding, abetting, and assisting the said A." the felony to commit; and concluded as follows: "And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said A., B. and C., the said R. in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder," &c. Held that the indictment was good, and that it was no objection to it that it did not charge that B. and C. were feloniously, wilfully, and of their malice aforethought, present, aiding, &c. *The State* v. *Raon*, 4 Rich. R. 260.

412. When an indictment is framed upon the 10th section of the act of 1835, ch. 19 (Car. & Nich. 683), which enacts, that "any slave or slaves who shall commit an assault and battery upon any free white person, with intent to commit murder in the first degree, or a rape upon a free white woman, shall, on conviction, be punished with death by hanging; held that he capital character of the offence created by the act, consists in the fact, that the person intended to be murdered by the slave, shall be a "free white person," and that the indictment must charge the offence, or without this charge the indictment would be defective. *Elijah* v. *State*, 2 Humph. 455.

413. Where an indictment charged that the blow was given on 27th of December, and that deceased then and there instantly died, and the evidence was, that he lived for twenty days after receiving the blow, and then died; it was held that the variance was not material. *State* v. *Baker*, 1 Jones' N. C. 267.

414. It is no defence to an indictment for manslaughter, that the homicide therein charged, appears by the proof to have been committed with malice aforethought, and was therefore murder, but the accused in such

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case, may, notwithstanding, be legally convicted of the offence of manslaughter. *The Com. v. McPike*, 3 Cush. 181.

415. The indictment of a slave for murder, does not include a charge for manslaughter; because by the act of 1819, ch. 35, § 1, murder committed by a slave, is declared to be capital; and by the act of 1835, ch. 19, § 9, exclusive original jurisdiction is given to the Circuit Courts of all offences committed by slaves, which are punishable with death; and as manslaughter is not so punishable, the Circuit Court has no jurisdiction thereof, and, therefore, it cannot be included in the indictment filed in that court. *Nelson* v. *State*, 10 Humph. 518.

416. But if it exists as an offence, it is punishable by the act of 1741, ch. 24, § 48 (1 Scott Rev. 74, 75); any crime committed by a slave, was to be tried before three justices, and four freeholders and slaveholders, and punished at their discretion. By the act of 1783, ch. 14, § 2, (1 Scott Rev. 279), trivial offences were to be tried before one justice alone, and punished not exceeding forty lashes. But if the justice was of opinion that the offender deserved a greater punishment, he was to commit him to jail to be tried as theretofore. By the act of 1815, ch. 138, § 1 (2 Scott Rev. 246, 247), the 48th section of the act of 1741 is repealed; and it is provided, that offences committed by slaves, shall be tried before three justices and nine freeholders and slaveholders, and if found guilty, they shall pass such judgment, according to their discretion, as the nature of the crime or offence shall require. *Ib.*

417. The word feloniously, in an indictment for manslaughter, will be considered as surplusage. *State* v. *Wimberly*, 3 McCord 190.

418. Indictments made for manslaughter, must allege that the death ensued in consequence of the act of the prisoner, or they will be fatally defective. *Ib.*

419. Where an indictment alleged that the accused did commit manslaughter on the high seas; 1, by casting A. B. from a vessel, &c., whose name was unknown; and 2, by casting him from the long-boat of the ship C. D., &c.,; held that the indictment was sufficiently definite. *U. States* v. *Holmes*, Wallace, jr. 1.

420. The section of an act of Congress on which an indictment for manslaughter is framed, declares that the officers and others employed on any steamboat, by whose "misconduct, negligence, or inattention, the life or lives of any person or persons on board," shall be destroyed, shall be deemed guilty of manslaughter. The Court holds under this section, that it will be the duty of the jury, if satisfied the material allegations of the indictment are sustained by the evidence, to return a verdict of guilty. There can be no doubt that it was the intention of Congress to create an offence by this statute, the essence of which consists in "misconduct, negligence, or inattention," and that no wilful negligence or wilful misconduct need be averred or proved. *U. States* v. *Warner*, 4 McLean 463.

421. An indictment for manslaughter, drawn after the approved Common Law precedents, is good in a prosecution under the statute of Ohio, for the same offence. *Sutcliffe* v. *State*, 18 Ohio 469.

422. A statement that the prisoner made an assault, and unlawfully discharged a gun loaded with powder and lead, at the person killed, is a sufficient averment of the unlawful act designated in the statute. *Ib.*

423. Where it was alleged in an indictment for manslaughter, that T., on the 25th of September, at Groton, in the county of Middlesex, "in and upon one L., then and there being, feloniously and wilfully did make an assault, and with a stone, which said T. then and there had and held, in and upon the head of said L., then and there feloniously and wilfully did cast and throw, and with the said stone, so as aforesaid, cast and thrown, the aforesaid L., then and there feloniously and wilfully did strike, penetrate and wound, giving to the said L., by the casting and throwing of the stone aforesaid, in and upon the head of said L., a mortal wound," &c.; held that the averment was sufficient to show

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that T. gave L. a mortal wound, on the 25th of September, at Groton. *Turns* v. *Com.*, 6 Metc. 224.

V. Evidence in Cases of Murder, &c.—Competency and Admissibility of.

424. The facts that must be established to convict on the trial of an indictment for murder, the distinction between positive and circumstantial evidence, and the comparative reliability of each, the reasons given for proving, and the character and value of dying declarations, the question of motive, and the cases in which the accused may avail himself of a previous good character, stated and discussed in the charge. *People* v. *Green*, 1 Parker's Crim. R. 11.

425. Form of a warrant of execution. *Ib.*

426. Proof that, as a justice of the peace, the accused had prosecuted the deceased for embezzlement of the county school fund, and that, in consequence thereof, the deceased vowed that the defendant should not be at the trial of said indictment, because he would kill him, is admissible in connection with other circumstances to establish that the defendant was in fear of his life from the deceased, and that the killing was in self-defence. *Monroe* v. *State*, 5 Geo. 85.

427. Proof that the shoes taken from the feet of the horse ridden by the prisoner on the morning of the murder, "seemed to fit in every particular" the tracks found near the remains of the deceased, will be admissible against him. *Campbell* v. *the State*, 23 Ala. 44.

428. When the government has proved the appearance of the prisoner on the evening of the day of the murder, and on the following day, the prisoner will not be permitted to show that on the third day after, on being informed of the murder, he appeared surprised, nor will he be allowed to prove that he appeared astonished on being told he was suspected of the murder. *Ib.*

429. Where, on the trial of an indictment for murder, the defendant introduced no evidence, it was held that circumstances of justification or mitigation might as well be shown from the testimony of the prosecution as from evidence produced by the defendant. *Crawford* v. *State*, 12 Ga. 142.

430. Where a homicide appeared to have been committed after dark, and it was somewhat doubtful from the evidence who gave the fatal blow, it was held that the defendant might show that, just after dinner, on the evening the deceased was killed, two other persons and the deceased had a quarrel at the same place where the homicide was committed, especially since it appeared that the defendant and deceased were on friendly terms a short time before the latter received the fatal blow. *Ib.*

431. Drunkenness is no excuse for crime, and it is not admissible in evidence as mitigation in a case of murder in the second degree; although it seems that proof of drunkenness would be admissible to show that the accused was incapable of the premeditation, which is necessary to constitute murder in the first degree. *Pirtle* v. *the State*, 9 Humph. 663.

432. Where, on a trial for murder, the declarations of the deceased have been offered in evidence, and an attempt has been made on the other side to destroy the effect of such declarations, by showing the bad character of the deceased, the State, for the purpose of corroborating the evidence, may prove that the deceased made other declarations to the same purport a few moments after he was stricken, though it did not appear that he was then under the apprehension of immediate death. *State* v. *Thomason*, 1 Jones' N. C. 274.

433. Upon an indictment for manslaughter, which was committed on board of an American vessel on the high seas, or in a foreign port, it is necessary for the prosecutor to show that the vessel belonged to a citizen of the United States. *U. States* v. *Imbert*, 4 Wash. C. C. 702.

434. Where the deceased had been cut with a knife, into the coats of the stomach, was very weak from the loss of blood, and said that he must die, and did die two days afterwards of the wound he had received, his account,

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in a conversation of short duration as to the manner in which the conflict began and was continued between him and the prisoner, was admissible as dying declarations, although the witness could not say whether the opinion expressed by the deceased, that he must die, was before or after the narration of the facts, there being no evidence that during the time of this conversation the condition of the deceased was materially changed. *State* v. *Peace*, 1 Jones' N. C. 251.

435. On an indictment for homicide, the prosecutor must show that the blows caused the death; but if he shows that the blows were given by a dangerous weapon, were followed by insensibility, or other alarming symptoms, and soon afterwards by death, this is sufficient to impose the burden of proof on the accused, to show that the death was occasioned by some other cause. *U. States* v. *Wiltberger*, 3 Wash. C. C. 515.

436. Where, on the trial of an indictment for murder, it appeared that the act was done by a single stab from a large butcher's or bowie knife, the wounds going to or near the heart, and physicians being of opinion that the wounds were inflicted by one well acquainted with the seat of the vital organs, and it was shown that the prisoner, on the day of the murder, had a large butcher's knife in his possession, upon his person, and had been in the business of a butcher, that the person committing the deed was about the size of the prisoner, and, after the deed, ran towards the place where the prisoner was employed, that the prisoner manifested no surprise when informed of the murder, and gave no account of his whereabouts at the time of the murder, and a stick which had been seen in the prisoner's possession that day was found clenched in the hand of the murdered man, and that a negro was seen to have an altercation with a man of about the size and form of the murdered man, near the place where the deed was committed; it was held that these circumstances went to establish the prisoner's guilt, and were wholly inconsistent with the supposition of his innocence. *Henry* v. *the State*, 11 Humph. 224.

437. Where a number of persons are jointly indicted for murder, and one is put upon his separate trial, it is proper to show that at and before the alleged murder, an unfriendly state of feeling existed between the deceased and the accused not on trial. *McMillan* v. *State*, 13 Mo. 30.

438. Where, on the trial of an indictment for murder in an affray, the defendant offered to prove that the deceased, recently before the affray, threatened to shoot the defendant; this was held inadmissible. *Ib.*

439. Evidence that the violence inflicted by the defendant was the cause of the death of the deceased, is important, though positive proof that life continued to the moment of the fatal blow, is not always essential. The presumption that a person proved to have been alive at a particular time is still so, holds good until it is rebutted by the lapse of time, or other satisfactory proof. *Com.* v. *Harman*, 4 Barr 269.

440. In a prosecution for murder, evidence that the prisoner, a short time before the murder, had set fire to the house of deceased, in the night-time, was held incompetent for the purpose of proving that the prisoner had committed the murder. *State* v. *Merrill*, 2 Dev. 269.

441. It is not competent for a prisoner indicted for murder to give in evidence his own account of the transaction, related immediately after it occurred, though no third person was present when the homicide was committed. *Bland* v. *State*, 2 Carter's Rep. 611.

442. In a trial for murder in the second degree, the State may prove previous threats made by the defendant against the person he afterwards killed, in order to show that the killing was malicious. *Stewart* v. *State*, 1 Ohio Rep. 66.

443. In order to be a part of the res gestæ, the declarations must have been made at the time of the act done, which they are supposed to characterize, and well calculated to unfold the nature and quality of the facts they were intended to explain, and so harmonize with them as obviously to

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constitute one transaction. *Munroe* v. *State*, 5 Ga. Rep. 85.

444. As a general rule, the slayer can derive no advantage from the character of the deceased for violence, provided the killing took place under circumstances that showed he did not believe himself in danger; yet in cases of doubt, whether the homicide was perpetrated in malice, or from a principle of self-preservation, it is proper to admit any testimony calculated to illustrate to the jury the motive by which the prisoner was actuated. *Ib.*

445. Naked threats, unaccompanied with personal violence, are admissible to show the reasonableness of the defendant's fears, provided a knowledge of the threats were brought home to him. *Ib.*

446. As a general rule, it is expedient to receive all the evidence which goes to show the state of feeling of the parties towards each other at the time of the act committed. And for the same purpose, testimony may be given of lawsuits existing between the parties. *Ib.*

447. Where a surgeon called to see a prisoner charged with murder, said to her, you are under suspicion of this, and you had better tell all you know; the confession was held inadmissible. *Ann* v. *State*, 11 Humph. 150.

448. So where it was said to the prisoner, it would have been better if you had told at first, the confession was rejected. *Ib.*

449. A. and B. were together; defendants came up and attacked A., who, after firing his pistol at one of them, fled; they pursued him a short distance, and immediately returned to where B. was, whom, as was inferred from circumstances, they killed, and were indicted for his murder; held, that it was competent upon the trial for the State to show the attack upon A. as immediately connected with the killing of B., and constituting part of the same transaction. *Glory* v. *State*, 8 Eng. 236.

450. There is no error in permitting the witnesses to state all that was done by the defendant at the time of the killing, as being connected with and a part of the entire transaction, either exculpatory, or as evidence of his innate depravity and malicious intention. *Reese* v. *State of Geo.*, 7 Ga. 373.

451. Evidence to show that the prisoner was in possession of land, and that the deceased was coming to commit a trespass upon it, cannot be received in justification or excuse of the homicide committed, but so far as it goes to show the state of feeling of the parties towards each other at the time of the act committed, it may be received. *State* v. *Zellers*, 2 Halst. R. 220.

452. So, with the same view, evidence may be given of lawsuits existing between the parties, but the Court will not enter into an investigation of such legal proceedings, to see whether the suits were malicious or not. *Ib.*

453. Nor will the Court inquire into the title of the land on which the act was committed, to see whether it belonged to the prisoner, or the deceased. *Ib.*

454. He who is in a state of voluntary intoxication, is subject to the same rule of conduct, and the same legal inferences, as the sober man; but where a provocation has been received, which if acted upon instantly, would mitigate the offence of a sober man; and the question in the case of a drunken man is, whether that provocation was in truth acted upon; evidence of intoxication may be considered in deciding that question. *State* v. *McCants*, 1 Spears 384.

455. The deceased said to a witness, on the evening before the morning of her death, "Mr. Freeman has killed me." And to another, about the same time, "I am dead; Mr. Freeman has killed me." The prisoner, after his arest, upon being interrogated why he had killed his wife, replied, "Because I loved her;" and said further, "I killed her because she loved another better than me." To a fellow-prisoner in jail, he said he had killed her, but if it was to do again, he would not do it. These declarations by the deceased, and admissions of the prisoner, held admissible in evidence. *State* v. *Freeman*, 1 Spears 57.

456. It is competent for one charged

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with the murder of a slave, to give in evidence that deceased was turbulent; that he was insolent, and impudent to white persons. *State* v. *Tackett*, 1 Hawks 210. The whole design of the act of 1847, to punish the offence of killing a slave, was to make the homicide of a slave extenuated by a legal provocation, manslaughter, and to punish it as such; it does not go further, and determine the degrees of the homicide, but leaves them to be ascertained by the Common Law *State* v. *Yarborough*, 1 Hawks 78.

457. "Though voluntary drunkenness cannot excuse from the commission of crime, yet when, as upon a charge of murder, the material question is, whether an act was premeditated, or done only with sudden heat and impulse, the fact of the party being intoxicated has been held to be a circumstance proper to be taken into consideration." *Swan* v. *State*, 4 Humph. 136.

458. Drunkenness does not incapacitate a man from forming a premeditated design of murder, but as drunkenness clouds the understanding, and excites passion, it may be evidence of passion only, and of want of malice and design. *Ib.*

459. If the question be whether the killing is murder or manslaughter, the defence being adequate provocation, and it be doubtful whether the blow be struck upon the provocation, or upon an old grudge, it seems proof that the prisoner was drunk when he struck the blow, is legitimate, not to mitigate the offence, but in explanation of the intent, that is, whether the blow was struck upon the provocation, or upon the old grudge, for the law only mitigates the offence to manslaughter upon adequate provocation, out of compassion to human frailty, and, therefore, though there be adequate cause for such mitigation, yet if, in point of fact, one avail himself of it to appease an old grudge, it is murder and not manslaughter; and in all such cases, the question necessarily is, whether the blow was stricken premeditatedly, or upon the sudden heat and impulse produced by the provocation, and the fact of the self-possession of the perpetrator of the crime, is very material in a conflict of proof upon the subject. *Pirtle* v. *State*, 9 Humph. 663.

460. But although drunkenness in point of law, constitutes no excuse or justification for crime, still when the nature and essence of a crime is made to depend by law upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness, as a matter of fact, affecting such state and condition of the mind, is a proper subject for consideration and inquiry by the jury. *Ib. Swan* v. *State*, 4 Humph. 136.

461. Where, upon the trial of an indictment for murder, a witness for the prosecution who resided in the same house with the accused, was examined as to her declarations and conduct for several successive days after the murder, and in the course of such examination, related his own occupation and conduct during that time, which had no apparent bearing upon the questions in issue, and the accused's counsel objected to all evidence of the independent conduct of the witness during that time, which objection was overruled, and the witness continued to relate his own conduct in connection with the accused's acts and declarations; but the bill of exceptions, instead of detailing the whole of the witness's testimony, was confined to what he said respecting himself; held that the objection was too broad, and could not be sustained—that it should have specified the particular acts of the witness which were objected to by the accused and insisted upon by the prosecution—or the whole of the witness's testimony should have been given, to enable the Court to judge what particular parts were objectionable. *People* v. *Bodine*, 1 Denio 281.

462. Where the State, in a prosecution for homicide, relies upon the grounds of express malice, the witnesses can only prove the existence of previous malice or threats, but they cannot prove the existence of the malice up to the time of the homicide, and that the prisoner acted on it in slaying; it is the province of the jury to make these inferences or not, upon the facts proved. *State* v. *Hildreth*, 9 Iredell 429.

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463. The purpose of the act of 1821, was to make the murder of a slave the same offence as the murder of a freeman at Common Law; and the words used in the first clause, particularly the term "deliberately," were used in contradistinction to the terms of the second clause, which provide for the offence of killing "in sudden heat and passion," and were not intended to restrict the murder of a slave to that class of cases characterized by express malice, or to require a different mode of proof from the Common Law; proof that the prisoner has killed a slave, is prima facie evidence that he has done it wilfully, deliberately, and maliciously. *State* v. *Cheatwood*, 2 Hill S. C. 459.

464. The deceased, on the day previous to his death, and when conscious that he was in extremis, deposed to the circumstance under which the mortal blow was given; and on the next day, when he was fully conscious of approaching death, the deposition was read over to him, and he said "that it was as nigh right as he could recollect;" held that the deposition was admissible in evidence as the dying declaration of the deceased. *Ib.*

465. In an indictment against an overseer for the murder of his employer, it is not competent for the prisoner to offer evidence of the general temper and deportment of the deceased toward his overseers and tenants. *State* v. *Tilly*, 3 Iredell 424.

466. It is not competent for a prisoner indicted for murder, to give in evidence his own account of the transaction related immediately after it occurred, though no third person was present when the homicide was committed. *Ib.*

467. Under an indictment for murder containing a count alleging the crime to have been committed by striking and cutting the deceased with a hatchet, and another count alleging it to have been committed by striking and cutting him with an instrument to the jurors, &c., unknown; held competent for the prosecution to prove that the killing was by the discharge of a pistol. *People* v. *Colt*, 3 Hill 432.

468. In a case of homicide, testimony to prove that the prisoner's wife had been in the habit of adultery with the deceased, not that he caught them in the act of adultery at the time of the homicide, is not admissible; because, if admitted, it does not extenuate the offence from murder to manslaughter. *State* v. *John*, 8 Iredell 330.

469. When a case of malicious homicide is not one of the particular cases enumerated in the statute, the proof must show that the actual death of the party slain, was the ultimate result sought by the concurring will, deliberation, malice, and premeditation of the party accused. *Bevins* v. *State*, 6 Eng. 455.

470. On the trial of an indictment for murder, the defendant cannot prove threats made by the deceased against him without also proving that such threats came to his knowledge before the killing. *Powell* v. *State*, 19 Ala. 577.

471. The deceased was poisoned on Sunday, and from that time until Tuesday evening, when she died, suffered severely from a burning pain in the stomach and bowels. On Sunday night, on Monday, and on Tuesday just before she made a declaration, she used such expressions as, "I cannot stay here"—"I must go"—"good people, I am gone"—and her medical attendant considered her in extremis from Tuesday morning until she died. Between 9 o'clock A. M. and noon on Tuesday, she asked her medical attendant if he could help her, to which he replied he thought he could; held that the inquiry and reply, taken in connection with such strong evidences of a sense of impending death, do not prove anything beyond the hope of present ease or relief, and are insufficient to exclude the declaration of the deceased. *Oliver* v. *State*, 17 Ala. 587.

472. The statement by the deceased of a distinct case no way connected with the circumstances of the death, or the immediate cause of it, is not admissible as a dying declaration. *Ib.*

473. On the trial of a prisoner for the murder of his wife, proof that the prisoner, during the year preceding the homicide, applied to the mother of a single woman for permision to visit

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her daughter, and was denied it because he was a married man, is admissible to show a motive for the commission of the crime. *Ib.*

474. And proof that the wife, for some time prior to her death, had been compelled by the prisoner to sleep in his kitchen, which was very open, and stood apart from the dwelling-house, in which he and the children lived, is admissible to show both malice and motive. *Ib.*

475. Where it appears that the deceased, from the time the wound was received, fifty-two days before his death, uniformly expressed the belief that the wound was mortal, that his medical attendant had so informed him, and that he was paralyzed from the point at which the ball entered, just below the shoulder, to his feet, a sufficient predicate is laid to authorize the admission of a statement made three days before his death, as a dying declaration. *Oliver* v. *State*, 17 Ala. 587.

476. Such circumstances, connected with the homicide, as the deceased, if living, would be allowed to testify to, may be the subject-matter of dying declarations. *Ib.*

477. The declarations of the accused, made after the commission of the act with which he stands charged, where they form no part of the res gestæ, are not admissible in his favor as original, independent testimony. *Ib.*

478. Where, on the trial of an indictment for murder, the prisoner proved a sufficient legal provocation at the time, to extenuate the homicide, it is not competent to prove, in order to show that the killing was not on the immediate provocation, but from previous malice, that the prisoner a year or a month previously had declared his intention to kill two or three men, it being admitted that the prisoner had no reference in such threats to the deceased as one of these men. *State* v. *Barfield*, 7 Iredell 299.

479. Where it appears, upon a trial for murder, that the deceased came to her death in part by strangulation with a rope, and the prisoner, while before the examining magistrate, but before the examination had begun, said—in reply to a bystander, who had a rope in his hand, "that is not the rope," upon which the magistrate observed to the prisoner, "keep that to yourself," it was *held* that the prisoner's declaration was admissible in evidence against him, whether he desisted from speaking further of his own accord or at the suggestion of the magistrate. *State* v. *Swink*, 2 Dev. & Batt. 9.

480. Where a man who is at full liberty to speak, and not in the course of a judicial inquiry, is charged with a crime, and remains silent, that is, makes no denial of the accusation, either by word or gesture, his silence is a circumstance which may by left to the jury to be considered, together with other circumstances, in deciding upon his guilt. *Ib.*

481. In the course of a trial for murder, evidence was proposed to be offered, that the deceased was a man in the habit of drinking to excess whenever he could get rum, and that drinking spirit of any kind uniformly had an effect to make him exceedingly quarrelsome, savage and dangerous; that he had, when in liquor, frequently threatened the life of his wife, and others, and that the prisoner had more than once been called upon to protect his wife and family from his drunken fury, and that his habits and character were well known and understood by all about him. Held that the evidence was incompetent. *State* v. *Field*, 2 Maine 244.

482. In a prosecution for murder, where it appeared that the deceased sought to gain admittance into a house of ill-fame by violence, and against the will of the keeper thereof, who made an attack upon the aggressor, and death ensued, *it was held* that the testimony that threats had been made a week previous to the assault by the persons who had broken into the house, that they would return some other night and break in again, might be admissible, and submitted to the consideration of the jury, under the instruction of the Court, although *it seems* that for the *rejection* of such evidence, where it was not shown that the deceased was of the party who made the threats, a new trial would not be granted. *People* v. *Rector*, 19 Wend. 569.

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483. The admission of dying declarations, in any case, is an exception to the general rule of evidence. It is only permitted in cases of homicide, and the exception stands upon the ground of the public necessity of preserving the lives of the community, by bring manslaughterers to justice. *McDaniel* v. *the State*, 8 Smed. & Marsh. R. 401.

484. It is essential to the admissibility of dying declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were made under a sense of impending death; but it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears, in any mode, that they were made under that sanction, whether it be directly proved, by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendant, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to, in order to ascertain the state of declarant's mind. *Ib. People* v. *Green*, 1 Park. Crim. 11; *People* v. *Knickerbocker*, 1 Parker's Crim. R. 302; *Hill* v. *Com.*, 2 Gratt. 594.

485. Where the nature and existence of the crime is made by law to depend on the condition of the criminal's mind at the time, and with reference to the act done, drunkenness may be a proper subject for the consideration of the jury, not to extenuate or mitigate the offence, but to show that it was not committed. *Clark* v. *State*, 8 Humph, 671.

486. In an indictment for murder in the first degree, the chief ingredient in the offence, consisting in a deliberate, formed design to take life, evidence of drunkenness to an extent which absolutely incapacitates the defendant from forming such a deliberate and premeditated design, is admissible to the jury, to show the offence has not been committed. *Ib.*

487. On the trial of an indictment for murder, the question before the jury was, the identity of the prisoner with the murderer. The State offered in evidence the registers of three several hotels, each from a different city, and each containing a different name, accompained by parol proof that the three names were written by the prisoner, and he was known by them respectively in the three cities; and they were admitted, without objection from the prisoner. It was held, that in considering the question whether the three names were written by the same person, the jury might compare the hand writings in the several registers. *Crist* v. *State*, 21 Ala. 137.

488. On a trial for murder, there is proof that the prisoner maltreated his wife, and forced her to abandon his house and seek refuge under the protection of the deceased; which was objected to, and it was argued, ought to have been excluded; but the Court held, that the protection afforded by the deceased was a most aggravating offence to the prisoner, and therefore exceedingly proper proof of malice prepense on his part. *Stone* v. *State*, 4 Humph. 27.

489. Where a person is killed by another by a pistol shot, and the slayer formed the intention to shoot but one moment before the firing; held that this was evidence of express malice, provided that there was no assault upon the person killing, or other attempt to do harm by a violent personal injury, by the deceased. *Mitchum* v. *State*, 11 Ga. 615.

490. To make the opinion of experts admissible as evidence, they must be founded on a given state of facts, which should include all the facts relied upon to establish the theory claimed. *Lake* v. *People*, 1 Parker's Crim. 495.

491. It is in the discretion of the Attorney General, on the trial of a capital case, to introduce on the behalf of the State only such witnesses as he may think proper. *State* v. *Stewart*, 9 Iredell 342.

492. Where, on a prosecution for murder, it appeared that the father of the accused had been arrested and examined before a magistrate, on a complaint against him for the same murder, and that on such examination, one of the accused, who was also at the same time under arrest for the murder, came forward as a volunteer witness, and

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testified on such examination; it was held that his statement, made under oath, on such examination, were admissible in evidence against him. *People* v. *Thayers*, 1 Parker's Crim. 595.

493. On a prosecution for murder, it is competent for the State to show what the accused testified to before a coroner's jury, at an inquest held on the body of the deceased, though it appears the accused, with other persons, were at the time under arrest for the alleged murder, the inquiry on such inquest not having been as to the guilt of the accused, but being general, to ascertain, if possible, who was the murderer. *Ib.*

494. On a trial for murder, where there was evidence that the accused shot the deceased as he was coming up the street towards the accused's office; held that the accused's declaration to the witness, "Yonder comes M. (the deceased), with his yauger," before shooting, was competent to be given in evidence; but not the statement which followed: "He intends to shoot, or kill me;" held, also, that a statement of the accused, to a witness, before the shooting, that he saw the conduct of the deceased that morning, which conduct was testified to by the witness, as being violent and threatening, as he passed with his gun, was admissible, as showing the accused's cause of alarm. *Monroe* v. *State*, 5 Ga. 85.

495. The prisoner offered to prove by the son of the deceased (who had been sworn for the prosecution), that he, the witness, and the widow of the deceased, who had also been examined by the State, had employed counsel to assist the attorney prosecuting for the State, in conducting the prosecution against the prisoner, and had agreed to pay him a fee conditional on conviction, the evidence was objected to. The Court admitted proof of the employment of the assistant counsel, but rejected the testimony as to the character of the fee; held that there was no error in the course pursued by the Court. *Beauchamp* v. *State*, 6 Blackf. 299.

496. There is in every homicide implied malice, but facts and circumstances in alleviation, excuse, or justification, may be adduced, the truth of which it is the province of the jury to determine; but whether, if true, they be sufficient to rebut the implied malice, is a matter of law to the Court. *Ib.*

497. When provocation is relied upon in defence, the nature of the weapon used by the prisoner in producing death, is always an important consideration, as tending to show the presence or absence of malice. If a deadly weapon, that is, one likely to produce death, was intended, it is evidence of malice. *Ib.*

VI. Evidence requisite to sustain an Indictment for Murder, &c.

498. Where two persons are indicted for murder, and he who is charged with having given the mortal blow is proved to have only been present aiding and abetting, and the blow is proved to have been given by another; held that the indictment is supported; for it is in law the stroke of all. *State* v. *Anthony*, 1 McCord 285.

499. As to what evidence will work out a case of murder in the first degree in Virginia, see *Bennett's case*, 8 Leigh 745.

500. To constitute lying in wait, three things must concur, to wit, waiting, watching and secrecy; and that these facts must be established beyond a reasonable doubt, to authorize the conclusion that there was such lying in wait. *Riley* v. *State*, 9 Humph, 647.

501. Where it is alleged in the indictment that the death was caused by the use of a specified metallic instrument, it is not necessary that the proof should show that it was done by that particular instrument. It will be sufficient if proved to have been done by some other one, if the nature of the violence, and the kind of death occasioned by it, be the same. *State* v. *Smith*, 32 Maine 369.

502. Where, in an indictment for murder, the crime is alleged to have been committed with a premeditated design to effect the death of the person killed, the premeditated design, or express malice, must be proved, or the prisoner cannot be convicted, although

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the act be also alleged to have been committed with malice aforethought; the description of the character of the crime, viz., its perpetration with a premeditated design, cannot be rejected as surplusage. *People* v. *White*, 24 Wend. 503.

503. In an indictment for murder, the designation of the person slain as a free negro, though unnecessary, is matter of description, and must be proved as alleged; and proof that he was a mulatto, will not sustain the allegation. *Felix* v. *State*, 18 Ala. 720.

504. To sustain a conviction for murder in the first degree, under the 3d section of the act of 1829, ch. 23, proof must be adduced to satisfy the mind that the death of the party slain was the ultimate result sought, by the deliberate and premeditated will of the assailant. *Clark* v. *State*, 8 Humph. 671.

505. On the trial upon the general charge of murder, the same proof must be made as on the other charge of killing in heat and passion, with the additional facts of malice and deliberation. *State* v. *Gaffney*, Rice 431.

506. The instrument by which the death is caused, need not necessarily be strictly proved as laid in the indictment; and proof of its having been caused by any other instrument capable of producing death in a similar mode, satisfies the indictment in that respect. *Goodman* v. *State*, 5 Smed. & Marsh. 510.

507. Where an indictment charged that William R. Morris was murdered by the prisoner, and the testimony was that W. R. Morris was slain by him, it was held that the proof of identity was properly left to the jury; and that a verdict of guilty found by them ought not to be disturbed. *Mitchum* v. *the State*, 11 Ga. 615.

508. Where, on the trial of an indictment for murder, before the Superior Court, in the County of Stewart, the proof was that the crime was committed in the house of the witness at Florence, Stewart County; it was held that the proof was satisfactory that the crime was committed within the jurisdiction of the court. *Ib.*

509. Where, on the trial of an indictment for murder, one witness testified "that the prisoner stooped down, and as witness heard a rattling on the floor, and did not see the knife afterwards, he supposed that prisoner picked it up. Prisoner rose, with a six-barrelled pistol in his hand, presented it at the breast of deceased, not more than six inches distant, took deliberate aim, long enough to count ten or fifteen, before he fired. He fired the pistol about the right nipple; deceased brought a groan, his face contracted, he fell upon the floor, and in about five minutes expired." It was held that the killing was clearly established. *Ib.*

VII. Evidence of Character.

510. A citizen, of irreproachable character, is found on a public highway, standing over the body of a dead man, with a bloody weapon in his hand, and declares that the deceased attempted to rob him, and he took his life. In such a case, there could be no doubt as to the fact, that the homicide was committed by the defendant; and yet his general good character, as a peaceable man, would be very important on his trial, in order to show the grade of homicide when charged with the offence of murder. *Davis* v. *State*, 10 Ga. Rep. 105.

511. On a trial for murder, evidence of the general character and habits of the deceased, as to temper and violence, cannot be received. The only exception to this rule, if there be one, is where the whole evidence as to the homicide is circumstantial. *State* v. *Barfield*, 8 Iredell 344.

512. Where evidence touching the general character of the party is admitted, it ought manifestly to bear reference to the charge against him; but this evidence of good character, in relation to the particular crime charged, seems to be only admissible in cases where the guilt of the party accused is doubtful; the prosecutor may introduce opposing testimony, and the presumption arising from such evidence of general character is said to be of

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little weight. *McDaniel* v. *State*, 8 Smed. & Marsh. 401.

513. On a trial for murder, the prisoner produced a witness, who gave evidence as to his character, and made reference in his testimony to rumors that had followed him as to his character in a neighborhood where he had formerly lived; upon which, the counsel of the State asked the witness, "Do you know the general character of the prisoner in his neighborhood, as to his former conduct?" held that the question on the part of the State was proper. *Beauchamp* v. *State*, 6 Blackf. 299.

514. The law is that, in prosecutions for crimes, the prisoner may call witnesses to his general character, and afterwards the State may rebut their testimony by proving his general character to be bad. *Ib.*

515. It is usual to put the question as to the general character of the prisoner in such a form as to have reference to the particular crime with which he is charged. *Ib.*

516. The prisoner having proved that a witness for the prosecution had made former statements inconsistent with her testimony, the State was permitted, against the objection of the prisoner, to prove that the witness had also made statements corresponding with it. *Ib.*

517. If a witness be impeached by proof of previous statements inconsistent with his evidence, he might be supported, by showing other statements made by him, agreeing with it. *Ib.*

VIII. Circumstantial Evidence.

518. The principles of circumstantial evidence explained. *Jim* v. *the State*, 5 Humph. 145.

519. The distinction between direct and circumstantial evidence is this: direct or positive evidence, is when a witness can be called to testify to the precise fact which is the subject of issue on trial; that is, in case of homicide, that the party accused did cause the death of the deceased, whatever may be the kind or force of the evidence, this is the fact to be proved; but suppose no person was present on the occasion of the death, and of course that no one can be called to testify to it, it is wholly unsusceptible of legal proof. Experience has shown that circumstantial evidence may be offered in such a case; that is, that a body of facts may be proved, of so conclusive a character as to warrant a firm belief of the fact, quite as strong and certain as that on which discreet men are accustomed to act in relation to their most important concerns. It would be injurious to the best interests of society, if such proof could not avail in judicial proceedings; if it was necessary always to have positive evidence, how many criminal acts committed in the community, destructive of its peace and subversive of its order and security, would go wholly undetected and unpunished? *Com.* v. *Webster*, 5 Cush. 295.

520. Strong circumstantial evidence, in cases of crimes of murder, committed for the most part in secret, is the most satisfactory of any from whence to draw the conclusions of guilt; for men may be seduced to perjury by many base motives, to which the secret nature of the offence may sometimes afford a temptation; but it can scarcely happen that many circumstances, especially if they be such over which the accuser could have no control, forming together the links of a transaction, should all unfortunately concur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous. *Ib.*

521. In a case of circumstantial evidence, where no witness can testify directly to the fact to be proved, it is arrived at by a series of other facts, which, by experience, have been found so associated with the fact in question, that, in relation of cause and effect, they lead to a satisfactory and certain conclusion; as where foot-prints are discovered after a recent snow, it is certain that some animated being has passed over the snow since it fell, and from the form and number of the foot-prints, it can be determined with equal certainty whether they are those of a man, a bird, or a quadruped. *Ib.*

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522. Circumstantial evidence is founded on experience, and observed facts and coincidences, establishing a connection between the known and proved facts, and the fact sought to be proved. The advantages are, that as the evidence commonly comes from several witnesses and different sources, a chain of cirstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected, and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which, they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence. *Ib.*

523. It is manifest that great care and caution ought to be used in drawing inferences from proved facts. It must be a fair and natural, not a forced or artificial conclusion; as when a house is found to have been plundered, and there are indications of force and violence upon the windows and shutters, the inference is that the house was broken open, and that the persons who broke open the house plundered the property. It has sometimes been enacted by positive law, that certain facts proved, shall be held to be evidence of another fact; as where it is provided by statute, that if the mother of a bastard child gives no notice of its expected birth, and is delivered in secret, and afterwards is found with the child dead, it shall be presumed that it was born alive, and that she killed it; this is a forced, and not a natural presumption, prescribed by positive law, and not conformable to the rule of the Common Law. The Common Law appeals to the plain dictates of common experience and sound judgment; and the inference to be drawn from the facts must be a reasonable and natural one, and, to a moral certainty, a certain one. It is not sufficient that it is probable only, it must be reasonably and morally certain. *Ib.*

524. The next consideration is, that each fact which is necessary to the conclusion must be distinctly and independently proved by competent evidence, every fact necessary to the conclusion; because it may, and often does happen, that, in making out a case on circumstantial evidence, many facts are given in evidence, not because they are necessary to the conclusion sought to be proved, but to show that they are consistent with it, and not repugnant, and go to rebut any contrary presumption. *Ib.*

525. All the facts proved must be consistent with each other, and with the main fact sought to be proved; when a fact has occurred with a series of circumstances preceding, accompanying, and following it, it must be known that these must all have been consistent with each other, otherwise the fact would not have been possible. Therefore, if any one fact necessary to the conclusion, is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstantial evidence upon which the inference depends; and, however plausible or apparently conclusive the other circumstances may be, the charge must fail. *Ib.*

526. The circumstances, taken together, should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused, and no one else, committed the offence charged. It is not sufficient that they create a probability, though a strong one; and if, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for on any hypothesis which does not include the guilt of the accused, the proof fails. It is essential, therefore, that the circumstances, taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis. The evidence must establish the corpus delicti, as it is termed, or the offence committed as charged; and, in case of homicide, must not only prove a death by violence, but must, to a reasonable extent, exclude the hypothesis of suicide, and a death by the act of any other person. This is to be proved beyond reasonable doubt. *Ib.*

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527. If, upon such proof, there is reasonable doubt remaining, the accused is entitled to it by an acquittal. For it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. *Ib.*

528. To establish premeditated malice, some affirmative evidence should be introduced by the prosecution; but the evidence as to this, as well as all the other ingredients of crime, or other thing connected with human transactions, may be either positive or circumstantial. *State* v. *Turner*, Wright 20.

529. Circumstantial evidence is often the most convincing. It is difficult to fabricate the connected links in a chain of circumstances, so as to preserve the semblance of truth. It is more easy, where perjury is intended, to fabricate positive facts. When the circumstances detailed are real and natural, they will correspond with each other; when they are inconsistent with each other, or irreconcilable with admitted or proven facts, there results a plain and almost certain inference that artifice has been resorted to, and that the tale is not true. All the evidence, whether positive or circumstantial, should be deliberately weighed, with great care and caution. *Ib.*

IX. Insanity—Evidence of.

530. Where the question to be decided by the jury is the sanity of a prisoner, both his acts and declarations are evidence for the purpose of ascertaining the state of mind of the actor. *Lake* v. *People*, 1 Park. Crim. Cas. 495.

531. Where, on a prosecution for murder, the defence set up is insanity, evidence may be given of the acts and declarations of the accused, as well before and after, as at the time of the homicide. *Ib.*

532. But it is not competent to prove the effect which the accused's conduct had on the mind of another person on the day before the homicide, nor the acts nor declarations of the party killed, then made, in the absence of the accused. The previously expressed opinion of the party killed, is not admissible evidence on the question of insanity, nor would such person, if living, be allowed to testify such opinion. *Ib.*

533. If a medical witness has heard only a portion of the testimony on which the accused's counsel relies to establish his defence, it is erroneous to allow such witness to give his opinion as to the accused's sanity, where such opinion is founded on the portion of the testimony so heard by him. *Ib.*

534. Every man is presumed to be sane, till the contrary be proven. The burthen of proof of insanity, to overcome such presumption, rests upon the prisoner. *Ib.*

535. On a trial for murder, where the defence of insanity is set up, and is left as a question of doubt upon the evidence, the Court ought not to instruct the jury that insanity has been proved. *State* v. *Stark*, 1 Strobh. 479.

536. The jury must be satisfied, in order to acquit a prisoner on the ground of insanity, that he was insane at the time of the act, and that actual delusion existed at the time. Mere want of memory is not enough. *Ib.*

537. Where the homicide is proved, the overwhelming barbarity of the act will not be deemed as affording a presumption of insanity. *Ib.*

538. Insanity, or a fixed habitual madness, which is the result of long-continued drunkenness, will excuse; but insanity, or a want of reason, which is the immediate result of intoxication, affords no excuse for crime. *Cromwell* v. *State*, 1 Martin's & Yerg. 147.

539. Insanity is a competent excuse in case of murder. In general, insanity is an excuse for the commission of the crime, because the party has not the possession of that reason which includes responsibility. An exception is when the crime is committed by a party while in a fit of intoxication, the law

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not permitting a man to avail himself of the excuse of his own gross vice and misconduct to shelter himself from the legal consequence of such crime. But the crime must take place and be the immediate result of the fit of intoxication, and while it lasts, and not a remote consequence superinduced by the antecedent exhaustion of the party, arising from gross and habitual drunkenness. However criminal, in a moral point of view, such an indulgence is, and however justly a party may be responsible for his acts arising from it to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. *U. States* v. *Drew*, 5 Mason 28.

X. Charging the Jury in cases of Murder and Manslaughter.

540. Where, in a case of murder, the homicide is admitted, and the question is, as to what grade of the offence the defendant is guilty, or whether it is justifiable homicide; it was held to be erroneous in the Court to charge the jury, "that a reasonable doubt was, when it was doubtful whether a homicide had been committed, and if committed, whether the accused had been the slayer. *Davis* v. *the State*, 10 Ga. 101.

541. In case of murder, where the defence is justifiable homicide, or where the defence insists on any inferior grade of homicide to that of murder, it is the province and duty of the Court to give to the jury the definition of each grade of homicide, as regulated by the penal code, and then to submit to the jury to find the defendant guilty of such grade of the offence as the evidence will warrant, or to find him not guilty. It was held to be erroneous for the Court to charge the jury that they must find the defendant guilty of murder, or voluntary manslaughter, or not guilty; thereby excluding from their consideration involuntary manslaughter. *Ib.*

542. It is erroneous for the presiding judge to remind the jury of the existence of the Supreme Court, to which the accused could carry his case up, if testimony offered in his behalf had been improperly rejected; such remark, however well-intended, being calculated to lessen their sense of their own responsibility, and at the same time to convey the idea that the evidence already before them was not sufficient to acquit the defendant. *Monroe* v. *State*, 5 Ga. 85.

543. It is not erroneous for the Court to refuse to instruct the jury, that they, in capital crimes, are judges of the law, as well as of the fact. *Pierson* v. *State*, 12 Ala. 149.

544. The fact that the prisoner, after the killing, wipes the knife with which the fatal wound is inflicted, is not so important, or so insignificant, as to warrant the prisoner in calling for the charge that it is not evidence of murder, or to authorize the Court in instructing the jury that it was. It is a fact evincing coolness and self-possession, and, as such, is proper to be left to the jury, in connection with the other circumstances of the case, for them to determine whether the killing was with malice aforethought, or on sudden heat and passion. *Ib.*

545. The Court, in its instruction to the jury, on a trial for murder, has no right to assume that the name of the party murdered is stated correctly in the indictment, that being a question of fact for the jury. *The State* v. *Dillihunty*, 18 Miss. (3 Bennett) 331.

546. In a case of murder, where the Court in charging, mentioned that the prisoner's counsel had admitted that "he was guilty either of murder or voluntary manslaughter, and they must find him guilty of the latter," and added, that was for the jury to decide, and if they were not satisfied of his guilt, beyond a reasonable doubt, they must acquit him. Held that the effect of this charge, taken as a whole, was to leave guilt or innocence of the prisoner to the jury, to be determined by the evidence. *Anderson* v. *the State*, 14 Ga. 709.

547. Where, on the trial of an indictment for murder, there is any doubt as to the grade of the offence, it is the duty of the Court clearly to define the

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several grades of homicide, and leave it to the jury to find from the evidence of what particular grade the defendant is guilty. *Crawford* v. *the State*, 12 Ga. 142.

548. As to whether the facts proved, make out a case of murder or voluntary manslaughter, it is a question for the consideration of the jury, and the Court will not interfere, except in a clear case. *The State* v. *Peter*, Ga. Decis. (Part 1) 46.

549. It is the province of the Court to explain what kind of killing constitutes murder of the first degree, under the statute. *Ib.*

550. As to whether an instrument with which one person has killed another is a deadly weapon, is a matter for the Court to decide; and if it be questionable whether it would probably cause death, the jury should be instructed to find for manslaughter only. *Com.* v. *Morler*, 4 Barr 264.

551. It is not necessary that the judge should embrace involuntary manslaughter in his charge to the jury, on a trial for murder. *Mc Whirt's case*, 3 Gratt. 549.

552. It is the duty of the judge in a case of homicide, to explain the law to the jury, leaving to them the exclusive decision as to the truth or falsehood of the facts proved. *The State* v. *Walker*, 2 Tayl. 230.

553. It as error on the trial of a defendant, indicted for murder, to instruct the jury that they must find him guilty of murder, of voluntary manslaughter, or not guilty. *Davis* v. *State*, 10 Ga. 108.

554. It is not error to charge a jury "to take into consideration the manner by which, and purposes for which, the prisoner had the possession of the knife with which he committed the homicide." *Stewart* v. *State*, 1 Ohio 66.

555. If, during the quarrel immediately preceding the fight between the prisoner and the person slain by him, the deceased charged that the prisoner had "for some time been mad at him," and stated facts to sustain his charge, but which were denied at the time by the prisoner; it is the duty of the Circuit Court, on the trial, to instruct the jury, that the statement of facts by the deceased, is no evidence of their truthfulness, and that such statement should only be regarded by them as part of the res gestæ, to show under what circumstances the conflict between the parties commenced. *Haile* v. *State*, 1 Swan 248.

556. The evidence was conflicting, as to whether the deceased came to his death from the effects of a wound inflicted by the prisoner, or from the improper treatment of it by the attending physician in sewing it up. The prisoner's counsel requested the Court to charge that if the wound was not mortal, and it clearly appeared that the deceased came to his death from the erroneous treatment, and not from the wound, they must acquit the prisoner. This charge the Court gave, with this qualification, "that if the ill treatment relied on, was the sewing up of the wound, the defendant would not be excused, if otherwise guilty." Held that the legal proposition asserted by the qualification to the charge, was erroneous. (Goldthwaite, J., dissenting.) *Parsons* v. *State*, 21 Ala. 300.

557. It is error in the Circuit Court, to instruct the jury in a prosecution for murder, that "if the prisoner and the deceased engaged in a fight, neither having a deadly weapon to be used in the conflict, but, in the progress of the combat, the prisoner's reason being temporarily dethroned, and acting upon the passion thus *aroused*, he slew the deceased, the killing would but be manslaughter." From such language as this the jury may infer that no sudden heat, short of the dethronement of reason, will mitigate the killing to manslaughter, and thus be misled. *Haile* v. *State*, 1 Swan's Rep. 248.

558. When the Court charges the jury that reason must be dethroned, and that there must be a whirlwind of passion in order to mitigate a killing to manslaughter; held that such charge was calculated to exclude from the jury the possibility that a sane man, having sense and reason, could, excited by anger and heat of blood, be guilty of manslaughter. *Young* v. *State*, 11 Humph. 200.

559. The Court, on a trial for murder, having charged the jury as to the

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different grades of homicide, and the evidence requisite to support them, is not bound, on the motion of either party, to repeat the same charge in substance, though varied in terms, where refusing to do so could work no injury to the party asking it, and compliance would only confuse the jury. *Stanton* v. *State*, 8 Eng. 317.

560. As the party who moves an instruction has the right to have it distinctly given or refused, in the language he puts it, so he should be bound by his election of the terms used; and if an entire instruction asked for be good in part, and objectionable in part, it is not the duty of the Court to separate the instruction, and it will not be error if the entire instruction be overruled. *Ib.*

561. Abstract instructions should not be given; and where the prisoner asks an instruction which would be less favorable to him than one given by the Court, though it may be law, yet he cannot complain at its refusal. *Ib.*

562. If, on the trial of a slave for a capital offence, the counsel for the prisoner does not ask the Court to give to a mulatto witness introduced on the part of the State, the charge required by the act of Assembly, Rev. Stat. ch. 111, § 51, advantage cannot afterwards be taken of the omission of the judge to make such charge. *State* v. *Stewart*, 9 Iredell 342.

563. Whether such a charge was or was not given cannot appear upon the record, unless placed there by the exceptions of one or the other party. *Ib.*

564. Where a prisoner on his trial upon an indictment for murder offers no proof of a necessity to take the life of the person killed, or of an attempt to decline or discontinue the combat, or of an inability to do so, he is not entitled to ask the Court to charge the jury that although the prisoner was mistaken in believing there was reasonable ground to apprehend a design on the part of the deceased to do him some great personal injury, and that there was imminent danger of such design being accomplished; yet that he was justified in killing the deceased if he believed himself to be in such danger. Per Mullett, J. *People* v. *Shorter*, 4 Barb. 460.

565. The prisoner, in such a case, has no right to ask the opinion of the judge upon a mere hypothetical proposition. *Ib.*

566. In an indictment for homicide, it is the province and duty of the Court to inform the jury upon the supposition of the truth of the facts, as agreed on, or found by the jury. *State* v. *Hildreth*, 9 Iredell 429.

567. Where the prisoner prayed for instructions, only on the ground that the deceased did intend to kill him, and not on the ground of a reasonable belief on his part that the deceased did so intend, the Court did not err in omitting to instruct the jury on the latter point. *State* v. *Scott*, 4 Iredell 409.

568. Where the Court was asked to instruct the jury, "that if they believed the deceased had taken the horse of the accused, and was riding him off beyond the reach of probable re-capture, and that the accused, after having repeatedly hailed him, slew the trespasser, he is not guilty of murder;" held that the charge was erroneous, and that if, under such circumstances, the killing was with a deadly weapon, it would be murder. *McDaniel* v. *State*, 8 Smedes & Marsh. 401.

569. Where, on a prosecution for murder, the evidence was circumstantial, and the judge instructed the jury that fair character was important to the prisoner, and that they were to inquire, "*why it was that she had given no evidence of her general character?*" held that such instruction suggested the inference that her character was bad, and was erroneous. *Bodine* v. *People*, 1 Denio 281.

570. Where, on the trial of an indictment for murder, there was evidence that a murder had been committed, and that the house in which the dead body was, had afterwards been set on fire, under such circumstances as to raise a suspicion that the same was done by the perpetrator of the murder, to conceal that offence, and the evidence left it uncertain whether the accused was in the vicinity of the house when the fire was set, and the Court charged the

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jury that if the prisoner *might* have been at the scene of the fire, "the *onus* was cast upon her to get rid of the suspicion that thus attached to her," and that she was bound to show where she was at the time of the fire; held erroneous. *Ib.*

571. It is not error in the judge to tell the jury, on the trial of an indictment for murder, that "if they believed from the evidence that the prisoner had malice against the deceased on the morning of the day when the killing occurred, and there was no evidence that such malice was abandoned, even if the prisoner accidentally fell in with the deceased, the question of manslaughter could not arise, as the malice would exclude provocation," it being clear, from the context of the charge, that the *malice* spoken of was *the purpose to kill or do great bodily harm to the deceased.* *State* v. *Tilly*, 3 Iredell 424.

572. A charge, "that although, *in general*, mere words might not be sufficient provocation to reduce the crime of murder to manslaughter, yet the jury were the judges whether the provocation, if more than by mere words, was sufficient," should be refused, as calculated to mislead the jury. 1st. Because it leads them to infer that *mere words* may, in *some* cases, thus reduce the offence. 2d. Because it assumes that it is not the province of the Court, but of the jury, to pass upon the legal sufficiency of the provocation. 3d. Because, there being uncontradicted evidence of express malice, no degree of provocation could extenuate the offence, and the charge, in that view of the case, was inapplicable to the facts. *Felix* v. *State*, 18 Ala. 720.

573. Where the judge, in charging the jury upon the subject of presumptive evidence, in a capital case, stated that there were three grades, to wit: slight, probable, and violent; that the jury was not to consider the first at all, but that they might act upon the two others, though the testimony must be such as to satisfy them beyond a reasonable doubt of the guilt of the prisoner; and further, that the circumstances must be as clear and as strong as to the testimony of one credible and respectable witness; it was *held* that taking the whole charge together, there was nothing in it of which the prisoner had a right to complain. *State* v. *Swink*, 2 Dev. & Batt. 9.

574. In an indictment for murder, the presiding judge instructed the jury in the following words: "If you find the defendant guilty of manslaughter, it must be of voluntary manslaughter. Your verdict must find the defendant guilty of murder, of voluntary manslaughter, or not guilty; held that the charge was erroneous. *Holder* v. *State*, 5 Ga. R. 441.

575. On the trial of an indictment for *murder*, where there is no pretence that the accused killed the deceased while engaged in a riot, or other misdemeanor, not amounting to a felony, by misadventure, but that death ensued in consequence of an intentional violence upon the person of the deceased, whether the accused intended to kill or not, he is not entitled to have the jury instructed that they cannot convict of murder, if they should come to the conclusion that the mortal wound was inflicted in committing, or attempting to commit, an offence, which of itself is of an inferior grade to felony. *People* v. *Rector*, 19 Wend. 569.

576. Where the Court instructed the jury, that if homicide be committed in a sudden heat, by the use of a deadly weapon, no provocation given by mere words, will reduce the killing to manslaughter: that "the question should never be, was there anger merely? but was there legal provocation to such anger?" that the use of a dangerous weapon under a provocation by words only, or under no provocation, was always evidence of malice aforethought; that to constitute malice aforethought, it was only necessary that there should be formed a design to kill, and that such design might be conceived at the moment the fatal stroke was given, as well as a long time before; that malice aforethought means the intention to kill; and that when such means are used as are likely to produce death, the legal presumption is that death is intended; held that the instruction was proper. *Beauchamp* v. *State*, 6 Blackf. 299.

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577. Where the counsel for the prisoner asked the Court to charge the jury, "that unless the jury find from the evidence, that Boles, with a premeditated design, or in some act dangerous to others, evincing a depraved mind, regardless of human life, killed Donahoo, they cannot find a verdict of guilty for murder;" held that the charge asked by the counsel of the prisoner was intended to show what was necessary to constitute the crime of murder; that it was couched in the language of the statute, and was improperly refused. *Boles* v. *State*, 9 Smed. & Marsh. 284.

578. On a trial for murder, it is material to instruct the jury what, under the law, constituted murder. *Watson* v. *State*, 5 Mo. 497.

579. Where the Court charged, in a case of murder, that every homicide is presumed to be committed with malice aforethought, and it devolves upon the prisoner to prove the circumstances which excuse the act; held that this charge is too broad and unrestricted. It contains only a part of the rule, as usually stated in the books, and omits the important addition "unless they arise out of the evidence produced against him." *McDaniel* v. *State*, 8 Smedes & Marsh. 401.

580. Under the Revised Statutes of New York, declaring the killing of a human being to be murder, when done from a "premeditated design" to cause the death of the person killed, it is erroneous for the Court to charge the jury, that the act must be murder, if the intent to kill was formed at the instant of striking the fatal blow. *Sullivan* v. *the People*, 1 Parker's Crim. Rep. 347.

581. Where, on a prosecution for murder, it appeared that the accused and the deceased had been engaged in a fight or scuffle in the public highway, and the accused, after knocking down the deceased, took from the stone wall a large stone, and with both hands threw it upon the head of the deceased, so as to break in his skull, and cause his death, and the presiding judge charged the jury, that if they believed the deceased came to his death by a blow from the stone thrown against him, the case was capable of being regarded as a case of murder, under the second subdivision of the section defining murder; the charge was held to be erroneous, and a new trial was granted. *The People* v. *Johnson*, 1 Parker's Crim. Rep. 291.

582. It was in evidence that the deceased came to his death by means of a discharge, by the accused, of a shot-gun, loaded with shot between the size of squirrel-shot and small-sized buck-shot, commonly known as duck-shot. Upon this evidence the Court was desired to charge the jury, "that if they believed, from the evidence, that the deceased came to his death by means of the shot aforesaid, and not by one leaden bullet, discharged from said shot-gun as alleged in the bill of indictment, they must find a verdict for the accused." This charge the Court refused, but charged the jury, "that the said proof was sufficient to sustain the said bill as alleged in the indictment;" held that the charge requested was properly refused. *Goodwyn* v. *State*, 4 Smedes & Marsh. R. 520.

XI. Malice.

583. The legal meaning of malice aforethought, in cases of homicide, is not limited to homicide committed in cold blood, with settled design and premeditation, but applies to all cases of homicide, however sudden the occasion, where the act is done with such cruel circumstances as are ordinary symptoms of a wicked, depraved, and malignant spirit. *U. States* v. *Cornell*, 2 Mason 91.

584. Malice may be inferred from the nature of the instrument and from the want of legal provocation; and the temper of the prisoner cannot be inquired into. *Ib.* *State* v. *Lipsey*, 3 Dev. 485.

585. Malice, and a design to kill, are essential ingredients in the crime of murder, in either degree, while the first ingredient is altogether excluded from the crime of manslaughter; the intention or design to kill is also excluded from the crime of manslaughter

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where the death results from an unlawful act, designed to effect another object; but if there arise a sudden quarrel, and one, under great provocation, instantly kill another intentionally, it would be manslaughter. *State* v. *Turner*, Wright 20.

586. Malice is the dictate of a wicked, depraved and malignant heart. It is not necessary that the malignity should be confined to a particular ill-will towards the person injured; it is evidenced by any act which springs from a wicked and corrupt motive, attended by circumstances indicating a heart regardless of social duty and bent on mischief. *Ib.*

587. Malice is said to be express where the cruel act is done with a sedate and deliberate mind—with settled and formed purpose. This kind of malice is generally evidenced by the circumstances preceding and attending the transaction complained of, as by threats, menaces, former grudges, lying in wait, concerted schemes to do injury, or by an unusual degree of cruelty attending the act. *Ib.*

588. Malice is implied where the killing is sudden, without any or great provocation; and, also, where the act done necessarily shows a depraved heart, as the giving of poison. *Ib.*

589. If the act of a person which produces the death of another, be attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit, the law, from these circumstances, will imply malice, without reference to what was passing in the person's mind at the time he committed the act. *State* v. *Smith*, 2 Strobh. 77.

590. There is a plain distinction between express and implied malice; the one is characterized by a sedate, deliberate intention and formed design, evidenced by external circumstances; the other is the offspring of sudden impulse. *Anthony* v. *State*, 13 Smedes & Marsh. 263.

XII. Presumption in cases of Murder, &c.

591. Where, on the trial of a homicide, malice was inferred from all the circumstances of the killing, and the prisoner then put in evidence to some extent rebutting this presumption; it was held that the State could then prove express malice. *Bird* v. *State*, 14 Geo. 43.

592. Where the act of killing is committed deliberately, and is likely to be accompanied with dangerous consequences, the malice requisite to constitute murder will be presumed, for the law infers that the natural or probable effects of any act deliberately done, were intended by its actor. *Com.* v. *Drew*, 4 Mass. 391.

593. Where death does not occur within a year and a day after a wound is inflicted, the presumption is that death proceeded from some other cause. *State* v. *Orrell*, 1 Dev. 139.

594. Every unlawful killing is presumed to be murder, unless the contrary is shown; drunkenness does not incapacitate one from forming a premeditated design to commit murder. *State* v. *McFall*, Addis. 255.

595. The presumption is, that all homicide occurs with malice. *State* v. *Town*, Wright 75.

596. The name of the person assaulted lays no foundation for a presumption that he was a free white person, neither does the circumstance that he was a witness in the case against the slave, nor that he was foreman in a mechanics' shop. *Elijah* v. *State*, 11 Hump. 455.

597. Where one wilfully poisons another, from such deliberate act the law presumes malice, though no particular enmity can be proved. *Ann* v. *State*, 11 Humph. 150.

598. But this presumption may be displaced in a case of death from poison, as in other cases, by direct proof, or by the circumstances of the particular case. *Ib.*

599. Where the existence of deliberate malice in the slayer is once ascertained, its continuance down to the perpetration of the meditated act must be presumed, until there is evidence to repel it; there must be some evidence to show that the wicked purpose had been abandoned. *State* v. *Johnson*, 1 Iredell 354.

600. Although a person may not go

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in search of or lie in wait for another whom he kills, yet if he has formed the purpose to kill him, and within a short time after forming and avowing such purpose, he, duly armed, meets the other by chance, whether in public or in secret, and slays him immediately, there is a presumption that he did it on the previous purpose and grudge, if there be no evidence of a change of purpose. *State* v. *Tilly*, 3 Iredell 424.

601. Homicide is presumed malicious until it appears to the contrary; and whether justifiable or excusable upon the facts, as an act of war or self-defence, &c., is a question for the jury to pass upon. *People* v. *McLeod*, 1 Hill 377.

602. The killing being proved, malice is presumed, and the onus of exculpation rests on the prisoner. *Mitchell* v. *State*, 5 Yerg. 340.

603. The fact of killing being proved, the law presumes it was malicious, and imposes on the defendant the necessity of proving matter in alleviation, or that it was a less offence. *Ib.*

604. The burden of proof is upon the prosecutor; all the presumptions of law, independent of evidence, are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. *Com.* v. *Webster*, 5 Cush. 295.

605. The law presumes every individual innocent of crime, and requires proof to satisfy the minds of the jury that a defendant is guilty before they are warranted in pronouncing him guilty. *State* v. *Turner*, Wright 20; *Com.* v. *Webster*, 5 Cush. 295.

606. Where the fact of killing, with all its attendant circumstances, is clearly proved, and the testimony either shows express malice, or that there was no malice at all, there is no room for presumption. *McDaniels* v. *State*, 8 Smed. & Marsh. 401.

607. But in cases where the killing is proved, and no accompanying circumstances appear in the evidence, the law presumes the killing was done maliciously. *Ib.* So where the killing is proved, and the circumstances attending it are shown, though no express malice may appear from the proof, it may be presumed, from some attending fact; as if a deadly weapon were used, the law presumes malice. *Ib.*

608. So if there be circumstances of barbarity and cruelty, the law presumes malice. *Ib.* These presumptions of law, if unopposed, may amount to full proof of the fact. They stand until the contrary is proved, or until such facts are proved as are sufficient to raise a contrary and stronger presumption. *Ib.*

609. From the presumptions of law, and the whole evidence in the cause, as well for the State as for the accused, the jury must make up their verdict. *Ib.*

610. In every charge of murder, the rule is, that where the fact of killing is established, the law presumes the killing founded in malice aforethought, until the contrary is made to appear; therefore, the circumstances relied upon by way of justification, excuse, or alleviation, if they do not arise out of the proof for the prosecution, must be introduced and proven on behalf of the accused, or he is held guilty of murder. *State* v. *Turner*, Wright 20.

611. The presumption of the English rule should be carried no further under our law and practice, than to raise, from the fact of killing, the presumption of murder in the second degree, if there be no explanatory circumstances in the evidence introduced by the State, and none are proven by the prisoner. *Ib.*

XIII. The Verdict in Cases of Murder, &c.

612. The general rule is, where accusation includes an offence of inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the less atrocious. *State* v. *Gaffney*, Rice 431.

613. In North Carolina, where one is convicted of murder, the entry of the verdict should be, guilty of felony and murder, in the manner and form as he stands charged, &c.; but where the jury thus render their verdict, and the entry was guilty in manner and form as charged, the finding was held good, and

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the prisoner not entitled to his clergy. *The State* v. *Upton*, 1 Dev. 513.

614. In Michigan, on the trial of an indictment for murder generally, as at Common Law, the prisoner may be found guilty of murder in the second degree, under the Rev. Statute. *People* v. *Doe*, 1 Manning 451.

615. In Pennsylvania, where an indictment is found for murder, a verdict of manslaughter is good, and is to be interpreted as voluntary manslaughter. *Com.* v. *Galie*, 7 S. & R. 423. Under such indictment, where one is found guilty of involuntary manslaughter, he is held guilty of misdemeanor merely, under the 8th section of the act of 22d April, 1794. *Ib.*

616. On an indictment for murder, a doubt must be serious and substantial, in order to warrant an acquittal, and not the mere possibility of a doubt. *Com.* v. *Harman*, 4 Barr 269.

617. In Indiana, a verdict of guilty of manslaughter must affix the punishment, otherwise it will be bad. *Dias* v. *State*, 7 Blackf. 20.

618. On an indictment for murder, it was not intended that the jury must return a verdict of not guilty, as to the murder, before the return of guilty of manslaughter; but that a prisoner might be found guilty of manslaughter, although indicted for murder, and not manslaughter. *Brooks* v. *State*, 3 Humph. 25.

619. By the Common Law, there are several classes of criminal cases, where the accused may be acquitted of the crime charged, but found guilty of an inferior degree of the same offence; as in the case of murder, burglary, grand larceny, and assault and battery. *King* v. *State*, 5 How. Miss. 730.

620. The statute found in How. & Hutch. Code, p. 126, sec. 22, in having created several new degrees of offences, it was reasonable and proper that the provisions contained in the said 22d section should have been made; and the rule there laid down, merely carries out, extends, and recognizes the rules and principles of the old law, and adapts them to the new grades of offence created, for the first time, by the provisions of the new Criminal Code, passed in 1838. The language of the 22d section is general, "upon an indictment for any offence, consisting of different degrees, and the jury may find the accused not guilty of the offence in the degree charged in the indictment, and may find such accused person guilty of any degree of such offence inferior, charged in the indictment, or of an attempt to commit such an offence. *Ib.*

621. Where it is not shown with what weapon the fatal blow was inflicted; in a case so serious, the Court should see that all such matters as go to affect the life of the prisoner, should not only be directly found, but should negative the possibility of the death having proceeded from any other cause. *Short* v. *State*, 7 Yerg. 513.

622. There is no such immediate connection between the weapon the prisoner had and held in his hand, and the blow struck, which produced the death, as makes it certain that the blow was with the weapon. The certainty required, must be certainty to every intent. *Ib.*

623. On an indictment for murder, committed by means of poison, the jury may find the accused guilty of murder in the second degree; and the Court, upon such conviction, will inflict the punishment prescribed by the law for the latter offence. *State* v. *Dowd*, 19 Conn. 388.

624. *It seems* that, in all cases of murder, the decree of criminality must be found as a matter of fact; and without an express finding of murder in the first degree, the Court would not be warranted in inflicting the punishment prescribed by law for that offence. *Ib.*

625. A verdict of a jury finding a party put upon his trial for murder, guilty of manslaughter in the third degree, must, of necessity, operate as an acquittal of every crime of a higher grade of which he might have been convicted under the indictment upon which the issue was made, otherwise the party, after undergoing the sentence for manslaughter, might be put upon his trial for the charge of murder, which would thus be only postponed, and not decided by the verdict of manslaughter. *Huit* v. *State*, 3 Cushman 378.

626. The jury in such case, in contemplation of law, render two verdicts,

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one acquitting the accused of the higher crime charged in the indictment; the other, finding him guilty of an inferior crime. They must first determine his guilt or innocence upon the charge made by the indictment, before proceeding to consider whether he is guilty of an inferior crime. The verdict of manslaughter is as much an acquittal of the charge of murder, as a verdict pronouncing his entire innocence would be, for the effect of both is to exempt him from the penalty of the law for such crime. *Ib.*

627. An indictment is defective in substance, when the Court cannot pronounce the proper sentence of the law upon a verdict, finding the accused guilty. In such case the judgment is arrested, and the party, according to the authorities, remanded for another indictment. While this may be the law and the universal practice of the courts upon a verdict of guilty, it by no means follows that either the law or practice ought to be the same upon a verdict of not guilty. *Ib.*

628. One weapon may be charged in the bill of indictment, and another proved to a jury as the instrument of the death; and this, where the jury are satisfied of the malice, will authorize a general verdict of guilty. *Short* v. *State*, 7 Yerg. 513.

629. Where the finding is special, the jury should, they doubting of the malice, show to the Court what kind of weapon was then and there used to produce the killing, otherwise the Court cannot imply the malice. *Ib.*

630. Where the finding of the jury negatived the intent as charged in the indictment, that intent was averred to be "to kill and murder," the intent found by the jury was "to commit manslaughter," another and distinct felony from that charged. Held that the variance is therefore fatal, and the judgment must be arrested. *Morman* v. *State*, 24 Miss. 55.

631. It is no objection to the verdict that it is written on the envelope of the indictment, on which no part of the indictment is written, but which is endorsed with the title of the case, and the finding of the grand jury where there is no charge; that the indictment thus endorsed is not the same on which the prisoner was tried. *State* v. *Cheatwood*, 2 Hill S. C. 459.

632. Though in the indictment it be averred that the assault was committed with malice aforethought, yet the jury may convict if the proof satisfies them the assault was committed with intent maliciously and purposely to kill, although they should find it was made without malice aforethought. *Sharp* v. *State*, 19 Ohio 379.

633. In South Carolina, where the indictment was under the act of 1821, for the murder of a slave, and the jury found a verdict of manslaughter, on motion, in arrest of judgment, the Court held that punishment could be awarded under the act, overruling the decision on the same point in *Raines' case*, 3 McC. 533. *State* v. *Fleming*, 2 Strob. 464.

634. Upon the indictment of a slave for the murder of a white man, a finding by the jury that the prisoner is "guilty of voluntary manslaughter," is sufficient to authorize the Court to sentence the slave to the punishment of death. *State* v. *Stephen*, 15 Ala. 534.

635. The crime of murder being divided by the penal code into two grades with different punishments, it is necessary, on the conviction of a prisoner for that offence, that the verdict of the jury should ascertain the degree, otherwise no judgment can be pronounced upon it. That the murder was committed by means of poison can make no difference. *Oliver* v. *State*, 17 Ala. 587.

636. The verdict of "killing in sudden heat and passion," establishes that there was a killing, that although there was no malice, there was also no sufficient excuse; just as a verdict of manslaughter has the same effect in indictments for murder. *State* v. *Gaffney*, Rice 431.

637. When the jury find the defendant guilty of manslaughter, it negatives the idea that he was guilty of murder, and it is clearly competent for the jury to find the defendant guilty of the lesser offence of manslaughter, on an indictment for murder, without any count therein for manslaughter. *Reynolds* v. *State*, 1 Kelly 222.

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638. Where the defendant was indicted for murder of a slave, and the jury found him "not guilty of murder, but killing on sudden heat and passion;" held that the conviction was good. *State* v. *Gaffney*, Rice 431.

639. Where the bill of indictment is drawn without any specification as to the degree of murder intended to be charged, and that the verdict of the jury is in general terms, that the prisoner is guilty in manner and form as charged in the bill of indictment, without specifying that he is guilty of murder in the first or second degree; held to be erroneous, under the act of 1829, c. 23, § 3, which enacts "that the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder in the first or second degree." *McPherson* v. *State*, 9 Yerg. 279.

640. Where the verdict of the jury was in these words: "We find the prisoner, Samuel Yancey, guilty of murder," and it appeared that the words "Samuel Yancey" were interlined after the verdict was returned into Court, some days after, by order of the Court; held that the amendment was irregular, but did not vitiate the verdict. *State* v. *Yancey*, 3 Brevard's R. 142.

641. On an indictment for murder, the jury may find the defendant guilty of manslaughter, the 14th sec. of the 9th ch. of the act concerning crimes and punishments has not altered the Common Law rules, so far, at least, as this offence is concerned; *quere*, how far this section will affect indictments for arson, burglary, forgery, &c.; will it enable the prosecutor, on an indictment for one degree of either of these offences, contrary to the settled rules of the criminal law, to convict defendant of another degree totally dissimilar in its character? *Watson* v. *State*, 5 Mo. R. 497.

642. Upon the trial of an indictment for murder in the first degree, a verdict that the jury find the prisoner "guilty in manner and form as he stands charged in the indictment," is sufficient; the 1st section of the 7th article of the act concerning "practice and proceedings in criminal cases," making it the duty of the jury, "if they convict the defendant, to specify in their verdict of what degree of the offence they find the defendant guilty." R. S. 1835, p. 493. *McGee* v. *State*, 8 Mo. Rep. 495.

XIV. Judgment and Sentence—Record—Place of Trial—Miscellaneous.

643. The Court, in its discretion, will respite the execution of so much of the judgment in manslaughter as relates to burning in the hand and imprisonment, that the party may be enabled to avail himself of the constitutional right of soliciting a pardon. *Allen* v. *State*, 1 Martin & Yerg. 294.

644. In North Carolina, a person convicted of manslaughter may be burned in the hand, and also imprisoned for any time not exceeding one year. The statutes of 4 Henry 7, c. 13 and 18, Eliz. c. 7, not being altered in this respect by the act of 1816 (1 Rev. Stat. c. 34, §§ 26 and 27). *State* v. *Henderson*, 2 Dev. & Batt. Rep. 543.

645. The judgment of death can only be satisfied by actual execution or a pardon; and when the sentence of death was not executed in consequence of the death of sheriff, the Court assigned another day for the execution. *State* v. *Kitchens*, 2 Hill's S. C. 612.

646. In North Carolina, the act of 1791, § 3, relative to the murder of slaves, is not sufficiently certain to authorize a court to pass judgment of death upon the prisoner convicted under it. *The State* v. *Boon*, 1 Tayl. 246.

647. Under the Pennsylvania Act of April 22d, 1794, §§ 10 and 11, where one is convicted of voluntary manslaughter, he cannot be sentenced to solitary confinement in solitary cells, on low and coarse diet. *White* v. *Commonwealth*, 1 S. & R. 139.

648. In South Carolina, judgment cannot be rendered on a verdict of guilty of manslaughter on an indictment for killing a slave in sudden heat and passion, contrary to the act of 1821. *State* v. *Ranies*, 3 McCord 533.

649. Where a witness testified, on

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the trial of an indictment for murder, that on the evening preceding the alleged murder the prisoner was at a certain house, and said that he was going thence to B.'s; and other witnesses testified that he came home that evening at about eight o'clock. After the evidence was closed on both sides, one of the jurors, addressing the public prosecutor, said, we must have B. here, and you must bring him here; and the next morning, the cause being still on trial, the same juror made application to the Court publicly to the same effect. The prisoner being found guilty, and a motion in arrest of judgment being made on the ground of these facts, it was held that they were sufficient. *State* v. *Watkins*, 9 Conn. 47.

650. Where A. was indicted for murder in the first degree, and the jury found him guilty, and judgment was rendered on the verdict; before the day named for his execution he made his escape, and was afterwards retaken by the sheriff, and kept in custody until the next term of Court, when he was brought into Court, and the fact of his escape having been made known, the Court awarded execution against him on the former judgment; held that this was proper. *Bland* v. *the State*, 2 Carter (Ind.) 608.

651. The sentence of the Court, upon the verdict of manslaughter, is of itself a complete acquittal of all higher crimes of which the party might have been convicted under the indictment. *Hurt* v. *State*, 25 Miss. 378.

652. It must appear in crimes of murder that the accused was present during his trial, or it will be error. The presence of the prisoner cannot be inferred, but must appear affirmatively on the record. *Scaggs* v. *the State*, 8 Smed. & Marsh. R. 722.

653. Where the jury, on a trial for homicide, state that the prisoner at the bar is guilty, and the clerk, in recording the verdict, calls him the prisoner at the bar, this is sufficient evidence from the record to show that the prisoner was actually in court when the verdict was rendered. *State* v. *Collins*, 8 Iredell 407.

654. In an indictment for murder in the first degree, the record should show that the prisoner was present in court when he was sentenced to be executed, and that the question was put to him, whether he had anything to say why sentence of death should not be pronounced upon him. *Harnten* v. *the Commonwealth*, 16 Penn. State R. (4 Harris) 129.

655. Where the record of an indictment for murder set forth the indictment, the answer of the prisoner to the inquiry how he would acquit himself, the reply of the Attorney-General, the order for a jury to come, and then proceed, "and afterwards in the said case, *State* v. *Thomas H. Christmas*, indictment murder, the following jury being sworn and impanelled, to wit, &c., who say that the prisoner, Thomas H. Christmas, is guilty of the felony and murder in manner and form as charged in the bill of indictment;" it was held that the record showed, if not in express terms, yet by necessary implication and with requisite certainty, that the jury was sworn to try the truth of the matters charged in the indictment. *State* v. *Christmas*, 4 Dev. & Batt. 410.

656. The record shows that the prisoner was indicted in the Vigo Circuit Court for the murder of George Mickelberry; that he pleaded there "not guilty;" that he procured a change of venue for his trial upon that indictment to the Parke Circuit Court; that the clerk of the former court handed over the papers, and among them the indictment (which is spread upon the record), to the clerk of the latter court, in which they were filed; and that the prisoner was placed upon his trial in that court for the murder of George Mickelberry upon the plea of "not guilty, theretofore entered in that behalf." No objection was made by the prisoner to the indictment upon which he was tried. It was held that enough was found to establish the identity of the indictment in the statement in the record, that the indictment which was recorded in the Parke Circuit Court, and upon which the prisoner was tried, is the one which was transferred among the papers of the cause. *Beauchampe* v. *State*, 6 Blackf. 299.

657. The A. A. 1793 (1 F. 393, 5 Stat. So. Ca. 231) providing in case of mortal

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injury inflicted in one county or district, and death ensuing in another, that the trial shall be had where the death occurred, extends to the case of homicide of one slave by another. *Matthews* v. *Loomer*, 1 Cheeves' Rep. 106.

658. In Virginia, where a person is stabbed, and die of his wounds in another State, the accused cannot be tried for the murder in any county in Virginia, but he may be tried for the stabbing in the county where the blow was inflicted. *Commonwealth* v. *Linton*, 2 Virg. Cas. 205.

659. Where one is examined by the examining court for feloniously stabbing another, and remanded for trial for that offence, and the party stabbed afterwards die, it is held that the accused cannot be indicted for murder without an examination for the murder. *Ib.*

660. Where a mortal blow is struck in one county and death takes place therefrom in another, the offender may be prosecuted and tried in the latter. *Nash* v. *the State*, 2 Green (Iowa) 286.

661. Where one was indicted and convicted for the crime of murder, in the Circuit Court, and the judgment of the Circuit Court was reversed, and a new trial was awarded, and after the said conviction the Legislature repealed the law defining the offence and fixing the punishment for manslaughter, by confinement in the penitentiary for not more than three years, and passed another law making the punishment confinement in the penitentiary for not more than eight years, and without any saving clause as to offences previously committed, and a new indictment was preferred for a manslaughter committed since the passage of this law, though in fact for the same act of killing, and the defendant, with a full knowledge of all the facts, on being arraigned, pleaded "guilty" and was sentenced to a confinement of seven years in the penitentiary; held that as the conviction appeared to have been the result of a voluntary contract, on the part of the defendant, the Court was not disposed to disturb it. *Sellers* v. *State*, 1 Gilman's R. 183.

662. Whether on the trial of an indictment for homicide, the weapon alleged to have been used is a deadly weapon or not, is a question for the Court, not for the jury. *State* v. *Collins*, 8 Iredell 407.

663. Where an entry is endorsed on an inquisition of murder, taken by a coroner, purporting to be the examination of witnesses, it will not be recognized as duly taken under the statute, if it have not a jurat or certificate of the coroner that the witnesses were sworn, and if it be not shown to be in the hand-writing of the coroner, or taken under his direction, and that the witnesses were in fact sworn, and that their testimony is stated truly. *People* v. *White*, 22 Wend. 167.

664. It is a well-understood rule of law, where a general felonious intention is sufficient to constitute the offence, that it is no ground of excuse, where a party who intended to commit one felony, has committed another. *Morgan* v. *State*, 13 S. & M. 242.

665. Where the defendant by leave of the Court withdraws his plea of not guilty, heretofore pleaded, and now pleads that he is not guilty of murder in the first or second degree, or involuntary manslaughter, but confesses that he is guilty of voluntary manslaughter, this admission of the felonious slaying is to be referred to the charge as made in the bill of indictment, and considered as a confession of the homicide, in the county where the indictment is laid; this plea confesses everything but the intent, and under it no proof was really necessary but such as showed that the killing was done wilfully, deliberately, premeditatedly and maliciously, or that it was done with malice aforethought, without circumstances of justification or excuse. *Hines* v. *State*, 9 Humph. 720.

666. Where, on the trial of an indictment for murder, the facts proved show on the part of the prisoner a deep and settled hatred towards the deceased, mixed up with a recent combat, the difficulty is to assign the homicide to its proper cause, to decide whether it was committed under the sole influence of passion justly excited, or whether it was the carrying into effect of a settled and deliberate purpose. *State* v. *Ford*, 1 Spears 146.

667. In such case there is no rule,

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and can be none, other than the jury must draw their conclusions from all the facts of the case, relying upon legal presumptions, so far as these are applicable to the case. *Ib.*

668. Upon a question of life or death, when there is any reasonable doubt in regard to the matter, the humane principle of the law is, that the defendant is entitled to the benefit of that doubt. *Davis* v. *State*, 10 Ga. 108.

669. Pregnancy may be pleaded by a woman after conviction, before sentence of death is passed upon her, which shall be tried by a jury of matrons. *State* v. *Arden*, 1 Bay 437.

670. In Virginia, where there is a change of venue from the county of R. to that of W., a plea that the murder was committed in R., and that therefore the court of W. has no jurisdiction, is not good on demurrer. *Vance* v. *Commonwealth*, 2 Virg. Cas. 162.

671. Where two prisoners were indicted together for murder, but were tried seperately, one was convicted of manslaughter, and the other of murder; the Court refused the motion of the latter for arrest of judgment, as he had been indicted as a principal in both counts of the indictment, and the jury were to pass upon the malicious intent and on the degree of guilt in the parties, and to apply the evidence to the different counts, as they thought proper. *State* v. *Arden*, 1 Bay 487.

672. In Virginia, an examining court has no authority to acquit a person charged before them with murder, of the murder with which he so stands charged, and to remand him to be tried for manslaughter only; and if it makes such discrimination, the prisoner will not be thereby discharged, but may be indicted for murder in the Superior Court. *Commonwealth v. Mayers*, 1 Vir. Cas. 188; vide, also, *Sorrell's case*, 1 Vir. Cas. 253; and *Bailey's case*, 1 Vir. Cas. 258.

673. Where a prisoner was indicted for murder, and the endorsement on the bill was, "Indictment for felony, found November term, 1848, a true bill," and the person was found guilty of murder, and after the jury had been charged and had retired, they sent for a copy of the judge's charge, which was send to them, with one word left out in the copy, which had been inserted in the original on motion of the prisoner's counsel; held that it did not appear from the record that the prisoner had been indicted for murder, as the presentment signed by the foreman of the grand jury was for a felony; that the whole trial ought to have been had in public before the prisoner, and that the sending in of the judge's charge, by an imperfect copy, was therefore erroneous. *Holton* v. *the State*, 2 Florida 476.

674. In cases of shipwreck, and extreme peril, where there is an absolute necessity that a part should be sacrificed in order to save the remainder, it is necessary that a decision by lot should be resorted to, unless the peril is so sudden and overwhelming as to leave no chance of means, and no moment for deliberation. *U. S.* v. *Holmes*, Wallace, Jr. 1.

675. Where one was indicted for murder, and found guilty of manslaughter, and the indictment was afterwards quashed, and the statute of limitations had become a bar to an indictment for manslaughter; held that the prisoner must be discharged. *Campbell* v. *State*, 23 Ala. 44.

676. Where, on a trial for murder, there has been an improper separation of the jury during the trial, the prisoner, if found guilty, has right to the benefit of the presumption that the irregularity has been prejudicial to him, and the onus is upon the State to show, beyond a reasonable doubt, that the defendant has sustained no injury by reason of the separation. *Monroe* v. *State*, 5 Ga. 85.

677. It is the duty of the jury, after they retire, to confer together touching the guilt or innocence of the prisoner; and secret consultations by two or more persons at a time, in separate groups, and out of the presence and hearing of their fellows, is held to be improper. *Ib.*

678. After a verdict of guilty and judgment reversed on account of error in the proceedings, the prisoner is not protected from a second trial before a jury, by the provision of the bill of rights, that "the accused shall not be

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twice put in jeopardy for the same offence." *Sutcliff* v. *State*, 18 Ohio 469.

679. The original papers and transcript from the journal entries, both of the Supreme Court and Common Pleas, are admissible in evidence as the record, when they have not been carried into the record book. *Ib.*

680. The plea of not guilty, upon the record, is not reached by the judgment of reversal. *Ib.*

681. Though the plea remain upon the record, it is not error to inquire by a jury whether the prisoner stands mute obstinately, and to cause the plea of not guilty to be entered without his consent. *Ib.*

682. It is not error to omit giving notice to the prisoner's counsel, that he may be present when the verdict is to be delivered by the jury. *Ib.*

INDICTMENT.

I. Indictment at Common Law. Its requisites, &c.
II. Indictment for Statutory Offences.
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XIV. Miscellaneous.

I. Indictment at Common Law—Its Requisites, &c.

1. Offences of the same character, though differing in degree, may be united in the same indictment, and the prisoner tried on both at the same time, and on the trial he may be convicted on the one and not upon the other; as murder and manslaughter; forging a check, and for publishing it, knowing it to be false. *Baker* v. *State*, 4 Ark. 58.

2. So burglary and larceny may be joined in the same indictment, under different counts. *Ib.*

3. So, also, a count for a burglarious entry, with intent to steal the goods of A., and stealing them, and a count for a burglarious entry with intent to steal the goods of another person, and a third count might be added, charging the breaking and entry with intent to kill or murder. *Ib.*

4. The introduction of several counts, which merely describe the same transaction in different ways, gives the public prosecutor greater latitude in proof, so as to avoid a variance, for if not sufficient to sustain one count it might another, and no objection could be taken either on demurer or by motion on arrest. But every separate count should charge the defendant as if he had committed a distinct offence, because it is upon the principle of the joinder of offences that the joinder of counts is admitted. *Ib.*

5. The law is now well settled that different offences may be charged in the same indictment, if the offences are subject to the same punishment. *Ib.*

6. In cases of felony where two or more distinct and separate offences are contained in the same indictment, the Court in its discretion may quash the indictment or compel the prosecutor to elect upon which charge he will proceed. *Ib.*

7. In point of law, it is no objection that two or more offences upon which the same or a similar judgment may be given, are contained in different counts of the same indictment. *Ib.*

8. It is every day's practice to charge offences in different ways in the same indictment, for the purpose of meeting the evidence as it may come out on the trial. Each of the counts on the face of the indictment, purports to be for a distinct and separate offence, and the jury very frequently find a general verdict on all the counts, although only one offence is proved. *Ib.*

9. If the different counts are inserted in good faith for the purpose of meeting a single charge, the Court

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will not even compel the prosecutor to elect; and where punishment is fine and imprisonment, the prosecutor is permitted to join and try several distinct offences in the same indictment. *Ib.*

10. Two counts for maiming and shooting at with intent to kill, may be united and tried in the same indictment. *Ib.*

11. The same principles are sustained in the following cases: *State* v. *Flye*, 26 Maine 312; *People* v. *Austin*, 1 Parker's Crim. 154; *State* v. *Paterson*, 1 W. & M. 305; *Commonwealth* v. *Manson*, 2 Ashmead 131; *McGregg* v. *State*, 4 Blackf. 101; *State* v. *Coleman*, 5 Porter 32; *Wash* v. *State*, 14 Smedes & Marsh. 120; *People* v. *Baker*, 3 Hill 159; *State* v. *Hogan*, Charlton 474.

12. To constitute a valid indictment, it must be found by a competent grand jury. *State* v. *Brown*, 5 Eng. 78.

13. In Tennessee, a bill of indictment was preferred against the defendant for an assault with intent to commit murder in the first degree, under the 52d section of the penal code. The indictment contained but a single count; the finding of the grand jury on said bill of indictment was as follows: A true bill as to the assault and battery, not a true bill as to the felonious intent. Held that the indictment was bad. *State* v. *Wilhite*, 11 Humph. 602.

14. A plea in abatement which avers simply that at the time of pleading the names of the jurors do not appear by any list, &c., is not a valid objection to the indictment; the list directed to be kept, may have been lost or destroyed by some casualty, after the jury was constituted and the indictment found. The omission to preserve it, would not go to the validity of an indictment found by a competent grand jury, constituted conformably to law. *Sayle* v. *State*, 8 Texas R. 120.

15. Where an indictment against a defendant charges that the defendant "feloniously, maliciously, voluntarily, and of purpose (with intention, in committing said act, to maim, disfigure, disable, or kill), did break, &c.," the jaw-bone of another; held that the indictment was defective by reason of omitting the averment that the defendant did disable, &c. *Com.* v. *Lester*, 2 Virg. Cas. 198.

16. And where an indictment for mayhem, in such case, concludes contra formam statuti, the indictment will not be good for a mayhem, at Common Law, because a mayhem at Common Law, with one exception, is no felony. *Ib.*

17. When an act becomes criminal only under certain circumstances defined by law, an indictment for such act without averment of the existence of those circumstances, would be bad. *Com.* v. *Clark*, 2 Ashm. 105.

18. When the record of the appointment of the foreman of a grand jury gives his name in full, his endorsement by the initial letter of his first name, will not be a material variance. *State* v. *Collins*, 3 Dev. 117.

19. Where an indictment does not allege the year to be "the year of our Lord," it is fatal. *Whiteside* v. *People*, Breese 4.

20. Under an act of incorporation of a turnpike road and bridge company, the offence of neglecting to repair is set forth with sufficient certainty by reciting the substance of the statute imposing the duty to repair, averring the company to be in existence as a body corporate, and that they have erected gates, and exacted toll, without formally alleging the road to have been made and completed; that the defendant was a director, that he had notice of the road being out of repair, and had been guilty of a neglect of duty in the premises. *Kane* v. *People*, 8 Wend. 203.

21. Although two statutes are set forth in the indictment, it is not necessary to allege the offence to have been committed contra formam statutorum, where it is wholly created by one of the statutes, and the second merely makes some alterations in the first, without affecting the offence. *Ib.*

22. A count in an indictment charging a party with neglect of duty as a director of a road and bridge company, after the company had been formed into two distinct companies, viz., a road and bridge company, is bad; but if there be also a count charging him as a director of the road company, and

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there be a general verdict of guilty, judgment may be rendered upon the last count. The law in criminal cases varying from civil cases in this particular. *Ib.*

23. It cannot be objected in error, that two or more offences of the same nature, upon which the same or similar judgment may be given, are contained in different counts of the same indictment; nor can such objection be urged either on demurrer or in arrest. *Ib.*

24. Where an indictment charges the defendant with maliciously destroying, &c., and maliciously causing certain property to be destroyed, it is not liable to objection for the reason that it alleges two distinct offences. *State* v. *Kuns*, 5 Blackf. 314.

25. A figure omitted cannot be supplied in an indictment. *State* v. *Street*, 1 Taylor 158.

26. The time when an offence was committed need not be averred in an indictment, except when it is a constituent part of the offence. *State* v. *Sam*, 2 Dev. 567.

27. The 15th section of the act "regulating juries," approved 4th of May, 1846, which requires the foreman of the grand jury "to endorse on the back of each presentment or indictment, the name or names of the witnesses for the prosecution, upon whose evidence the presentment or indictment was found, certifying thereto as foreman," is merely directory. Such endorsement is not a constituent part of the indictment, or of the finding of the grand jury, and is not essential to its validity. *Steele* v. *the State*, 1 Texas R. 142.

28. Where the words "then and there being found," were omitted in an indictment charging the prisoners with force, &c., on a certain day and year, and particular place, with feloniously, &c., taking a slave, being the property of A. B., the indictment was held good. *State* v. *Sparrow*, 2 Taylor 93.

29. In the State of North Carolina, where an indictment concludes, "and the jurors," the word "so" being omitted; it is good. *State* v. *Moses*, 2 Dev. 452.

30. It is not necessary that an indictment should show on its face when it was presented by the grand jury. *Haught* v. *Com.*, 2 Virg. Cas. 3.

31. In an indictment, the place where the offence was committed must be charged in the body of the indictment: it is not sufficient to charge it in the margin only. *State* v. *Cook*, 1 Mo. 547.

32. An indictment is well laid which charges that N. obtained bills by pretending he had slaves, which he sold for said bills, when in fact he had no slaves. *State* v. *Newell*, 1 Mo. 248.

33. In an indictment where a libel is charged to have been published of and concerning the prosecutrix J. C., describing her as the *only* daughter of the widow R.; held that it was unnecessary to state in the inuendo that she was an *only* daughter. *State* v. *Perrin*, 1 Const. R. 446.

34. An indictment for conspiring together to manufacture a base composition resembling genuine indigo of the best quality, with a fraudulent intent that the same should be exposed to sale and sold at public auction, will be good, though no sale should be shown. *Com.* v. *Judd*, 2 Mass. 329.

35. An indictment for neglecting to repair a highway, must so charge the offence as to leave no doubt in what town the aforesaid road lies, or else the indictment cannot be sustained. *Com.* v. *the Inhabitants, &c.*, 8 Pick. 463.

36. An indictment for a libel must state the exact words of the libel. *Com.* v. *Sweney*, 10 Serg. & Rawle 173.

37. Where an indictment against the surveyor of a public road gave a description of the road, but omitted to name the surveyor; held to be bad on demurrer. *Snider's case*, 2 Leigh 744.

38. Where the defendant is charged in an indictment with committing an offence with "divers other persons, to wit, to the number of five," and the indictment omits to state that the five others are unknown, and omits to set forth their names; held that the indictment was bad, and this would be so, admitting that the prisoner had pleaded guilty to a true indictment found against him by the grand jury. *State* v. *O'Donald*, 1 McCord 532.

39. Where the indictment, in one count, charges two distinct substantive offences, shop-breaking and larceny, it

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was held not to be double. *Com.* v. *Tuck*, 20 Pick. 356.

40. In civil actions, duplicity is cured by general demurrer, or by pleading over; and in criminal cases it is extremely doubtful whether it can be taken advantage of in arrest or error. *Ib.*

41. There is no law in the State of Mississippi, which requires the signature of the district attorney to an indictment. The Common Law does not; and if there be no statute which does, then it is not required at all. An indictment derives its validity by the endorsement of the grand jury, "A true bill," over the signature of their foreman. *Keithler* v. *the State*, 10 Smedes & Marsh. 192.

42. If the facts be stated, as to time or place, with repugnancy or uncertainty, the indictment will be bad. *State* v. *Hardwick*, 2 Mo. 226.

43. If two times or places have been previously mentioned, and afterwards a part only is laid, "then and there," the indictment is defective, because it is uncertain to which it refers. *Ib.*

44. An indictment against a slave for preparing, exhibiting or administering medicine, must charge the act to have been done feloniously, or with a felonious intent. *Ib.*

45. Where an indictment lies for putting obstructions into a navigable stream, it must contain the name of the stream, and state that the river or stream is navigable where the obstruction is placed, and that the bed of the stream has not been sold by the Government of the United States as land, and the place where the obstruction is must be particularly described in the indictment, and the fact that boats cannot pass that point in the stream where the obstruction is, must also be alleged in the indictment. *Cox* v. *State*, 3 Blackf. 193.

46. Where an indictment lies for obstructing a river in such a manner as to overflow the highway, the indictment need not contain an allegation of the length and breadth of the overflow on the highway. *Respublica* v. *Newell*, 3 Yeates 417.

47. Where an indictment is in the usual form in the name of the Commonwealth, and concludes against its peace and dignity, but does not express to be found by the authority of the Commonwealth; held that such expression was unnecessary. *Allen* v. *Com.*, 2 Bibb 210.

48. In Illinois, if the indictment omits to state the words "in the name and by the authority of the people of the State of Illinois," it is a fatal defect. *Whitesides* v. *People*, Breese 4.

49. In Pennsylvania, the act of 1771, § 4, prohibits the building or erecting of any dam or obstruction by which fish may be prevented from passing up the streams. An indictment under such act, for obstructing the Susquehannah with erections and tackling made for the purpose of taking fish, in such a manner as to prevent fish from passing up and down, was held good. *Werfel* v. *Com.*, 5 Binn. 65.

50. Where an indictment commences with "South Carolina," and omits the words "State of" before "South Carolina," and concludes with the words "against the peace and dignity of the said State," the indictment was held to be good. *State* v. *Anthony*, 1 McCord 285.

51. Where the indictment contains four counts: the first charges that the defendant did steal Wilson, a slave, the property of Joseph Willis; the second count charges the stealing Wilson, a slave, the property of William H. Willis; the third count charges stealing a gray mare, the property of Abner Bryant, and the fourth count charges the stealing a bay horse, the property of John Ganaway; held that there was, in point of law, no objection to the insertion of several distinct felonies of the same degree, though committed at different times, in the same indictment against the same offender, and it was no ground either of demurrer or arrest of judgment. *Cash* v. *the State*, 10 Humph. 111.

52. The act of the legislature of Indiana, of 1825, authorizing Special Sessions of the Court for the trial of particular cases therein stated, does not warrant the grand jury in finding any indictments at such special term, except against the person or persons for whose trial the Court was thus partic-

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ularly convened. *Wilson* v. *State*, 1 Blackf. 428.

53. A misdemeanor cannot be indicted as a felony. *Com.* v. *Macomber*, 3 Mass. 254.

54. A general mode of charging a party as a common barrator, in an indictment, is sufficient. *Com* v. *Davis*, 11 Pick. 432.

55. The certificate of the foreman of the grand jury that an indictment is "a true bill," is not necessary in New Hampshire. *State* v. *Freeman*, 13 N. Hamp. 488.

56. If the defendant wishes to have the advantage of an objection to an indictment, on the ground that the description of other persons in it than himself is not sufficiently accurate; he must take it by demurrer, and not wait till after verdict. *State* v. *Crank*, 2 Bailey 66.

57. It will not be permitted to inquire into the grounds of the evidence upon which the grand jury acted in finding a bill of indictment. *Tuck* v. *State*, 7 Ham. (Part 2) 240.

58. If twelve grand jurors concur in finding a bill of indictment, it will be a valid bill, even if one of the panel has been guilty of misconduct. *Ib.*

59. If an offence be committed in the county of S., and, after the commission of the offence, the county of S. is divided, and that part of the said county in which the offence was committed is created a new county and called W., the offence is indictable in the county of W. *State* v. *Jones*, 4 Halst. 357.

60. It is an offence indictable at Common Law to disinter the bodies of the dead; but the Common Law has been superseded by the statute of 1814. *Com.* v. *Cooley*, 10 Pick. 37.

61. An indictment for disintering a dead body having alleged that the burying-ground belonged to the first Congregational parish in G., and there being no evidence offered by the government to support the allegation; held that the allegation was unnecessary, and that it did not become material by having been introduced into the indictment, and therefore need not have been proved. *Ib.*

62. To make an indictment lie for taking away a slave, it must appear that the taking was with force. *State* v. *Flowers*, 1 Law. R. 97.

63. As to time and place, in an indictment, all that the law requires is a sufficient degree of certainty to a common intent. *State* v. *Brisbane*, 2 Bay 451.

64. Where an offence is alleged in an indictment to have been committed on a day impossible or future, the indictment will be bad. *Markley* v. *State*, 10 Mo. 291.

65. An indictment for conspiring to defraud a married woman out of a note, the consideration of which was a part of the distributive share in her father's estate, cannot be sustained, for the reason that the note, coming to the possession of the husband, became his property, and it being necessary to allege in the indictment the name of the real owner of the note. *Com.* v. *Manley*, 12 Pick. 173.

66. Where, in the commencement of an indictment, a county is named for which the grand jurors were sworn, the venue will be sufficiently laid in the county aforesaid. *State* v. *Ames*, 10 Mo. 743.

67. In order to maintain an indictment for administering a drug to a female for the purpose of procuring an abortion, it must be alleged that an abortion actually ensued, and that the woman was quick with child at the time. *Com.* v. *Bangs*, 9 Mass. 387.

68. Where an offence is capable of being committed by several, a joint indictment for such offence may be laid against several individuals. *State* v. *Gay*, 10 Mo. 440.

69. Each count in an indictment is a distinct substantive charge; internal repugnancy in any one, is a good exception; but non constat as to the whole, taken severally, but each may be for a distinct offence. *U. States* v. *Bowers*, 5 Wheaton 184.

70. In an indictment for the offence of confining the captain, the place where the offence was committed, if it be committed in a foreign port, or on the high seas, does not at all constitute any part or degree of the offence; and being therefore immaterial, it need not be proved. *U. States* v. *Stevens*, 4 Wash. C. C. 547.

71. Where an indictment is removed

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into a Superior Court, it should have a caption endorsed on it, and the day and year should appear in the caption; and it ought also to appear that the indictment was presented on the oath of jurors of the county where the crime was committed. *Tipton* v. *State*, Peck. 308.

72. In an indictment, the allegation must strictly correspond with the probate. *State* v. *Rushing*, 2 Nott & McCord 560.

73. Where an indictment is signed by the foreman of the grand jury, but the words "a true bill" do not appear over his signature, the indictment was bad, for that reason. *Webster's case*, 5 Greenleaf 432.

74. Where there is a failure to show the truth of an unnecessary averment in an indictment, it will not render the indictment bad. *U. States* v. *Vickery*, 1 Har. & J. 427.

75. If an indictment contain three counts, and the third count omits to state that the grand jury, "on their oaths present;" held that the defect was cured by the fact that the first two counts were regular, and indicated that the grand jury had been sworn in open court. *Huffman* v. *Com.*, 6 Rand. 685.

76. There is no objection to several distinct felonies of the same degree, though committed at different times, being joined in the same indictment against the same offender. *State* v. *Hogan*, R. M. Charlton 474.

77. But if the Court perceives that by this means the prisoner will be confounded in his defence, or prejudiced in his challenges, or that the attention of the jury will be distracted, it will listen to such request, and compel the prosecutor to elect. *Ib.*

78. But this rule only applies where the charges are actually distinct. *Ib.*

79. An indictment must contain all the essentials to constitute the offence, explicitly charged, and they must not be left to inference. *State* v. *Seay*, 3 Stew. 123.

80. Indictments cannot be aided by intendments, but must positively and explicitly state what the prisoner is called upon to answer. *Ib.*

81. In the State of Tennessee, if the indictment be sent to the grand jury without the approval of the solicitor-general, by his endorsement on some part of it, it will be a nullity. *Font* v. *State*, 3 Hayw. 98.

82. Where the examining court has sent a prisoner to the Superior Court to be tried for larceny, and the indictment found against the prisoner in the Superior Court was not for the larceny alone, but also for taking the slave from one county to another without the owner's consent, and for enticing and assisting the slave to abscond from his master; held that the indictment was bad as to the additional charge, and that those counts must be stricken out of the indictment. *Cleve's case*, 3 Gratt. 615.

83. Where an officer is indicted for misfeasance, it is enough to state in the indictment that he was duly elected to office by the legal voters, &c., and entered upon the discharge of his office. *Edge* v. *Com.*, 7 Barr 275.

84. A charge against supervisors of roads for neglect to open and repair roads, may be embraced in one count of an indictment against them. *Ib.*

85. In Alabama, the statute (Clay's Digest 442, § 26) dispenses with the necessity of using the word "feloniously" in all indictments for crimes which were misdemeanors at Common Law, but are made felonies by our penal code. *Butler* v. *State*, 22 Ala. 43.

86. Where an indictment is found against a slave for administering poison to white persons, a count is not demurrable for duplicity when it charges that the defendant "did administer to and cause to be administered to and taken by three certain free white persons, a large quantity of arsenic," &c. *Ben* v. *State*, 22 Ala. 9.

87. Where the indictment charges that the defendant "did administer to and cause to be administered to and taken by," &c., "a certain deadly poison, with the intent then and there feloniously," &c., "to kill and murder" the persons named, it well charges a violation of the statute, Clay's Digest 472, § 4, although not using the same words. *Ib.*

88. Where an indictment is mislaid, lost or destroyed, there can be no substitution, on satisfactory proof to the Court, of a copy (Goldwaithe and Gib-

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bons, J. J., dissenting.) *Ganaway* v. *State*, 22 Ala. 772.

89. Where the indictment is well drawn, and the evidence not reported, the Court will presume the verdict to be correct. *Garrard* v. *State*, 25 Miss. 469.

90. The justices of a County Court are not obliged, by their own exertions, to build and repair jails; they are only bound to use such means for the accomplishment of that end as the law prescribed, *i. e.*, to lay a tax, appoint commissioners to contract, a treasurer of public buildings, &c.; and for an omission of one or all these acts, it seems, they may be indicted jointly as a body; but the indictment must charge which of the duties prescribed by the act has been neglected; it is not sufficient to charge generally that they negligently and unlawfully did permit the jail to go to ruin and decay. *State* v. *Justices, &c.*, 4 Hawks. 194

91. Where a prisoner is indicted for a felony, and found guilty, and judgment arrested, he is liable to a second indictment. *State* v. *Phil*, 1 Stew. 31.

92. It is not a fatal objection against an indictment, that it concludes against the form of the "statute," instead of the "statutes," when there are more than one, nor that the name of a grand juror in the caption does not correspond with his name in the panel, nor that the indictment is stated as found upon the oaths, instead of the oath of the inquest. *State* v. *Dayton*, 3 Zabris. 49.

93. Where an indictment alleges a cheating in an executed contract, and the proof establishes an *attempt* to cheat in executing a contract, which was abandoned before its consummation, the variance is fatal to the prosecution. *State* v. *Corbett*, 1 Jones' N. Car. R. 264.

94. The principal offenders and accessories after the fact may be legally included in the general count in the indictment, and if charged in the manner prescribed by the penal code of Georgia, the charge against the principal and the charge against the accessories will not be construed as separate and distinct counts, but the accusation against all will be considered as included in one count, especially when each count commences and concludes in the manner and form required by the code, and such conclusion at the end of each count against such principal and accessories, is sufficient. *Bell's case*, 8 Gratt. 600.

95. Where an indictment describes the offence as having been done feloniously and unlawfully and maliciously, it will not be good where the statute uses the words wilfully and maliciously. *State* v. *Delue*, 1 Chand. (Wis.) 166.

96. Neither the caption nor the body of the indictment need allege that it is found as presented under the authority of the State, provided there is a statement in it that the crime charged to have been committed, is against the peace and dignity of the State of Wisconsin, and that the grand jury making the presentment were impanelled and sworn to inquire for the body of the county wherein the indictment is found, that county being within the State.

97. As to what constitutes a sufficient entry on the record, of the finding of an indictment for a misdemeanor by a grand jury, see *Nutler's case*, 8 Gratt. 699.

98. As to what constitutes a good indictment for attempting to commit a felony. *Ib.*

99. The names of the persons against whom the fines had been assessed, in an indictment against a justice, for omitting to make out and file in the clerk's office a list of all the fines, &c., assessed by him, need not be stated. *The State* v. *McCormack*, 2 Carter (Ind.) 305.

100. Where an indictment alleges that A. B., on, &c., at, &c., with force and arms broke and entered in upon the close and lands of C. D., there situate (describing it), and then and there took and removed from said land a portion of the timber of a poplar tree, which timber so removed by said B. was of the value, &c., without license, &c.; held that the indictment was not bad for not alleging that said portion of said tree was there, and of the value stated. *State* v. *Blackwell*, 3 Ind. 529.

101. No amendment will be allowed in an indictment for a capital offence.

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even with the prisoner's consent. *Com.* v. *Mahar*, 16 Pick. 120.

102. An offence should not be charged in the indictment disjunctively, as that the defendant "did take, or cause to be taken." *State* v. *O'Bonnor*, 1 Bailey 144.

103. It is not necessary in an indictment for the obstruction of public officers, to set forth the particular exercise of office in which they were engaged at the time, or the particular act and circumstances of obstruction. *U. States* v. *Bachelder*, 2 Gallis 15.

104. Where an indictment does not conform to technical rules in some parts of it, but contains sufficient averment in other facts, it will be considered good. *Fitch* v. *Respublica*, 3 Yeates 49.

105. The estate, degree, and mystery of the defendant should be set forth in the indictment. *State* v. *Hughes*, 2 Har. & McHen. 479.

106. At Common Law, the indictment may describe the year by the initials A. D. and numerals. *State* v. *Hodgeden*, 3 Vt. 481.

107. It will vitiate the whole indictment if one count be stricken out or quashed. *Rose* v. *State*, Minor 28.

108. The Court cannot reject in an indictment as surplusage what may have been the ground of the conviction. *Commonwealth* v. *Atwood*, 11 Mass. 93.

109. A substantive charge, not sufficiently alleged in an indictment, can never be rejected as surplusage. *Ib.*

110. An indictment will not be defective on account of clerical or grammatical errors, unless the meaning is obscured. *State* v. *Wimberly*, 3 McCord 190.

111. Where an indictment, containing one count, charges the defendant with rude behavior in a meeting-house, and with disturbing public worship; held that these two distinct offences, joined in the same count, was fatal to the indictment. *Commonwealth* v. *Symond*, 2 Mass. 163.

112. When an indictment describes the defendant as late of U., in the county of Oneida, and then laid the offence at F., in said county, F. being in truth in the county of H.; held that this was equivalent to laying the offence in the latter county; F. being a town created by public statute. *People* v. *Breese*, 7 Cow. 429.

113. In an indictment for extortion, when M. acted merely as the agent of B., it was rightly stated in the indictment that the extortion was from B. *Commonwealth* v. *Bayley*, 7 Pick. 279.

114. It is necessary to set forth in an indictment the entire fact, with such a degree of certainty that the crime committed may appear fully to the Court. *State* v. *Wimberly*, 3 McCord 190.

115. For misdemeanor of the same kind, differing only in the degree of guilt and of punishment, one indictment, charging divers offenders severally, may be maintained. *Com.* v. *McChord*, 2 Dana 243.

116. Different persons, guilty of a joint offence, may be indicted jointly or severally. *Ib.*

117. A joint indictment against several, for distinct offences, will not lie. *Ib.*

118. If one can be indicted alone for an offence in which he participated with others, the offence is the joint act of all, otherwise it is several. *Ib.*

119. The strictness of old times is not now required in indictments for misdemeanors and minor offences; the omission of terms merely technical is not material. *Ib.*

120. Where an indictment concludes, "against the peace and dignity of this State," while the language of the Constitution is, "gainst the peace and dignity of the same;" held that the indictment was good. *State* v. *Yancey*, 1 Const. R. 237.

121. An indictment against a justice of the peace for a wilful misdemeanor in office, should show such facts as would amount to such misdemeanor, independent of the word wilful; and to make this out, the indictment should charge the act to have been done knowingly and corruptly. *State* v. *Gardner*, 2 Mo. 23.

122. The fact should be alleged to be wilful, not that the defendant wilfully did an illegal act, which was held bad on demurrer. *Ib.*

123. Where, from the terms of the location of a town or district, by the

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act of incorporation, the Court cannot conclude that the whole town or district lies in one county; then the indictment ought to describe the offence as committed not only in such town, but also in the county where it is found. *Com.* v. *Springfield*, 7 Mass. 9.

124. This opinion is confined to indictments for misdemeanors, and for felonies not capital; but in the indictments for capital offences, the strictness of requiring the indictments to allege the offence as committed not only in a certain town, but also in a certain county, has always been adhered to. *Ib.*

125. In an indictment for letting a house to a woman of ill-fame, the time of the contract of letting need not be alleged in the indictment. *Com.* v. *Harrington*, 3 Pick. 26.

126. The act of 1797, of Kentucky, concerning public roads, declares that where any fence shall be made across or in any public road, the owner or tenant of the land shall pay the penalty. No other person is made liable, and no indictment can be maintained under the act, unless it charges that the accused was the owner or tenant of the land. *Gregory* v. *Commonwealth*, 5 Dana 417.

127. An indictment for a misdemeanor, describing an offence at Common Law, but not within any statute, may be maintained, notwithstanding it concludes against the statute in such cases made and provided; as that may be rejected as surplusage. *Ib.*

128. Where in an indictment it is not positively averred that the prisoner did the act, such omission cannot be remedied by concluding with an averment of the scienter. It will be a fatal defect in the indictment. *State* v. *Holder*, 2 McCord 377.

129. It need not be charged in the indictment, nor need it appear by the record, that the prisoner was examined in the mode prescribed by the act of Assembly, before the Court of the county in which the offence charged in the indictment is alleged to have been committed. *Commonwealth* v. *Miller*, 1 Virg. Cas. 310.

130. Where a defendant is indicted for extortion, the place where the offence was committed must be laid in the indictment. *Halsey* v. *State*, 1 Southard 324.

131. Where an indictment is found for extortion, in taking more than what was due, it must be alleged that there was nothing due; and where the charge is for more than what was due, it is necessary that it should be alleged in the indictment how much was due. *State* v. *Coggswell*, 3 Blackf. 54.

132. Where an indictment is founded on the 8th sec., ch. 36, of the act of 1790, against revolting, the indictment need not state that the master is in the peace of the United States at the time, or a citizen of the United States at the time when the offence is committed. *United States* v. *Thompson*, 1 Sumner 168.

133. A cooper is a seaman, in contemplation of this act. *Ib.*

134. An endeavor to commit a revolt may be complete not merely by stirring up, encouraging, or combining with others of the ship's crew to produce a general disobedience of all orders, but also by stirring up, encouraging, or combining with any one or more of the crew, to produce a deliberate disobedience to any one lawful order of the master or other officers. *Ib.*

135. The confining the master of the ship may take place by means of a moral or a physical restraint, by threats of violence, with a present force, which restrains the master from his freedom of movement or command in his ship, or by physical restraint of his person. But every confinement is not an offence within the act; it must be an illegal confinement or restraint. *Ib.*

136. The indictment need not show what was the number of the grand jury who found the bill. *Young* v. *State*, 6 Ham. 435.

137. An indictment, averring that the defendant, in and upon the public road and common highway, there unlawfully did erect, build, and put up a number of wooden sheds and buildings, was held defective, as being too loose, in not averring the exact number of the sheds. *Commonwealth* v. *Hall*, 15 Mass. 240.

138. Where an indictment is laid for a malicious trespass, it is not necessary

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to allege what means were employed to effect the trespass. *State* v. *Merrill*, 3 Blackf. 346.

139. Where an indictment alleges that the defendant did "assist a negro woman named N., the slave of J. A., in eloping and running away from J. A., by accompanying her a considerable distance, and showing her the road by which she might escape, thereby depriving her master, J. A., of the service of said slave;" held that the indictment was well laid. *Queen* v. *State*, 5 Har. & J. 232.

140. Whoever commits an offence indictable either by statute or at Common Law, is guilty of a breach of the peace of that government which exercises jurisdiction for the time being, over the place where such offence is committed; and in setting forth the offence in an indictment, an omission to charge it as having been done against the peace of that government, is fatal to the indictment. *Damon's case*, 6 Greenleaf 148.

141. All the circumstances and facts which constitute a riot should be fully and distinctly set out in the indictment for such offence. *Whitesides* v. *People*, Breese 4.

142. Where a defendant is indicted, and the charge is alleged in the words, "taken upon himself to do the act complained of;" held that the indictment was defective, as it did not contain, in the words "taken upon himself," a positive averment that the defendant committed the act or offence. *State* v. *Perry*, 2 Bailey 17.

143. Where an offence was committed while the statute creating it was in force, it may be the subject of an indictment after the statute so creating it has been repealed. *State* v. *Matthews*, 14 Mo. 133.

144. Where an indictment is laid for fraudulently mortgaging real estate before it is conveyed, it is necessary to state in the indictment the time and place where the fraud was committed, or the indictment will be defective. *State* v. *Walker*, 14 Mo. 398.

145. At the August term 1851, of the Sebastian Circuit Court, M. was indicted for larceny; the indictment alleging that he committed the offence on the 10th January, 1851, in the county of Sebastian. The act creating the county of Sebastian out of portions of territory belonging to Crawford, Scott, and Polk, was passed 6th January, 1851. The proof was, and the jury so found, that the offence was committed in the year 1850, within the limits of Sebastian, as afterwards organized by the act of Assembly; held that the defendant was properly indicted in Sebastian county, the offence having been committed upon the territory out of which it was formed, and that he could not have been indicted in the county from which the territory was taken, after the organization of Sebastian county. *McElroy* v. *the State*, 8 Eng. 708.

146. Where the statute, in Missouri, requires the certificate of the foreman of the grand jury on each indictment found, that it is a true bill, it is regarded merely as directory. *State* v. *Martens*, 14 Mo. 94.

147. Where a person keeps a bawdy house he may be indicted, and the party who leases a house for such purpose, knowing for what purpose the house was leased, and doing it with the intent of its being so used, he is in law a participator in the crime or offence. *Smith* v. *State*, 6 Gill. R. 425.

148. It is necessary to allege in an indictment in such case a particular description of the crime, and a statement of the circumstances and facts which constitute the crime. The time the lease began need not be stated, nor the time when it is to end. *Ib.*

149. Where an indictment is found against a defendant who is not in custody, the indictment must not be docketted nor entered on the minutes of the Court. *State* v. *Corson*, 12 Mo. 404.

150. Where the law makes an offence more highly punishable, when committed upon a particular class of persons; held that an indictment, though it does not allege whether the injured person belongs to that particular class, will be sustained; and upon the prisoner's conviction in such case, the Court will award only the milder punishment. *State* v. *Fielding*, 32 Maine R. 585.

151. Where, in an indictment, the words "Hendricks Circuit Court, October term, 1846," placed at the head of

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the indictment, formed a part of it, and the offence charged in the indictment is stated to have been committed on the third day of October, in the year aforesaid, the latter words will be referred to the year stated at the head of the indictment. *State* v. *Paine*, 1 Smith R. 73.

152. A letter added to a word in the indictment in pencil mark, before the indictment is found by the grand jury, does not vitiate the indictment. *May* v. *State*, 14 Ohio 461.

153. It is no variance between the note offered to the jury and the one set out in the indictment, that in the latter, the letter S is added to the word "promise," the sound and sense being the same. *Ib.*

154. If the indictment be found in the Oyer and Terminer, and tried in the Sessions, and there be no order by the former court for it to be delivered to the latter, the omission will be fatal. *Cruiser* v. *the State*, 3 Harrison 206.

155. On an indictment for setting fire to "a building" erected for a dwelling-house, and not completed or inhabited, it will be considered after a verdict on such indictment, that the building thus situated, was a dwelling within the statute, and not a mere parcel of building materials. *Commonwealth* v. *Squire*, 1 Metc. 258.

156. That section of the sixth article of the Constitution of Alabama, in relation to the malicious dismemberment, or killing of a slave, was not intended to create a new offence, punishable by indictment—setting out specially, the terms used in the Constitution. *Slater* v. *Coleman*, 5 Porter 32.

157. So a count in an indictment, charging one with maliciously depriving a slave of life, &c., was held to be defective. *Ib.*

158. An indictment cannot be moved by the defendant till he places himself within the jurisdiction of the Court. *Sailer* v. *State*, 1 Harrington 357.

159. When a certified copy of an indictment has clerical errors in it, this will not vitiate it. *State* v. *Thompson*, Wright 617.

160. Where an indictment was found against the town of Dedham, instead of against the inhabitants of the town of Dedham; held that the indictment was proper. *Commonwealth* v. *Dedham*, 16 Mass. 141.

161. If the finding of an indictment was irregular, and the party went to trial without objection; held that after verdict the objection could not be taken. *Wau-kou-chaw-neek-kaw* v. *United States*, 1 Morris 332.

162. Where an offence is charged in an indictment to have been committed "in Pendleton county, in the district aforesaid," when there was no such division as Pendleton county, but in the margin of the indictment, the venue having been correctly laid, "Pendleton district;" held that the indictment laid the offence with sufficient certainty, since the words "in Pendleton county" might be rejected as surplusage, and the term "district aforesaid" could be referred to the venue in the margin. *State* v. *Harden*, 1 Brevard 47.

163. Where there were two counts in an indictment, the one charging a rape on C., on a certain day, and the other charging the defendant with having had carnal knowledge of the said C., on the same day, being under ten years of age. This was held to be but a charge of one offence. *Wright* v. *State*, 4 Humph. 194.

164. Where a defendant, being a justice of the peace, was indicted for taking up certain stray animals, specifying their kind and number, and corruptly causing them to be appraised before himself, being a justice of the peace; the indictment was held to be good. *Wickersham* v. *People*, 1 Scam. 128.

165. Where a defendant was indicted at Common Law for "unlawfully and injuriously" taking a horse, and the words "force and arms" being also used, it was held that this charge did not show such an offence as constituted a breach of the peace. *Israel's case*, 4 Leigh 675.

166. Where a defendant is charged in an indictment at Common Law, with rescuing property, which the sheriff had distrained, from a person in whose charge the sheriff had placed it, it is necessary to allege that the defendant knew by what right the bailee for the

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sheriff held it, or the indictment will be defective. *Israel's case*, 4 Leigh 675.

167. Nor would the want of such an allegation be remedied by verdict under the statute jeo fails, in criminal cases. *Ib.*

168. Where a dwelling-house is occupied by a tenant at will of the owner, it may be well to describe the house as the tenant's house, in an indictment for maliciously injuring the house. *State* v. *Whittier*, 8 Shepley 341.

169. In an indictment, an instrument may be set forth according to its legal effect. *United States* v. *Keen*, 1 McLean, 429.

170. But when descriptive words are used in such case, though they need not have been used, yet they must be proved. *Ib.*

171. When a creek is known by the names of "the Middle Fork of the Beaver," and "the middle fork of the Little Beaver," a description of it by the first name is sufficient. *Bossert* v. *State*, Wright 113.

172. When there are three counts in an indictment, and the first and second charge a felony upon the principal, and the last charge one as accessory to "said" felony, the word "said" will be referred to the second count, and will not therefore be bad for uncertainty. *Sampson* v. *Commonwealth*, 5 Watts & Sergeant 385.

173. The same certainty only is required in indictments that is requisite in declarations. *Sherbon* v. *Commonwealth*, 8 Watts 212.

174. Where there is a defective count in an indictment, by reason of its not alleging the offence to have been committed against the form of the statute, such defective count cannot be veiled by another, for a different offence, laid upon the same state of facts which contains such allegation. *State* v. *Soule*, 2 App. 19.

175. Where, in an indictment founded on the act of 1825, ch. 276, §§ 5 and 22, it was alleged that the vessel was owned by "William Nye, &c.," instead of "Willard Nye, &c.," the Court held the allegation of particular ownership unnecessary; and that the misnomer was, therefore, of no consequence. All that was required was that it should be alleged that the owners were citizens of the United States. *United States* v. *Howard*, 3 Sumner 12.

176. Where the same offence is alleged in an indictment to have been committed on different days, the indictment will be defective in that respect. *State* v. *Hendricks*, C. & N. 369.

177. Where an offence is alleged in an indictment to have been committed within the jurisdiction of the Court, no venue need be laid. *State* v. *Glasgow*, C. & N. 38.

178. Where the indictment is defective, and judgment is arrested for that reason, this does not entitle the prisoner to his discharge; he may be remanded to prison, and tried on a new indictment for the same offence. *State* v. *Holley*, 1 Brevard 35.

179. Where the statute in Virginia provides that the prosecutor shall give security for costs in case of his insolvency, the indictment will not be discontinued on this ground, if the ends of public justice require that the prosecution should proceed. *Hill's case*, 9 Leigh 601.

180. Nor will the Court dismiss an indictment upon the prosecutor's insolvency, when it would, ex officio, have ordered a prosecution to be commenced. *Ib.*

181. In the State of Tennessee, it is a fatal defect in an indictment if one of the grand jurors who found the bill, was neither a freeholder nor a householder; and it is good ground for a plea in abatement before the general issue. *State* v. *Duncan*, 7 Yerg. 271.

182. Indictments, in Virginia, for trespass and misdemeanors, need not set forth the name of a prosecutor at the foot of them; all that is required is, that the indictments should appear to have been found true on the evidence of some witness produced before the grand jury. *Wortham* v. *Commonwealth*, 5 Rand. 669.

183. Whatever it is absolutely necessary to prove, in order to sustain a conviction, must be set forth in the indictment. *State* v. *Wilson*, 2 Rep. Con. Ct. 135.

184. Where several persons are charged in one indictment, none can be discharged from the indictment if

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there is any evidence bearing on his guilt or innocence. *State* v. *Alexandria*, 2 Rep. Con. Ct. 171.

185. Where the allegation in an indictment is, that the crime was committed on the first of March, instead of the first day of March; held not to be a defect. *Simmons* v. *Commonwealth*, 1 Rawle 142.

186. The year, month and day when an offence was committed, must be alleged in indictments; and in a case of burglary, even the hour must be specified; but any other day than the one given in the indictment may be shown, provided it falls within the statute of limitations. *State* v. *G. S.*, 1 Tyler 295.

187. The place where a crime is alleged to have been committed, must be stated in such manner as to show that the Court have the jurisdiction of the offence; it must also be stated with such certainty that the respondent may be fully informed of the charge in this respect, as well as others; and with such distinctness, that the judgment rendered upon the indictment may be pleaded in bar to any second indictment for the same offence. When, also, the place is matter of essential description, it must be particularly and truly stated, and proved as stated. *The State* v. *Cotton*, 4 Foster's R. 143.

188. Where an indictment charges that "John Cotton, of Marellenborough, in the County of Carroll, on the 17th of October, 1851, did feloniously steal, take and carry away a quantity of bank-bills, the money, goods and chattles of one Ira Canny, then and there being found, then and there did feloniously steal, take and carry away," and the defendant pleads guilty; judgment will not be arrested. *Ib.* The words then and there, as used in an indictment, are words of reference; and when time and place have once been named with certainty, it is sufficient to refer to them afterwards by these words; and they will have the same effect as if the time and place were actually repeated. *Ib.*

189. It has been uniformly holden that where the evil intent accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment and proved; and the intent with which the act was done must be proved to be the same with that charged. *Monroe* v. *the State*, 24 Miss. 54.

190. The allegation in an indictment that the name of the person injured by the accused, is unknown to the grand jurors, is a material one, is traversed by the plea of not guilty, and must be sustained, and may be rebutted by proof. *Cameron* v. *the State*, Engl. 712.

191. Where a defendant is acquitted because of a variance between the indictment and the proof, it would be the duty of the judge (supposing section 242, ch. 52, Digest, to be constitutional), to hold the accused in custody, or render cognizance, to the end that a new indictment might be preferred. *Ib.*

192. Where the 43d section of chapter 21, which declares that a general verdict of guilty upon an indictment or information containing several counts, one or more of which is faulty, shall be good, and judgment shall be entered thereupon accordingly. But the accused on the trial may apply to the Court to instruct the jury to disregard the faulty counts; and it shall be the duty of the Court to give such instruction. It was held that one of its manifest designs was to furnish a prisoner arraigned on an indictment containing various counts, some of which are faulty, a means of protecting himself against any prejudice or injury that might arise from such faulty counts, to wit: by a motion, on his trial, to the Court to instruct the jury to disregard them; and that if the Court should refuse, to the prejudice of the prisoner, to give such instruction, it would be an error which he would have a right to redress by an appeal. *Rand* v. *the Commonwealth*, 9 Grat. 738.

193. In criminal pleadings, where penal consequences follow conviction, it is indispensable that there should be certainty to a reasonable extent. *The State* v. *Nutwell*, 1 Gill. 54.

194. Where, in an indictment, there is one good count, and the others are defective, if the proof applies to the good count, judgment will be given accordingly. *The State* v. *Brown*, 3 Strobh. 508.

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195. In a very few instances courts have been so tenaciously formal as to decide that words, not figures, must be used in designating numbers, or in alledging the date of the offence, in an indictment. *The State* v. *Seamons*, 1 Greene's Iowa R. 418.

196. As the words are usually more reliable and certain than mere figures, it is no doubt a more reliable practice to represent amounts and dates by writing them out in full; especially when time or the amount constitutes an essential ingredient of the offence; but in Iowa it is held that if figures are used they do not vitiate the indictment. *Ib.*

197. An indictment is defective when the day of the month or the year when the offence is alleged to have been committed are expressed in figures and not in words at length. *Chambers* v. *the People*, 4 Scam. 351.

198. An indictment will be good if the offence be established that a man of rational understanding cannot fail to comprehend the offence. *Stephen* v. *the State*, 11 Ga. 225.

199. But the act of February, 1850, cited, makes it the duty of the solicitor-general to frame and send before the grand jury bills of indictment against colored persons charged with capital crimes in the same manner as in cases of free white persons; the act obviously designing to place both in all respects upon the same footing. *Ib.*

200. Therefore, in Georgia, under the code, a free white person could be indicted for a rape, and convicted of the attempt, without any count for the attempt. And now the indictment against the slave or free person of color is to be framed in the same manner, of course the same incidents must attach to each. *Ib.*

201. The objects in requiring particularity in setting out an offence. *Wingard* v. *the State*, 13 Ga. 396.

202. Where the indictment alleges that the offence was perpetrated on the 23d day of May, 1851, in the county of Baker; held that more certainty was not necessary. *Ib.*

203. Where a prosecutor ought to be named at the foot of the indictment, if the defendant postpones his objection on that account, until after the jury have returned their verdict against him, he should be held as having waived that objection, and it is then too late to make it. *Hayden* v. *Commonwealth*, 10 Mon. 125.

204. Where an indictment for sending a threatening letter with a view of extorting money, charged the sending of the letter by the accused, to one A. "with intent to extort and gain from him the said A. a large sum of money," &c., held that these words sufficiently implied that it was the property of A. which the accused was aiming at, and that the addition of the words "belonging to the said A.," was unnecessary. *Biggs* v. *the People*, 8 Barb. 547.

205. It was held, also, that the omission of these words was such a formal defect as under the statute (2 R. S. 728) could be disregarded, inasmuch as it did not in any respect tend to the prejudice of the accused. *Ib.*

206. A charge of an intent to extort and gain money from A., necessarily means that it was A.'s property. *Ib.*

207. Where an indictment does not allege with sufficient certainty when the offence was committed, as where it alleges the act to have been done on a day of September now past. This does not in terms, or by reference, state any year, and it is not sufficiently certain for an indictment. *Com.* v. *Griffin*, 3 Cush. 523.

208. The grand and petit jurors were summoned to attend, and the indictment alleged that the bill was found at "Horry Court House" instead of "Conwayborough," the place appointed by law for holding the courts of Horry district; the Court held that "Horry Court House," was the more precise term; but that in one sense both meant the same, and might be regarded as equivalent, convertible terms. *The State* v. *Thayer*, 4 Strobh. 286.

209. In a criminal proceeding, it is not necessary to insert the middle letter in a person's name; but if inserted, it must be proved as laid. *Price* v. *the State*, 19 Ohio R. 423.

210. It is not a defect in an indictment, that it purports to be made upon the "oaths," instead of the "oath" of the grand inquest. *The State* v. *the*

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Morris Canal & Banking Company, 2 Zabris. 537.

211. The practice of finding two or more indictments for different degrees of the same offence, or for different offences, founded on the same matter, disapproved as a general rule. *People* v. *Van Horn*, 8 Barb. 158.

212. In criminal prosecutions, of the grade of felony, at least, nothing that goes to the substance of the offence should be left to intendment, it should be directly averred. *Kit* v. *the State*, 11 Humph. 167.

213. Where the article "the" is omitted, running in the name of "State of Iowa," instead of "the State of Iowa," the indictment will be good. *Hamman* v. *State*, 2 Iowa 270.

214. The certificate of the foreman affirming an indictment to be a true bill, is evidence conclusive and proper, that it was duly found by a legal grand jury. *Ib.*

215. If the requisite number of lawful grand jurors had not participated in, and favored the finding and presentment, it would not be "a true bill," as authenticated by the certificate of the foreman. *Ib.*

216. The Rev. Stat. 152, § 39, enacts that "where a person shall commit an offence within this territory (State) on board of any vessel, or float, he may be indicted for the same in any county, through any part of which such vessel or float may have passed on that trip, or voyage; held that the act applied to offences committed anywhere on said trip, and that the indictment could be laid in any county through which the boat may have passed on such trip, though the offence was actually committed in another county. *Nash* v. *the State*, 2 Iowa 286.

217. It is a familiar and well-settled principle of the Common Law, that the indictment must allege that the offence was committed within the jurisdiction of the court. This must appear on the face of the charge, and the prisoner is not bound to show the contrary by plea in abatement. *McBride* v. *the State*, 10 Humph. 615.

218. Where an indictment alleges that the offence was committed in the county of Shelby, and the act of 1843, ch. 35, establishes a criminal court for the 5th, 13th and 14th civil districts of the county of Shelby, to be held in the city of Memphis, and confers upon it exclusive jurisdiction over all crimes and misdemeanors; held that the indictment did not show that the offence was committed within the jurisdiction of the court. *Ib.*

219. An indictment for an attempt to commit an offence ought to allege some act done by the defendant of such a nature as to constitute an attempt to commit the offence mentioned in the indictment, or it will be bad. *Commonwealth* v. *Clark*, 6 Gratt. 675.

220. An indictment, whether for an offence at Common Law or by statute, must set forth every fact, with every incident necessary to constitute the offence; and when the offence is created by statute, it should do this in the very words of the statute. *Ib.*

221. An indictment under the 8th section of the 4th chapter of the penal code (Clay's Digest, 435, § 8), which charges the defendant "with selling to a certain slave, whose name is to the jurors unknown," is fatally defective, on demurrer, for uncertainty. *Francois* v. *the State*, 20 Ala. 83.

222. As a general rule, when an indictment is defective on demurrer, advantage may also be taken of the defect on the motion in arrest of judgment. *Ib.*

223. An indictment cannot be objected to because one of the grand jurors who found it was an alien. *The State* v. *Taylor*, 8 Blackf. 178.

224. Where an indictment against a county assessor, for neglect of official duty, contains two counts, the first charges that Benjamin Parker was a resident of Bartholomew county during all time between the first day of January and the twenty-fifth day of May, eighteen hundred and forty three, and subject to taxation; and that the defendant being assessor, &c., in utter neglect of his duty, failed within all the time aforesaid, to call on said Parker for a list of his taxable property, in obedience to the requirements of the laws of eighteen hundred and forty-one, and eighteen hundred and forty-two, then in force, the second

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count charges that the defendant failed to list from said Parker his taxable property, &c.; held that the indictment was good without averring that Parker had taxable property. *The State* v. *Hunter*, 8 Blackf. 212.

225. Another duty of the assessor is to list from each person the property subject to taxation, he may possess; and where no such property exists, it is very evident it cannot be the duty of the assessor to make a list. He therefore cannot "be guilty of any neglect of duty" in failing to list property from a person who has none. It follows, that to show a neglect of this duty, the indictment must aver that the individual in reference to whom the neglect is alleged to have taken place, had taxable property. *Ib.*

226. As a general rule of criminal pleading, a defendant cannot be charged with distinct offences in the same indictment; as, for instance, larceny in one count, and perjury in another, for the reason that it would necessarily embarrass him in his defence; for he might be willing that a juror should try him for one offence, and not the other; but the same offence, that is to say, the same species of offence, may be charged in different ways in several counts, in order to meet the evidence. *Bullock* v. *State*, 10 Ga. 46.

227. It is no objection to an indictment that the punishment of the offence in one of the counts is positive, and in the other discretionary; for, after a general verdict, the objection of misjoinder may be avoided by entering up judgment upon a particular count. *Ib.*

228. Where an indictment charges the prisoner with a second offence of petit larceny, it is essential to such charge, that the indictment should state facts to show that he had, prior to the last offence, been convicted of the previous offence in due form of law; and as the conviction is alleged to have taken place before a court of special and limited jurisdiction, the indictment should allege such facts as would show that the justice holding such court had jurisdiction as well of the subject-matter, as of the person of the prisoner. *The People* v. *Powers*, 2 Seld. 50.

229. But where the indictment alleges, in general terms only, that the court before which the prisoner was tried and convicted, then and there had competent power and authority to try and convict him for such offence; held that the defect was mere matter of form, and no ground for a writ of error. *Ib.*

230. Where the defendant, Odell, was indicted in the Daviess Circuit Court, for oppression, under color of his office as a justice of the peace, the indictment was founded on the 83d section of the 53d chapter of the Revised Statutes of 1843, and alleges that on, &c., the defendant being a justice of the peace, as such charged one Baldwin Howard with the offence of committing an assault and battery upon one Isaac Eaton, upon his, the said justice's view, without complaint on oath or affirmation having been made; and that he verbally required the said Howard to appear before him, the said justice, to answer for said offence; that upon such requisition, the said Howard did then and there appear without consenting so to do; and that the defendant, as such justice, thereupon rendered judgment against the said Howard, without the plea of guilty, and without proof, and fined him three dollars, which fine the defendant collected; held that the indictment was bad. *The State* v. *Odell*, 8 Blackf. R. 396.

231. Where an indictment does not allege that the respondents acted as overseers of the poor in the town, or accepted the office, and does not allege that it was the duty of the respondents to relieve or maintain the child, judgment will not be arrested for such cause. *State* v. *Hoif*, 3 Foster 355.

232. In an indictment against overseers of the poor for neglect of duty, the very essence of the crime is the wrong intent with which the act is done; and the gist of an indictment consists in the charge of criminal intent. In order to convict the overseers, it is necessary to allege, and prove that they were overseers of the poor of the town, that it was their duty to relieve the pauper, and they intentionally, and wilfully neglected so to do. *Ib.*

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233. It is sufficient in an indictment for resisting an officer, to allege that the prisoner resisted the officer in the discharge of his duty. It has never been held that the specific acts of resistance should be stated. *State* v. *Copp*, 15 N. Hamp. 212.

234. Where the indictment charges an assault upon John A. Rowell, "then and there being one of the deputy sheriffs in and for the county of Hillsborough, aforesaid, legally appointed, and duly qualified to discharge the duties of said office." The assault is upon a sheriff "legally appointed, and duly qualified;" it would undoubtfully have been sufficient if these words had been omitted. *Ib.*

235. Where an assault is alleged to have been committed upon a deputy sheriff, "legally appointed, and duly qualified," these words are as clearly descriptive as any that could have been selected; the whole averment of an assault upon a deputy sheriff cannot be omitted without affecting the charge against the prisoner. *State* v. *Copp*, 15 N. Hamp. 212.

236. The general rule is, that every indictment must charge the crime with such certainty and precision, that it may be understood, alleging all the requisites that constitute the offence, and that the party accused may know the general nature of the crime of which he is accused. *Bullock* v. *State*, 10 Ga. 46.

237. Where an indictment charged an offence to have been committed on a certain day, of a certain month, "in the year eighteen hundred and forty-six," and it was insisted that it was fatally defective in omitting the words "of our Lord," between the words "year" and "eighteen," the Court held the indictment good. *Engleman* v. *the State*, 2 Carter's R. 91.

238. An indictment "ought to be as certain as a declaration, for all rules in civil pleadings apply to criminal accusations." *The State* v. *McCormack*, 2 Carter's R. 305.

239. An indictment is defective which does not state the time when the offence was committed, and a demurrer to it on that ground, should be sustained. *Roberts* v. *the State*, 19 Ala. 526.

240. The name of a feme covert, as prosecutrix, marked on an indictment, is a nullity, she being wholly irresponsible in law either for costs or damages, the endorsement of her name as prosecutrix is no compliance with the true meaning of the statute. *Mayers* v. *the State*, 11 Humph. 40.

241. In criminal prosecutions of the grade of felony, at least, nothing that goes to the substance should be left to the intendment, it should be directly averred. *Kit* v. *the State*, 11 Humph. R. 167.

242. The offence charged in an indictment, is described in the following terms: that "prisoner with force and arms in the county aforesaid, in and upon one Eliza Conely (being then and there a white free woman), feloniously did make an assault, and her, the said Eliza Conely, then and there feloniously did attempt to ravish and carnally know by force against her will, and in said attempt did forcibly choke and throw down the said Eliza Conely," &c. It was held not bad for duplicity or uncertainty. *Green* v. *the State*, 23 Miss. 509.

243. Where an indictment for lewd and lascivious cohabitation, charged the offence to have been committed a day prior to the day when the statute under which the prosecution was had went into effect, but as continuing to a day after the act took effect; the indictment was held good. *Nichols & Janes' case*, 7 Gratt. 589.

244. Where an indictment for misdemeanor charges that the shop was erected and maintained for the purposes of the trade described; that the defendants did therein carry on that trade, and in the exercise of that trade collected and kept certain offensive matters; and that in manner aforesaid they collected and kept certain other specified offensive matters; and that by reason of the premises, that is, by exercise of the trade, and by collecting the offensive matters in the exercise of the trade, the evil results followed; held that the term "premises," used in the indictment, includes both the exercise of the trade, and the accumulation of the hurtful materials in that exercise of the trade. *State* v. *Hart*, 34 Maine R. 36.

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245. Where an indictment alleges particular facts, and that those facts constituted an offence, the government is to prove the facts, and is entitled to prove them all. *Ib.*

246. Where an indictment commences, "State of Indiana, Hendricks County, Hendricks Circuit Court, October term, 1846, the grand jurors for the State of Indiana, impanelled, sworn, and charged to inquire within, and for the body, of the county of Hendricks aforesaid, upon their oaths present, that John Paine, late of said county, on the third day of October, in the year aforesaid," &c; held that the words "Hendricks Circuit Court, October term, 1846," are a part of the indictment, and that the statement below "on the third day of October, in the year aforesaid," refers to those words, and charges the time of the commission of the offence with sufficient certainty. *The State* v. *Paine*, 1 Carter's R. 163.

247. Where an objection to an indictment is, that it is defective in not stating that the grand jury were sworn and charged for the county of C., this defect, even if it be one after verdict at Common Law, is expressly cured by the Statute of Amendments of Arkansas, which enacts that "no indictment shall be deemed invalid or quashed, nor shall the trial or judgment, or other proceedings therein, be stayed, annulled, or in any manner affected, by reason of any defect or imperfections in matters of form, which shall not be to the prejudice of the defendant. *Denis* v. *State*, 5 Ark. 230.

248. An indictment can be originated at a special term of the Circuit Court. *Young* v. *State*, 2 Howard's R. 865.

249. In the State of North Carolina, the terms "good and lawful men," signify freeholders. *State* v. *Glasgow*, C. & N. 38.

250. Suppose the carrier of the mail should steal a horse, and in the indictment for it should be described as the carrier of the mail, would that vitiate the indictment? Surely not; as carrier, he is not punishable for stealing a horse, but as an individual he is. The description as carrier would be regarded as surplusage. *U. States* v. *Burroughs*, 3 McLean 405.

251. If a letter be stolen from a post-office which contains an article of value, a higher punishment is inflicted on the offender, and consequently the article must be described, and the value of it stated; but the taking of a letter which contains nothing of value, need not be averred; and so it is in regard to the mail. *Ib.*

252. If a carrier of the mail, having possession of it, shall steal it, he cannot escape for the reason that there is no provision in the statute to punish him as carrier. *Ib.*

253. For matters which can be tried in the Court of Maine alone, the grand jury of the District Court cannot indict, unless the accused has been committed or bound over. *State* v. *Jackson*, 32 Maine 40.

254. An indictment will therefore be unauthorized, as to a defendant who has neither been recognized or committed, and he must be discharged; but that irregularity cannot impair the validity of the same indictment as to a defendant who was under recognizance. *Ib.*

255. Where, in an indictment for stopping the mail, the contract of the carrier of the mail with the post-office department was set out, it must be proved; and where an indictment for burglary in the house of J. D., with intent to steal the goods of J. W., it appearing that J. W. had no property there, it was held material to state truly in whom the property of the goods was. *State* v. *Brown*, 3 McLean 233.

256. If, however, the matter unnecessarily stated be wholly foreign and irrelevant to the cause, so that no allegation whatever on the subject was necessary, it will be rejected as surplusage. *Ib.*

257. It is not necessary that an indictment founded upon presentments, should be referred to the grand jury for the further action of that body. *Nunn* v. *State*, 1 Kelly's R. 243.

258. But in case of an indictment for resisting an officer, the judgment must be reversed if the process charged to be in the hands of the constable is not set out; nor is it alleged to be a lawful

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process, or so described as to show it to be so. *Cantrill* v. *the People*, 3 Gillman 356.

259. Where the gist of the offence is resistance or opposition to the officer while acting in his official character, that he was an officer, and so acting, must be distinctly charged in the indictment, and proved upon the trial. Both are matters of fact to be determined by the evidence. There is no more occasion for setting out in the indictment the process or order, the execution of which was resisted or opposed, for the purpose of showing jurisdiction, than there is to copy the officer's commission to show his official character. *McQuoid* v. *the People*, 3 Gillman's R. 76.

260. There must be an entry of record, showing that the bill was returned by the grand jury in open court, and when so returned and filed, the endorsement upon it becomes a part of the indictment. *Brown* v. *the State*, 7 Humph. 155.

261. A bill of indictment, to be good in law, must be signed by the proper officer appointed to prosecute on behalf of the State. *Teas* v. *the State*, 7 Humph. 174.

262. Where an indictment commences, "the grand jurors for the people of the State of Vermont," this is not the usual form of the commencement of indictments in this State, but nevertheless it may be questioned whether it is not more correct than the one commonly used. *State* v. *Nixon*, 3 Vermt. 70.

263. Where a count in an indictment charges that the defendant Michael Connolly (and two others who are named but not tried), late of the said county, on the 5th day of December, 1841, in the county of Cook aforesaid, in and upon the person of George H. Germain, in the peace of the people of the State of Illinois, then and there being with force and arms, did make an assault with an intent then and there unlawfully, wilfully and feloniously to commit a robbery and other wrongs to the said George H. Germain, did then and there; it was held good. *Connolly* v. *the People*, 3 Scam. 474.

264. An exception taken to a count that it does not charge who was intended to be robbed, nor of what; this is doubtless a material fact, and must be plainly charged in the indictment to make it a good one. *Ib.*

265. The word "stab," by its own proper force and meaning, imports a breaking and penetration of the skin, as distinctly as would the word "cut," and more distinctly than would the word "wound;" and is peculiarly, if not exclusively, appropriated to describe the injury inflicted by thrusting with a sharp-pointed instrument. *Jarnagin* v. *the State*, 10 Yerg. 529.

266. The mode of charging the double offence of housebreaking and theft, when used in regard to burglary properly so called, that of breaking and entering a dwelling-house in the night-time, and the kindred offence of breaking and entering dwelling-houses and other buildings in the day-time, seems to have been long in use, and has not been considered obnoxious to the charge of duplicity. *Com.* v. *Hope*, 22 Pick. 1.

267. The rule of law is, that where, by omitting a letter, it produces a different word, or a different meaning, the omission is fatal to the indictment. *Com.* v. *Riley*, Thacher's Crim. Cas. 67.

268. But the omission of the letter e in the word Keene, produces no difference in the sound or signification of the word; the omission of it is no defect. *Ib.*

269. It may be regarded, as a general rule, both in criminal prosecutions and in civil actions, that an unnecessary averment may be rejected, where enough remains to show that an offence has been committed, or that a cause of action exits. *The State* v. *Noble*, 15 Me. 476.

270. There is one exception, however, to this rule, which is, where the allegation contains matter of description; then, if the proof given be different from the statement, the variance is fatal. As an illustration of this exception, Starkie puts the case of a man stealing a black horse; the allegation of color is unnecessary; yet, as it is descriptive of that which is the subject-matter of the charge, it cannot be rejected as surplusage, and the man convicted of stealing a white horse. The

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color is not essential to the offence of larceny, but it is made material to fix the identity of that which the accused is charged with stealing. *Ib.*

271. Under the charge of taking a pine log, the Court held that the defendant could not be convicted of taking an oak or a birch log; the offence would be the same; but the charge to which the party was called to answer, and which it was incumbent on him to meet, is for taking a log of an entirely different description. *Ib.*

272. In an indictment against a town for not making and opening a road, laid by a committee appointed by the Court, it is sufficient if it describe as leading from one terminus, in various directions through the town to another terminus, without giving the survey by the courses and distances. *State* v. *Newfane*, 12 Vt. 422.

273. The acceptance of the report of the committee laying the road, is, ipso facto, an establishment of the road. *Ib.*

274. In describing third persons in an indictment, certainty to a common intent is all that is required; and if such persons are described by the initials of their Christian names, the indictment is on its face sufficiently certain. *The State* v. *Anderson*, 3 Richard. 172.

275. The defendant was indicted and convicted upon the following indictment, to wit: "State of North Carolina, Greene County Superior Court of Law, fall term, 1846;" the jurors of the State, upon their oath, present that John Patterson, late of the County of Greene, on the 1st day of August, 1845, and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at and in the county aforesaid, did keep and maintain a certain common, ill-governed, and disorderly house; and in his said house, for his own lucre and gain, certain persons, as well free as slaves, to frequent and come together, then and on the said other days and times, there, unlawfully and wilfully did cause and procure, and the said persons in his said house, at unlawful times, as well in the night as in the day, then and on the said other days and times, there to be and remain, drinking, tippling, and misbehaving themselves unlawfully, and wilfully did permit, and doth permit, to the great damage and common nuisance of all the citizens of the State, thereby inhabiting, residing, and passing, to the evil example of all others in like case appending, and against the dignity of the State. Upon motion in arrest of judgment, held that this indictment did charge a criminal offence, and that it was not necessary to set farther the particulars, as the names of the parties, &c., though these particulars might be given in evidence on the trial. *The State* v. *Patterson*, 7 Iredell R. 70.

276. Where an indictment lies for maliciously discharging a gun, to the terror of the citizens, all that the law requires in an indictment of this kind is, that the facts shall be so charged as to show that a breach of the peace had been committed, and not merely a civil trespass; laying the offence to have been committed, vi et armis, does not of itself show this, for that is no more force than the law implies. *State* v. *Langford*, 3 Hawks 381.

277. Indictments are not within the operation of the statutes of amendment. *Finch* v. *the State*, 6 Blackf. 533.

278. It is improper to lay the offence to have been committed after the finding the indictment; but if a day certain is laid before, the other may be rejected as surplusage. *State* v. *Woodman*, 3 Hawks 384.

279. An indictment which charges that "A., B. and C., &c., with force and arms, &c., unlawfully, riotously, did assemble together to disturb the peace of the State, and did then and there, being so assembled and gathered together, make a great noise and disturbance in and near the dwelling-house of one W. S., proclaiming that the said W. S. and his wife were persons of color, offering them for sale at auction, and calling them vulgar and opprobrious names, all of which was done in a loud voice, so that the same could be heard at a great distance, to the great damage and terror of the said W. S. and wife, and the common nuisance," &c., does not charge any criminal offence, inasmuch as it does not state

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that the said W. S. or his wife was in the house at the time. *State* v. *Hatchcock*, 7 Iredell's R. 52.

280. Every indictment is a compound of law and fact, and must be so drawn that the Court can, upon its inspection, be able to perceive the alleged crime. *Ib.*

281. Where it becomes necessary, in charging the commission of an offence, to allege that a certain term of a County Court was duly holden, it is not sufficient to allege that it was held by and before the chief judge of such Court, without mention of any assistant judge; if either of the judges is named, it should appear that at least a quorum of the Court held the term. *State of Vermont* v. *Freeman*, 15 Vermont Rep. 722.

282. So if it be alleged that a particular cause was tried, by and before the chief judge, it should appear that one or both of the other judges assisted to try it, or that they were unable or disqualified to sit on the trial. *Ib.*

283. Where one act is indifferent in itself, and becomes criminal only from the intent with which it was done, the intention then becomes material, and it is as necessary to allege and prove it, as any of the facts and circumstances of the case. *State* v. *Freeman*, 6 Blackf. 248. An averment in an indictment that liquor was sold by the defendant, and drank in his house, is not equivalent to an averment that he sold it to be drunk there. *Ib.*

284. All that is necessary as regards laying the time in a bill of indictment is, that the offence shall appear to have been committed before the finding of the bill, except in those cases where the time forms part of the offence. *State* v. *Haney*, 1 Hawks R. 460.

285. In general, the time is not traversable; and if it be laid after a scilicit, and be repugnant to the time laid in a former part of the indictment, the scilicit will be rejected as superfluous. *Ib.*

286. If the indictment lay the offence to have been committed on an impossible day, or on a future day, the objection is as fatal as if no time at all had been inserted. *State* v. *Sexton*, 3 Hawks 184.

287. Nor are indictments within the operation of the statutes of Jeofails, and cannot, therefore, be amended; being the finding of a jury upon oath, the Court cannot amend without the concurrence of the grand jury by whom the bill is found. *Ib.*

288. Where the crime charged against the prisoner is alleged to have been committed the 30th day of September, A. D. one thousand and thirty-three, whether it is a mistake which occurred in the indictment, or was made by the transcribing clerk, cannot be inquired into, the record in this respect appears not to be imperfect, and a presumption cannot be entertained which contradicts it. *Serpentine* v. *the State*, 1 Howard's R. 256.

289. An allegation in an indictment which substantially contradicts a known law of nature regulating the duration of human life, is clearly defective, and cannot constitute the legitimate foundation of a judgment of a Court. *Ib.*

290. If the words "then and there" precede every material allegation, it is sufficient; and in drawing the conclusion from the preceding facts, these words may be omitted. *The State* v. *Johnson*, Walker's R. 392.

291. There is no doubt there is more propriety in writing the year or the day of the month whenever it is necessary to state either in the caption or the body of the indictment, than to insert the Arabic characters now in use, as writing is less liable to alteration, and more certain; but the contrary practice has prevailed so long that it would be unwise now to disturb it. *The State* v. *Raiford*, 7 Porter's R. 101.

292. Twelve good and lawful men constitute a legal grand inquest, and indictments found by them are good, though there be a thirteenth man acting with them who is not, of record, a member of the body; but it is not so with presentments; and this because bills of indictment are founded upon proof, presentments upon information of some one of the grand jury; twelve men may legally find a true bill upon proof, but in the case of presentments, if there be one of the jury not legally a member of the body, the presentment is void, because it may have been

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found upon his information, which would not be under oath. *The State* v. *Baker*, 4 Humph. 12.

293. It is not essential that the record show, by any order or memorandum, that the indictment is founded upon the presentment; but if it appear that there had been a presentment made against the same individual, for the identical offence for which he was indicted, that will be sufficient to show that the indictment was founded upon the presentment, and to excuse the attorney-general from the obligation to to mark a prosecutor on the indictment. *State* v. *McCann*, 1 Meigs 91.

294. Where the only difference from the usual finding, consists in the omission of the indefinite article "a" before the words "true bill," the endorsement being "true bill," instead of "a true bill," it was held not a fatal omission. *State* v. *Elkins*, 1 Meigs 109.

295. Where the indictment set forth the counterfeit bills in their words and figures, as it was proper it should do, and the allegation that the bill charged to be forged in each count, was made in imitation of, and did purport to be, a bank-note, issued by the bank of Cumberland, is nothing more than an allegation that the bill was a fiction, and it is no attempt to set forth the forged bill according to its purport. *State* v. *Wilkins*, 17 Vermont R. 151.

296. The introduction of several counts, which merely describe the same transaction in different ways, cannot be made the subject of objection. *State* v. *Hogan*, Charlton 474.

297. The preface to a bill of indictment is no part of the presentment of the grand jury, and may be amended at any time, so as to conform to the other records of the term. *State* v. *Gilbert*, 13 Vermont 647.

298. If wholly omitted, the presentment may nevertheless be sufficient; the minute of the clerk upon the bill, at the time of presentment, and the general records of the term, will supply any defect in such preface. *Ib.*

299. The term Anno Domini, in an information or bill of indictment, is equivalent to The Year of our Lord; either is good, and so is the want of either. *Ib.*

300. An objection to an indictment because it is not signed by the prosecuting attorney, is untenable in Arkansas. *Anderson* v. *the State*, 5 Ark. 444.

301. Where the record shows that the indictment was found, and returned into Court, by the whole panel of the jury, this is sufficient. *Peter* v. *the State*, 3 Howard's R. 433.

302. The name of the prosecutor must be marked on the bill of indictment. *Ib.*

303. Where the indictment is clearly defective in point of form, and affords prima facie evidence of the guilt of the prisoner, he must be remanded for further proceedings. *Ib.*

304. Formal objections should be raised before pleading to the indictment, as the 153d section of the criminal code requires. *Guykowski* v. *State*, 1 Scam. R. 476.

305. If one count is good, and is sustained by evidence, judgment can be legally given upon it. Nor can the grand jury separate the parts of an indictment, but must either find a true bill, or throw out the whole. *State* v. *Mathis*, 3 Ark. 84.

306. Two distinct offences, with different penalties, may be charged in the same indictment; but care must be taken to have the verdict framed so as to secure the several counts. *State* v. *Priester*, Cheeves' R. 103.

308. In the first count of an indictment, the grand jury charge an offence exclusively cognizable in the Superior Court. In the other counts, upon which the conviction followed, offences of the same class, but of a less aggravated character, are charged. The gravamen in the first count consists in being possessed of ten counterfeit bills, of the Kenduskeag Bank, knowing them to be such, with intent to utter them as true; no conviction on this count could legally follow, unless it was proved that he was possessed, with the criminal intent charged, of as many as ten such bills; there being a failure of proof to this extent, the defendant was acquitted upon this count, but he was convicted upon the other counts, which, taken together, charged that he was at the time averred in the first count, possessed of seven such counterfeit bills, with the same criminal intent,

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consummated by actually uttering and passing some of them as genuine; the conviction was held good. *The State* v. *Andrews*, 17 Maine R. 103.

308. Any indictment taken by a jury, one of whom is unqualified, shall be altogether void and of no effect. *The State* v. *Trott*, 7 Yerg. 271.

309. It is common in practice, in the Commonwealth of Mass., and especially in the county of Suffolk, to include several distinct substantive offences in the same indictment, where they are of the same general nature, and where the mode of trial and the nature of the punishment are the same. *Carlton* v. *Commonwealth*, 5 Metc. R. 532.

310. In an indictment for defacing an ear-mark, it is necessary that the State attain to such certainty as to notify the defendant what he is to answer, in order that he may shape his defence to meet it, and be enabled to plead in bar of any future prosecution, an acquittal or conviction under it ; it should set forth the existing mark, and describe its alteration, or the manner, as near as may be, it is alleged to be defaced. *Sewall* v. *the State*, Ohio, Wright's R. 483.

311. As a middle name may properly be a part of the person's name, if it be stated in full or by the initial letter, it must be correctly stated. *The State* v. *Hughes*, 1 Swan's R. 262.

312. But in pleading either civil or criminal, if the error in stating the middle name or initial letter be excepted to by plea in abatement, it will be fatal. *Ib.*

313. In 3d ch. Cr. Law 832 (596) there is a precedent of an indictment for assaulting a constable in the execution of his office, and he is described as "then being one of the constables of, &c., and in the due execution of the duty of his said office, then and there also being;" this is a sufficient allegation that he was a constable, and it would be proved by evidence that he acted as such. *State* v. *Copp*, 15 New Hamp. 212.

314. It is a most general rule that no allegation which is descriptive of the identity of that which is legally essential to the claim or charge, can ever be rejected. *Ib.*

315. Upon the same principle, no allegation can be proved partially in respect of extent or magnitude, when the precise extent or magnitude is in its nature descriptive of the charge or claim. *Ib.*

316. The position that descriptive averments cannot be rejected, extends to all allegations which operate by way of description or limitation of that which is material. An averment is never considered immaterial when it constitutes the identity of that which is material. *Ib.*

317. If an allegation limit and confine that which is material, the latter can never be available to any greater extent, for such an averment is always descriptive. *Ib.*

318. In cases of felony, no more than one distinct offence or criminal transaction, at one time, should regularly be charged upon the prisoner in one indictment, because if that should be shown to the Court before plea, they will quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenges to the jury ; and if they do not discover it till afterwards, they may compel the prosecutor to elect on which charge he will proceed; but this is only matter of prudence and discretion, which rests with the judges to exercise, for in point of law, there is no objection to the insertion of several distinct felonies of the same degree, though committed at different times, in the same indictment, against the same offender, and it is no ground either of demurrer or arrest of judgment. *Wright* v. *the State*, 4 Humphrey's R. 194.

319. Where the prisoner was indicted for forging the check, and also for publishing it as true, knowing it to be false, these were different offences and punished with different degrees of severity, but were properly united, both in the indictment and trial *Ib.*

320. Where the bill of indictment was endorsed by Alexander R. Hutchinson, instead of Hutcheson, as foreman of the grand jury, it was held no valid objection. *The State* v. *Stedman*, 7 Porter's R. 4951.

321. Where the indictment concludes "against the peace and dignity of our said State," instead of "the peace and

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dignity of the State," as required by the Constitution, it was held good. *The State* v. *Kean*, 10 New Hamp. 347.

322. By the act of 1801, c. 30, § 1, it is enacted that no bill of indictment shall be preferred to any grand jury in the State without a prosecutor marked thereon; and if omitted, the omission need not be pleaded in abatement, advantage may be taken of it at any time. *Medaris* v. *the State*, 10 Yerg. 239.

323. It is clear that offences of a different class, and which require different punishments, as murder and larceny, cannot be joined in the same indictment. *The United States* v. *Dickinson*, 2 McLean's R. 325.

324. A count charging a person with being accessory before the fact, may be joined with a count charging him with being accessory after the fact, to the same felony; and the prosecutor cannot be required to elect upon which he will proceed, as the party may be found guilty on both. *Ib.*

325. A receiver may be indicted as an accessory in one count, and for a substantive felony in another count; and although in his discretion, the judge may put the prosecutor to his election, he will not do so whenever it is clear that there is only one offence, and the joinder of counts in order to meet the facts of the case. *Ib.*

326. Where the first five counts in an indictment charge, substantially, the same offence, though taking a letter or package which contain bank-notes, as charged in the third and fourth counts, is punished by a higher penalty; and the Court cannot but know that all the counts in the indictment relate to the same transaction, and that the variation of the form in which the offence is charged, in the different counts, is done with a view to meet the evidence, and that they present only different grades of the same offence. It was held to be a good indictment. *Ib.*

327. Where an indictment charges the plaintiff in error with being an overseer of the road leading from Raleigh to Memphis, and that he permitted said road to be out of repair and ruinous, and that said road was not carefully measured, and marks and posts of durable wood at each mile set upon said road; held that the indictment in this case charges two distinct offences in the same count, and for this reason it is bad. *Greenlow* v. *the State*, 4 Humph. R. 25.

328. Where, on an indictment, it was endorsed a true bill, by one of the body, and it is shown independently of this endorsement that it was returned by the authority of the whole fifteen jurors who composed the panel; held good, though not signed by a foreman. *Friar* v. *the State*, 3 Howard's R. 422.

329. Where an indictment begins "State of Tennessee, Hardin county," and states the grand jury of the State of Tennessee elected, impanelled, sworn and charged to inquire for the body of the county of Hardin, aforesaid, upon their oaths aforesaid, present, &c., and the charging part of the indictment alleges the defendants with others in the county aforesaid, did commit the offence, this is well. *Barnes* v. *the State*, 5 Yerg. 186.

330. Where an indictment commenced thus: "The grand jurors within, and the body of the county," &c., it was held in motion in arrest, that the omission of the word for, after the word "and" did not vitiate the indictment. *State* v. *Brady*, 4 Weston 353.

331. Where an indictment for obstructing is found, for obstructing an officer in the execution of process, it must recite the writ, that the Court may see that it was such a writ as the officer had a right to execute. *The State* v. *Henderson*, 15 Mo. 486.

332. Where an indictment gives a statement in the caption, of the term, in these words, "Fall term of 1852," and the time is charged in the body in these words, "on the first day of August in the present year," it was held a good indictment. *State* v. *Haddock*, 2 Hawks 461.

333. The Common Law does not require the defendant to be described by his addition, in indictments in Indiana. *The State* v. *McDowell*, 6 Blackf. 49.

334. Where an indictment is headed "Circuit Court, November term, 1829," in figures, it was good, when the record specified it to have been found that term. *Barnes* v. *the State*, 5 Yerg. 188.

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335. Where an indictment concludes "against the peace and dignity of the people of the State of Arkansas," while the form prescribed by the Constitution requires all indictments to conclude simply against the peace and dignity of the State of Arkansas, it was held to be a good indictment. *Anderson* v. *State*, 5 Ark. 444.

336. The words, vi et armis, are necessary in indictments for offences which amount to an actual disturbance of the peace, as nuisances, assaults, &c.; but they were never necessary where it would be absurd to use them, as in indictments for conspiracies, slanders, cheats, escapes, and such like. *State* v. *Kean*, 10 N. Hamp. 347.

337. It is well settled, that in indictments for offences against the persons or property of individuals, the Christian and surnames of the parties injured must be stated, if the parties are known; the name so stated must be either the real name of the party injured, or that by which he is usually known; in cases where the owners are unknown, it must be so stated. *Willis* v. *People*, 1 Scam. 399.

338. If the Christian name is mistaken, it is fatal to all legal instruments; a declaration against W. E. Smith would be bad, and a judgment upon it would be reversed in error. In criminal proceedings, greater strictness is required; and the record should be so perfect as to be a bar to a subsequent prosecution for the same crime; but after verdict, the indictment will stand in case of a mistake in the Christian name of a prisoner. *Smith* v. *State*, 8 Ohio 294.

339. The name of the prosecutor must be endorsed on an indictment for a riot before the bill is returned by the grand jury. *State* v. *McCourtney*, 6 Mo. 649.

340. Petty larceny is a trespass within the meaning of the 22d section of 3d article of the act concerning practice and proceedings in criminal cases, Rev. Stat. 1835, p. 451, and the name of a prosecutor must be endorsed on the indictment. Scott, J., dissenting. *State* v. *Hurt*, 7 Mo. 521.

341. It is not necessary for the circuit attorney to subscribe his name to the indictment. *Thomas* v. *State*, 6 Mo. 457.

342. If a caption to an indictment does not state where the Court was holden, or that a grand jury, of good and lawful men, was impanelled, it will be defective. *Grandison* v. *State*, 2 Humph. 452.

343. The act of 1811, which requires the name of the prosecutor to be endorsed "on all bills of indictment," is merely directory, and the omission to make such an endorsement will not affect the validity of the indictment. *State* v. *Hughes*, 1 Ala. 655.

344. The words, "a true bill," must be endorsed upon every indictment so found; but there is no law requiring that they shall be signed by the foreman. The omission of the foreman to add "foreman" to his name in signing the endorsement upon a true bill (which he had signed at the foot with that addition), is no ground for a quashal. *Com.* v. *Walters*, 6 Dana 291.

345. In an indictment under 2 Rev. Statutes, 698, p. 3, for attempting to commit an offence, the particular manner in which the attempt was made, is immaterial, and need not be set forth in the indictment. *People* v. *Bush*, 4 Hill 133.

346. An indictment charging a person with disturbing "a religious assembly commonly called a quarterly meeting conference," cannot be supported. *State* v. *Mitchell*, 3 Iredell's R. 111.

347. The indictment should charge that the assembly had met "for divine worship," "divine service," "religious worship" or "service," or something of the same import. *Ib.*

348. An indictment against an individual for permitting a public bridge to become ruinous, which he was bound to repair, must set forth how he became subjected to the duty of making repairs. *State* v. *King*, 3 Iredell's R. 411.

349. No indictment is allowed to be filed in Court and to become matter of record, unless it is brought into court by the grand jurors in a body, and delivered to the Court by their foreman, by whose signature it is verified. *Com.* v. *Johnson*, Thach. Crim. Cas. 284.

350. It is not error to join issue by

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adding the similiter in the name of the State, instead of in the name of the Attorney-General; and semble, any error in adding the similiter, or by not adding it all, is amendable. *Berrion* v. *State*, 2 Zabris. 9.

351. It is error in an indictment to express numbers or dates by Arabic figures or Roman numerals: they must be written in words at length, except when the indictment, as in forgery, professes to set forth the exact tenor or a fac-simile of any instrument. *Ib.*

352. In an indictment against a justice of the peace for corruption in an act done in virtue of his office, it is not sufficient to charge that the act was done corruptly; the facts must be set out in which the corruption consists. *State* v. *Zachay*, Bush. (N. C.) 432.

353. It is a misdemeanor in office for a justice of the peace to sell or transfer a judgment rendered by himself, or by any other justice, if in his possession virtute officia; the law making it his duty to keep and preserve such judgments. *Ib.*

354. The prosecuting officer for the State has a discretionary power to endorse the Governor as prosecutor on bills of indictment, whenever he may think the public interest may require it. *State* v. *English*, 1 Murphy 435.

355. The time of the commission of offences is, in general, necessary to be stated in the indictment, and especially where the time for the prosecution is limited by statute. *State* v. *Beckurth*, 1 Stew. R. 318.

356. The act of Pennsylvania could never intend there should be a prosecutor endorsed on indictments, unless there was really a prosecutor existing; for the words in the act are, "the prosecutor;" and as no person in the present case is proved to be active in carrying on the prosecution, the defendant must plead to the indictment without any endorsement. *The King* v. *Lukens*, 1 Dall. 5.

357. The defendant himself cannot be sworn to prove the person prosecuting, it must be proved by indifferent witnesses. *Ib.*

358. An indictment can be maintained concluding against the form of the statute, if the facts charged amount to an offence at Common Law, and are not within the purview of any statute. *Com.* v. *Hoxey*, 16 Mass. R. 385.

359. Under the act concerning crimes and punishments, felonies and misdemeanors cannot be joined in the same indictment; and the offence charged in the second count being only a misdemeanor, there was a misjoinder of counts; and the verdict being general, it was impossible for the Circuit Court to direct what judgment should be entered. *Hilderbrand* v. *State*, 5 Mo. 548.

360. Indictment containing three counts. First count charged prisoner with stealing a mare, of the value of thirty dollars; second count, with stealing a bell collar, of the value of twenty-five cents; third count, with stealing a mare and bell collar, of the value of twenty-five dollars; there was a general verdict of guilty; held, that though the third count was double, in joining two distinct offences of a different degree, and punishable in a different manner, yet as there was no demurrer, either general or special, nor any motion to quash, the defect was cured by verdict, and could not be taken advantage of by motion in arrest, or writ of error. *Hilderbrand* v. *State*, 5 Mo. 548.

361. It is not error for an indictment to charge the defendant with several distinct facts, where they all constitute one offence. *State* v. *Palmer*, 4 Mo. 453.

362. If the venue be laid in the body of the indictment, at the township of St. Louis, it "is sufficient, as it may be referred to the" county in the margin. *Ib.*

363. Every indictment must contain and set forth all the ingredients of an offence, and no omission, in such statement, can be supplied by evidence or inuendo. *State* v. *Henderson*, 1 Rich. 179.

364. Unnecessary and useless averments in an indictment may be rejected as surplusage. *State* v. *Hamilton*, 7 Mo. 300.

365. Nothing need be averred which is not necessary to constitute the offence charged in the indictment. *State* v. *Ballard*, 2 Murphy 186.

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366. If the indictment alleges the grand jurors to be good and lawful men, this is all the law requires, and must be presumed to include every statutory as well as Common Law qualification. *Jerry* v. *State*, 1 Blackf. 395.

367. Where an indictment contained two counts, on the first of which a nolle prosequi was entered, and the time of committing the offence was only averred by reference to the first count, it was held that the defendant might be tried and convicted on the second count, it not being stricken out, or rendered null, as, perhaps, it would have been sustained upon a demurrer. *Wills* v. *the State*, 8 Mo. 52.

368. Where one is indicted for refusing to assist an officer in securing a person whom he has arrested, it is not sufficient to state in the indictment that this was an arrest by lawful authority; the authority to arrest must be set forth in the indictment. *State* v. *Shaw*, 3 Iredell's R. 20.

369. The finding of the grand jury being in writing, and having been publicly announced by the clerk, as is invariably the case, in the presence of the grand jury, is a sufficient guard against misconstruction or perversion and as there is no positive law requiring it, it is not essentially necessary to its validity that it should be signed by the foreman. *The State* v. *Creighton and another*, 1 Nott & McCord's R. 257.

370. The insertion of the words contra formam statuti (or what is tantamount in English), in such indictments, is not error; where there is no statute, and the offence charged is indictable at Common Law, these words will be rejected as surplusage. If a caption says the foregoing bills of indictment are true bills, without it appearing on the record that the bill set out was one of them, the omission is fatal. *Cruiser* v. *the State*, 3 Harrison's R. 206.

371. It is doubtful whether the Common Law required that any of the grand jurors should sign the endorsement on an indictment, or the finding of a petit jury, and believed that an endorsement without being signed by a foreman, or otherwise, was sufficient in either case. *The Com.* v. *Ripperdon*, 5 Littell S. C. 195.

372. Where the indictment set forth the commission of a murder in these words: "On the third day of August, one thousand eight hundred and forty-three," without saying, "the year of our Lord," or even using the word "year;" held that although this defect would have been fatal at the Common Law, yet it is cured by our act of Assembly of 1811, Rev. Stats. ch. 35, § 12. *State* v. *Lane*, 4 Iredell's N. C. 113.

373. An indictment entitled thus: "City of B., to wit, at the Municipal Court, for the town of B., now by an act, &c., incorporated into a city, &c., begun, &c., for said city and county of S., on, &c., the jurors, &c., present that N. J., at B., aforesaid," &c., was held good. *Commonwealth* v. *James*, 1 Pick. 375.

374. Where an indictment purports to be on the affirmations of some of the grand jurors, it must appear that they were persons entitled by law to take affirmations in lieu of oaths, or the indictment will be fatally defective. *The State* v. *Harris*, 2 Halst. 361.

375. The caption of an indictment must describe the court before which it is found, that it may appear that the court can exercise jurisdiction over the offence charged. *The State* v. *Sutton, et al.*, 1 Murph. 281.

376. The time of committing an offence (except where the time enters into the nature of that offence), may be laid on any day previous to the finding of the bill, during the period within which it may be prosecuted. *Shelton* v. *the State*, 1 Stew. & Port. 208.

377. It is not essential to the safety of the prisoner that the particular words, "good and lawful men," should be set forth in the indictment. *The State* v. *Yancey*, 1 Const. R. 237.

378. If the fact be stated as to the time or place with repugnancy, or uncertainty, the indictment will be bad. *Jane* v. *the State*, 3 Mo. 61.

379. If two times or places have been previously mentioned, and afterwards a part only is laid, "then and there," the indictment is defective, be-

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cause it is uncertain to which it refers. *Ib.*

380. An indictment against a slave for preparing, exhibiting, or administering medicine, must charge the act to have been done feloniously, or with a felonious intent. *Ib.*

381. The charge under every indictment must be sufficiently explicit to support itself, no latitude of intention can be allowed to make it include anything more than is expressed. *Graham* v. *the State*, 1 Ark. 171.

382. It has been held that an indictment charging the defendant with obtaining money by false pretences, without stating what were the particular pretences, is insufficient. *Ib.*

383. To this there are some exceptions, as in the case of indictment for being a common scold or barrator, or for keeping a disorderly house, or for conspiracy. *Ib.*

384. Every indictment ought to contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy; and in particular cases, where precise technical expressions are required to be used, there is no rule that other words shall be employed than such as are in ordinary use, or that in indictments, or in pleadings, a different sense is to be put upon them than what they bear in ordinary acceptation; and if when the sense is ambiguous, it is sufficiently marked by the context or other means, in what sense they are intended to be used, no objection can be made on the ground of repugnancy. *Ib.*

385. Where an indictment charges the offence to have been committed "at the city of Little Rock," and this allegation is not as explicit as it might have been; and it certainly would have been more in conformity with the approved precedents, to have charged the acts constituting the offence to have occurred "in" or "within" instead of "at" the city of Little Rock aforesaid; held that the allegation was sufficient to show that the offence was committed within the city. *Ib.*

386. Although this form of stating the venue, might not be sufficient in indictments of higher grade, where the consequence of a conviction might be the forfeiture of life, or the infliction of some corporal or infamous punishment, in which class of cases the law requires more exactness and greater certainty than it does in indictments for mere misdemeanors, where, upon a conviction, a pecuniary fine only is imposed. *Ib.*

387. In an indictment against a slave for a capital offence, some part of the proceeding must contain the name of the owner; and such ownership is an essential matter, necessary to be proved and found by the jury. *Flora* v. *the State*, 4 Port. 111.

388. On an indictment for marrying a female infant under the age of fifteen years, where the defendant relies upon the statute of limitations as to prosecutions for misdemeanors, Rev. Stats. ch. 35, § 8, proof that the marriage was by consent of the mother, and was solemnized by a minister of the gospel, in the presence of six or seven persons, and that the parties lived together afterwards, openly, as man and wife, shall protect the defendant from the operation of the proviso, that the offence was committed in secret. *The State* v. *Watts*, 10 Iredell 369.

389. So where the parties went to an adjacent county to be married, and afterwards returned to the county of their domicil, where they lived together as man and wife, the fact being known to the community, and the defendant continuing in the open exercise of his duties as a minister of the gospel, it cannot be held that he absconded from the county in which he was married, or concealed himself, so as to bring his case within the operation of the second part of the said proviso. *Ib.*

390. Where a prisoner who was on examination in a County Court, was remanded to the Circuit Court, for a further examination, and the session of the Circuit Court being then in the sixth day of the term, and the rest of that term and the following term of the Circuit Court having passed without the prisoner being indicted, it was held that the prisoner was not entitled to his discharge, on the ground that two terms had elapsed since his ex-

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amination without his being indicted. *Bell's case*, 7 Gratt. 646.

391. Where an indictment purports to be on the affirmation of some of the grand jurors, it must appear that they alleged themselves conscientiously scrupulous of taking an oath. *The State* v. *Fox*, 4 Halst. 244.

392. Where A. was arrested as a vagrant, in pursuance of a city ordinance in St. Louis, and confined in the calaboose, but was liberated upon his promise to leave the city within a stipulated time, which promise he did not fulfil, and his re-arrest was ordered by the city marshal. In attempting to re-arrest him, without warrant, B., a watchman (and a member of the police), was killed, and A. was committed for murder; held that the breach of his promise, by A., constituted no legal grounds upon which to re-arrest him; that it was necessary to show that B. was a watchman, and a member of the police, and that A. was guilty of the violation of the city ordinances, or that he was a vagrant within the purview of the same; and it was further held that it was not necessary to allege in the indictment that A. was a vagrant, or that B. was a police officer, as it would be in an indictment for resisting an officer in the discharge of his duty. *The State* v. *Roberts*, 15 Miss. 28.

393. An indictment which charges an indecent and scandalous exposure of the naked person to public view in a public place, is sufficient, without charging the act to have been committed in the presence of one or more of the citizens of the State. *State* v. *Roper*, 1 Dev. & Batt. 208.

394. The name of a prosecutor (who will be answerable for costs), the town or county in which he resides, with his title or profession, must be written at the foot of every indictment, for a trespass upon the person or property of an individual; and an omission of his addition is a fatal defect, not cured by security for the costs required of and given by the prosecutor. *Commonwealth* v. *Gore*, 3 Dana 475.

395. An indictment need not express that it is found by authority of the Commonwealth. *Allen* v. *Com.*, 2 Bibb 210.

396. The prosecutor must be set at the foot of an indictment for trespass or misdemeanor, before it is presented to the grand jury. *Ib.*

397. To set down the prosecutor after the indictment is found, will not do. *Ib.*

398. The statute which requires the name of a prosecutor to be endorsed on the indictment in certain cases, does not require the name to be on the back of the indictment; it is sufficient if it be on any part of the indictment. *Williams* v. *State*, 9 Mo. 268.

399. Where, on the trial of an indictment for murder, the prisoner's counsel objected that the name of the deceased, as mentioned in the indictment, was not his true name; that was a fact to be tried by the jury. *State* v. *Angel, et al.*, 7 Iredell 27.

400. The purpose of setting forth the name of the person on whom an offence has been committed, is to identify the particular fact or transaction on which the indictment has been founded, so that the accused may have the benefit of an acquittal or conviction, if accused a second time. The name is generally required, as the best mode of describing the person, but he may be described otherwise, as by his calling, or the like; if he be identified thereby as the individual, and distinguished from all others, and if the name be not known, that fact may be stated as an excuse for omitting it altogether. *Ib.*

401. Mere surplusage will not vitiate an indictment, and need not be established in proof. *U. States* v. *Howard*, 3 Sumner 12.

402. Where an indictment is found against a justice of the peace for failing to return to the clerk's office, &c., a certificate of the solemnization of marriage, &c.; held that an averment as to a license having issued was unnecessary, and should be rejected as surplusage. *The State* v. *Wilder*, 7 Blackf. 582.

403. An indictment for selling foreign merchandise is not objectionable for omitting to state that the article had not been received by the defendant in exchange for articles of his manufacturing, &c.; the exception being in a separate statute. *Colson* v. *the State*, 7 Blackf. 590.

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404. It is not necessary that the name of the defendant, or any other person mentioned in an indictment, should be constantly repeated; when once mentioned in full, it may be abbreviated when it occurs again in the same count or sentence, with a reference to the first statement of it, by the words "said," or "aforesaid." *The State* v. *Coppenburg*, 2 Strob. 273.

405. Where an indictment contains matter unnecessary to the description of the offence, it may be rejected. *Ib.*

406. Where the indictment alleges the offence to have been committed on the 22d day of March, in the year 1846, and the objection is that it does not state the era or period from which said date begins, the Court held that it might fairly be presumed to have been in the year of our Lord 1846, or in the year 1846 of the Christian era. *Hall* v. *the State*, 3 Kelly 18.

407. The attorney-general need not add the number of the district of which he was attorney-general on an indictment. *State* v. *Brown*, 8 Humph. 89.

408. The ninth section of the Bill of Rights in the constitution of the State of Connecticut, is not applicable to an inquiry before a grand jury, nor is it essential to the validity of an indictment, that the accused should be present at such inquiry, or that notice should be given him for that purpose. *The State* v. *Wolcott*, 21 Conn. 272.

409. Therefore, where the defendant, during the inquiry by the grand jury, which resulted in an indictment against him, was confined in the State's prison, had no notice of the proceedings against him, and no opportunity to be present; it was held that the indictment was not thereby rendered invalid. *Ib.*

410. It is not customary for the Court, without special reasons suggested on application, to give directions regarding witnesses to be called before the grand jury. *Ib.*

411. Therefore, where P., an accomplice in the crime charged, went before the grand jury, and testified, as a witness, without the direction or permission of the Court; it was held that the indictment was not thereby rendered invalid. *Ib.*

412. If the accused plead not guilty, and go to trial without suggesting such objections, they will be deemed as waived by him. *Ib.*

413. A prosecution is not necessary on an indictment upon the 15th section, 7th article, act concerning crimes and punishments, R. C. 1835, for disturbing the peace of a family by loud noises, &c., in the night, that not being a trespass, either to the person or the property of any one. *State* v. *Moles*, 9 Mo. 685.

414. "But no allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage. *U. S.* v. *Howard*, 3 Sumner 12.

415. Neither a presentment of a grand jury, nor an indictment, requires necessarily that it should be signed by any one. *State* v. *Cox*, 6 Iredell 44.

416. It is the returning of the bill or indictment publicly in open court, and its being there recorded, that make it effectual. *Ib.*

417. An indictment ought to be certain to every intent, and without any intendment to the contrary; and it ought to have the same certainty as a declaration; for that all the rules that apply to civil pleadings, are applicable to criminal accusations. *State* v. *Hand*, 1 Eng. 165.

418. The name of the defendant committing the offence should be repeated to every distinct allegation; but it will suffice to mention it once, as the nominative case in one continuing sentence. *Ib.*

419. If defendant's full name has appeared in the first part of the indictment, it would be sufficient throughout the residue to refer to it by the Christian name alone; but if the surname be omitted in the first, and afterwards used, this will not cure the defect. *Ib.*

420. It is a general rule that repugnancy in a material matter is fatal to the indictment. *Ib.*

421. But though the indictment must in all respects be certain, yet the introduction of averments altogether su-

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perfluous and immaterial, will seldom prejudice. For, if the indictment can be supported without the words which are bad, they may, on arrest of judgment, be rejected as surplusage. *Ib.*

422. Where the indictment accuses the defendant of the offence of a misdemeanor, and then proceeds to specify the particular acts of the defendant, which constitutes the offence; held to be well laid, though not expressly named as a misdemeanor in the statute, but coming within the definition of such offence in the statute. *Hall* v. *State*, 3 Kelly 18.

423. Where it is said the circumstances which made the time and place suspicious, should have been stated in an indictment, for allowing slaves to assemble on defendant's premises; it was held that this was properly matter of evidence, and should not be alleged in the indictment. *State* v. *Brown*, 8 Humph. 89.

424. It is essential that it should appear in an indictment, that it was found upon the oath of jurors. *State* v. *McAllister*, 13 Maine 374.

425. And it was once considered that the names of the jurors finding it, should also be inserted; but that is not necessary. *Ib.*

426. Where in a criminal case, a copy of an indictment is furnished the prisoner, which omits to add the words foreman of the grand jury, to the name of the foreman, and the prisoner goes to trial without objecting to the incorrectness of the copy; held that his objection thereto will be waived by his going to trial. *Com.* v. *Betton*, 5 Cush. 427.

427. Where a prisoner is indicted under the laws of Missouri, and is not tried previous to the expiration of the second term after that at which the indictment was found; held that he was entitled to his discharge, unless he moved for a continuance, or unless there was not time to try him. *Robertson* v. *State*, 12 Mo. 592.

428. Where a particular intent accompanying an act, is necessary to constitute a crime, such an intent should be alleged in the indictment. *People* v. *Lohman*, 2 Barb. 216.

429. The strictness with which indictments were formerly construed, has been somewhat relaxed. *People* v. *Lohman*, 2 Barb. 216.

430. Mere surplusage in an indictment will not vitiate the indictment so long as it is not contradictory. *Ib.*

431. Where an indictment alleged that the defendant administered to a pregnant woman some drug, and in another count, that she employed some instrument, with intent thereby to procure a miscarriage of the patient, which is all the 2d section of the act of May 13th, 1845, to prevent the procurement of abortion, requires to constitute a misdemeanor, and then goes on to charge that the patient was quick with child, and that the death of such child was effected, and characterizes the act of the defendant as felonious, these allegations do not contradict the charge for a misdemeanor; nor do they contain a valid charge of felony, which will merge the misdemeanor, because there is no charge of an intent to destroy the child. *Ib.*

432. If a proceeding for the recovery of a penalty be commenced, and judgment be rendered thereon for the penalty, it must be precisely that judgment which the process sought, and not another and different; if an act be passed which requires a different judgment, the process abates, or, after verdict, the judgment may be arrested. *State* v. *Fletcher*, 1 Rhode Island R. 193.

433. In indictments where an act creating an offence has been repealed between two terms of the court, pending at the last term, and continued to the present, and upon which no convictions have yet been had. Upon these no judgments can be rendered; for though the amending sections provide for convictions, yet to be had on those indictments, it changes the form of judgments to be rendered thereon, and requires the judgments to invest the complainant with rights to which he is not entitled, by virtue of the indictment or proceedings thereon, but solely by force of the statute, and to divest the town of rights which it had at the commencement of the process. *Ib.*

434. In general, when any particular fact is averred, it should be stated to

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be done then and there, after the county and ville have been clearly expressed in the body of the indictment, and the allegation of time and place "then and there," should be repeated to every material fact which is issuable or triable. *State* v. *Roberts*, 26 Maine 268.

435. If two places be previously named, and afterwards a material fact only laid "then and there," the indictment is defective, because it is uncertain to which place reference is made, and the indictment would be bad on motion in arrest of judgment. *Ib.*

436. If the place where an offence is usually alleged in an indictment to have been committed, is a town named, which is within the county also named, where the court have jurisdiction ; but it is not necessary that the town should be stated, if the place mentioned is equally specific. *Ib.*

437. If the whole description of the place where the offence is alleged in an indictment to have been committed, when taken together, legitimately conveys the idea to the mind, that it was either in the town of Enfield, or the town of Howland, in the county of Penobscot, without indicating more specifically the particular spot, there would be an uncertainty, which has been held in analogous cases to be fatal. *Ib.*

438. Where the indictment states that the place where the offence was committed, was on the Penobscot river, and was between the towns of Enfield and Howland, "or within the limits of one or other of them," it was held sufficiently certain. *Ib.*

439. Mere surplusage in an indictment will not vitiate; and, therefore, when an indictment alleges facts which constitute a misdemeanor, it will be good for that offence, although it state other facts which go to constitute a felony, provided all the facts alleged fall short of the charge of felony, in consequence of some other facts essential to that charge, *e. g.*, the intent of of the party accused not being averred. *Lohman* v. *the People*, 1 Com. R. 379.

440. Where an instrument is to be set forth, the description that it purports a particular fact, necessarily means, that what is stated as the purport of the instrument appears on the face of the instrument itself. *Downing* v. *the State*, 4 Mo. 572.

441. Where an objection was taken to an indictment, that it charges the offence as at Common Law, whilst the punishment is inflicted under the statute ; held that this objection could not prevail. *McCann* v. *the State*, 13 Smed. & Marsh. 471.

442. If the law requires the intent to be charged, where the statute expressly dispenses with the necessity of alleging that the party intended to pass upon any particular person, corporation, or company, à fortiori, would it be necessary where the statute is silent upon the subject ; and for such defect the indictment is bad, and consequently the judgment founded upon it is irregular and void. *Gabe* alias *Santa Anna* v. *the State*, 1 Eng. 519.

443. An indictment was entitled on the margin "The State of Alabama, Butler County," and in the body of the indictment it was recited that "the grand jurors," &c., "of the County of Buter, upon their oath present," &c., the name of the county was not again repeated, nor was any other county named, the offence was charged to have been committed "in the county aforesaid." It was held that the indictment was not defective ; the courts are bound to know the names of all the counties in the State, and there being no such county as Buter, the words in the county aforesaid must refer to the county stated in the margin of the indictment. *Reeves* v. *State*, 20 Ala. 33.

444. Indictment against two, one only put upon trial, it is not error if it can be justly inferred from the record that an order for a separate trial was made, though it does not appear in form upon the record. Two may be joined in indictment for having counterfeit notes in possession. *Hess* v. *State*, 5 Ohio 5.

445. Where the indictment commences as follows : The grand jurors, impanelled and sworn, &c., upon their oath, present, &c., there is no year set out in it ; and the words, "in the year of our Lord aforesaid," "the said year," &c., amount to nothing. In the cap-

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tion of the indictment, beginning with the words, "Be it remembered," the year 1841 is named, but the caption is no part of the indictment. It is the mere statement of the clerk, made after the suit is determined in making up the record. *State* v. *Hopkins*, 7 Blackf. 494.

446. An indictment, or presentment is required by the fundamental law of the land, for every criminal charge, and it is declared that no person shall be put to answer in any other manner. An indictment or presentment is therefore necessary, to confer jurisdiction upon the Court over the person accused; it can be obtained in no other way, not even by consent, but the statute requiring a copy of the indictment to be furnished the accused twelve hours before trial, is merely a directory provision. It refers only to the time of trial, it shall not be until twelve hours after the copy ; but it has nothing to do with the jurisdiction of the Court, that is already acquired by the indictment. *Smith* v. *the State*, 8 Ohio 294.

447. If the accused insist upon such copy, or rather if he do not waive his right in this respect, and is forced to trial without it, and against his own consent, it would most clearly lay the foundation for a motion for a new trial; and if the facts appeared on the record, a motion in arrest of judgment, or a writ of error, might be sustained. *Ib.*

448. But where there was no objection for the want of a copy of the indictment, such copy, then, must be considered as waived, and it does not lie in his mouth to say that it was not furnished. *Ib.*

449. The Circuit Court has no more power to impanel, swear, and charge a grand jury, and receive an indictment for a capital crime, than it has to try the cause, and pronounce sentence. *Cook* v. *the State*, 7 Blackf. 165.

450. An indictment will be defective if the name of the prosecutor is not endorsed on it according to the directions of the statute. *Moore* v. *the State*, 13 Smed. & Marsh. 260.

451. If an indictment be defective because the name of the prosecutor is not endorsed, it is too late to remedy the defect by amendment after trial *Ib.*

452. Words other than technical terms, used in an indictment, are to be understood in their ordinary and usual acceptation. *State* v. *Freeman*, 1 Spears 57.

453. An indictment may be found for maliciously, wilfully, and wickedly killing a horse. *Respublica* v. *Teischer*, 1 Dall. 335.

454. Where there are two counts in a bill of indictment, and evidence of two corresponding offences proved, the Court will not order the solicitor to select one of the offences and abandon the other. *State* v. *Marsh*, 1 Jones' N. C. R. 526.

455. After verdict in a capital case, and a motion in arrest of judgment, because one of the grand jurors, who returned the indictment, had not been duly returned, the Court looked into the case, and permitted the officer to amend his return, and it was so made to appear that the juror was in fact legally chosen and returned. *Commonwealth* v. *Read*, Thacher's Crim. Cas. 180.

456. So, where the indictment was returned by the grand jury, and the word Foreman was omitted, it was held not material. *Ib.*

457. It is well settled that if a bill is entitled generally of the term, it relates prima facie to the first day of the term ; and if the cause of action does not arise till afterwards, the defect is fatal. *Ib.*

458. But the true time of filing the bill may be shown ; and if the cause of action is prior thereto, though after the commencement of the term, judgment will not be arrested nor reversed on error. *Ib.*

459. And so if it should appear on the face of an indictment, that it was found prior to the commission of the offence alleged, it would be a fatal error. *Ib.*

460. The statute makes it the duty of the foreman of the grand jury to endorse on an indictment the names of the witnesses upon whose testimony the same shall have been found ; R. S. ch. 58, § 3. It further declares every person charged with treason, murder, or other felonious crime, shall be furnished, previous to his arraignment, with a copy of the indictment and a list

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of the jurors and witnesses; R. S. ch. 30 § 180. In reference to these provisions, the Supreme Court of Illinois decided, in the case of *Gardiner* v. *the People*, 3 Scam. 83, that the prosecution is not restricted to the list of witnesses furnished to the prisoner before his arraignment, but that the Court, in the exercise of a sound discretion, may permit the prosecution to introduce other witnesses. *Gates* v. *People*, 14 Illinois R. 433.

461. It was said, taking these two statutes together, it is evident that the list of witnesses which is required to be furnished to the prisoner, prior to the arraignment, is to be composed of the witnesses endorsed on the indictment by the foreman of the grand jury. *Ib.*

462. The prosecution is not confined to the list of witnesses endorsed on the indictment and furnished previous to the arraignment, but the Circuit Court, in the exercise of sound discretion, and having a strict and impartial regard to the rights of the community, and the prisoner, may permit such other witnesses to be examined as the justice of the case may seem to require. *Ib.*

463. Two distinct offences, requiring different punishments, cannot be charged in the same count; such an indictment is defective for duplicity, and a conviction upon it will be reversed on error. *Reed* v. *the People*, 1 Parker's Crim. Rep. 481.

464. Where, in the same count of an indictment, the accused was charged with a Common Law nuisance, and also with a violation of a regulation of a board of health, under the fourth section of the "act for the preservation of the public health," passed April 10, 1840, the count was held to be bad for duplicity, the former offence being punishable by fine not exceeding $250, or imprisonment not exceeding one year, or both (2 R. S. 697, §§ 40, 41), and the latter being punishable by fine not exceeding $1,000 or imprisonment not exceeding two years, or both. *Ib.*

465. There is no reason why the person appointed by the Court as the foreman of the grand jury, may not be a prosecutor, as well as any other one of the grand jury, unless expressly disqualified by law; he is as competent to prosecute as any other person; any one member of a grand jury may be a prosecutor or an informer; it is their peculiar province to inform against, and to present all offenders against all the criminal laws of the State. *King* v. *the State*, 5 Howard's R. 730.

466. It is not necessary that the grand jury should make return of the witnesses examined, or the evidence taken before them; the only return they are required to make, is whether they find a true bill or not. *Ib.*

467. It is not the practice of the courts of Mississippi, to make a record of the names, or of the swearing of the witnesses called to testify in trials at bar, or before the grand juries; and all the ends of justice, and of fair and legal trials, can be attained without such record being made. *Ib.*

468. Indictments being the act of the inquest, are not amendable like declarations in a civil suit, which are the work of the suiter, or his counsel; but new indictments found for the same offence, are substituted in the place of the old, and quoad hoc operate like the new or amended declaration. *Commonwealth* v. *Adcock*, 8 Gratt. 661.

469. So that when a prisoner pleads to a new or second indictment, that he has not been indicted or tried in time, the new indictment having been found, and he being arraigned thereon, when still liable to be tried for the offence, it is an all-sufficient answer to reply, and show by the record, an indictment found in time, though a defective one, or to reply and show by the record a trial, though an abortive one, and rendered so by the action of the Court in setting aside the verdict, and awarding a new trial upon the prisoner's motion. *Ib.*

470. When the charge in the new count is so variant from the old, or from the record of the examining court, as to require the interposition of the examining court by new examination, then the Commonwealth is not only entitled to, but bound to resort to proceedings de novo; but when the charge is so identically the same as to render a new examination neither ne-

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cessary nor proper, then the new indictment is to be based upon the examination had, and to be proceeded on to trial and conviction or acquittal, as the case may be, subject to precisely the same objections for default or failure to try, and no other that would have been applicable to the old indictment. *Ib.*

471. Where an indictment is laid for preventing a witness from appearing before the grand jury, in offences of this kind, guilt or innocence does not depend upon the guilt or innocence of the original party, against whom the witness may be subpœnaed, or recognized, to appear; nor upon the sufficiency or insufficiency of the original indictment. *State* v. *Carpenter*, 20 Vt. 9.

472. To thwart or obstruct the due administration of justice by violence, bribery, threats or other unlawful means, whether in preventing the attendance of witnesses, jurymen, or other officers of the court, is a high-handed offence, which strikes at the vitals of judicial proceedings, and subjects to severe animadversion, in every well-ordered community. The attempt to commit such an act, it is well settled, is itself a substantive offence punishable by the Common Law. *Ib.*

473. Where such an offence is described as the defendant, "being an evil-disposed person, and contriving and intending to obstruct and impede the due course of justice," unlawfully and unjustly did endeavor to dissuade, hinder and prevent the said William Warren from attending as a witness, &c.; held that this was sufficiently distinct and definite to show that the defendant knew for what purpose the witness was going to attend before the grand jury. *Ib.*

474. Where a prisoner is sent on by the examining court to be tried for embezzling the goods of A., it was held that he might thereupon be indicted for embezzling the goods of B., the embezzlement being of the same goods for which he was tried by the examining court. *Adcock's case*, 8 Gratt. 661.

475. Where a prisoner was indicted for embezzling the goods of A., and was tried and convicted at the fifth term of the court, after his trial before the examining court, but the verdict was set aside for a variance as to the ownership of the goods, and there was then a nolle prosequi entered and a new indictment to suit the proof; held that the prisoner was not entitled to be discharged because three terms had elapsed between his examination and the last indictment. *Ib.*

476. Since an offence which was committed before the code of 1849 went into operation, must, so far as the question of guilt, degree of crime, quantum of punishment, and rules of evidence are concerned, be governed by the law in force at the time the offence was committed, yet upon the question of the prisoner's right to a discharge from the failure to try him arising after the code went into operation, it must be governed by the law in the code. *Ib.*

477. In such a case, when the prisoner moves for a discharge, the record of the Circuit Court is competent and the only competent evidence for the Commonwealth to show that he had been indicted, tried and convicted within the time prescribed by law. *Ib.*

478. It is a well-settled principle in criminal law, that where there are several counts in an indictment, some of which are good, and others bad or defective, that judgment may be rendered against the defendant upon those which are valid. *Bullock* v. *State*, 10 Geo. 46. Vide *State* v. *Mather*, 3 Aiken 84; *State* v. *Jones*, 5 Ala. 666; *People* v. *Stein*, 1 Parker's Crim. Cas. 202; *State* v. *Coleman*, 5 Porter 32.

479. The indictment should allege all the material facts necessary to be proved to procure a conviction. *State* v. *Philbrick*, 31 Maine R. 401.

480. It is not necessary in the State of Indiana, that the prosecuting attorney should sign an indictment, or that it should appear that there was a foreman of the grand jury. *McGregg* v. *State*, 4 Blackf. 101. Vide *Ward* v. *State*, 22 Ala. 16.

481. Where there is no prosecutor marked upon the indictment, according to several decisions of the Court of Errors of Mississippi, that is a fatal objection. *Kirk* v. *the State*, 13 Smed. & Marsh. 406.

482. The name of a feme covert as

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prosecutrix on an indictment, is a nullity; she being wholly irresponsible in law either for costs or damages, the endorsement of her name as prosecutrix is no compliance with the true meaning of the statute. *Mayers* v. *the State*, 11 Humph. 40.

483. Where an indictment is alleged to have been found on the "oaths" of the grand jury; held that the use of the word "oaths" instead of the word "oath," was not a fatal defect. *Jerry* v. *State*, 1 Blackf. 395.

484. An indictment should be endorsed "a true bill," with the signature of the foreman of the grand jury who found the bill, underneath, so as to authorize the Court to try the prisoner; and without that endorsement the indictment would be defective. *Nomaque* v. *the People*, Breese 109.

485. In an indictment against the owner of a vessel for casting away and destroying the vessel at sea, it is not necessary to allege that it was done with intent to gain corrupt advantage to himself; but it is necessary to allege that the intent was to prejudice the underwriters. *U. States* v. *Johns*, 1 Wash. C. C. 363.

486. An indictment describing a note as purporting to be payable to the holder, when on its face it purports to be payable to bearer, is bad. *Downing* v. *State*, 4 Mo. 572.

487. An indictment must contain a definite description of the crime charged, and a statement of the facts which constitute it, that the Court may be enabled to pronounce the judgment of the law, and that the party may be enabled to avail himself of the conviction or acquittal upon a subsequent indictment for the same offence. *State* v. *Fields*, Mart. & Yerg. 137.

488. Writers on criminal law concur in requiring the time when an offence was committed, to be alleged. *State* v. *Baker*, 34 Maine R. 52; *Erwin* v. *State*, 13 Mo. 306.

489. In an indictment reciting that the grand jurors were "impanelled, sworn, and charged," &c., time and place need not be laid to show when and where they were so sworn. *Vaughan* v. *State*, 4 Mo. 530.

490. It is not necessary in an indictment for not repairing a highway, to set out the termini a quo et ad quem of the way. *Com.* v. *Newbury*, 2 Pick. 51.

491. Wherever one of the counts in an indictment for trading with a slave is good, the Court awards judgment upon it, notwithstanding the other counts may be bad. *The State* v. *Turner*, 2 McMullan's R. 399.

492. Where the indictment commences with "the State of Mississippi," and concludes, "against the peace and dignity of the same," held good. *The State* v. *Johnson*, Walker 392.

493. Where there are two counts in an indictment, one good and the other defective, and there is a general verdict against the defendants, the judgment will be presumed to have been given upon the good count alone; but when both counts are good, and the Court gives erroneous instructions to the jury as to one of the counts, it is presumed that the judgment was given upon both counts, and a venire de novo will be awarded. *The State* v. *McCauless*, 9 Iredell 375.

494. When the statute directs that an indictment shall be returned and endorsed "a true bill, with the signature of the foreman," it is only directory, and, if omitted, a due return may be shown by other proof. *Waw-kow-chaw-week-kowe* v. *U. States*, 1 Morris 332.

495. It is a rule of criminal law, based upon sound principles, that every indictment should contain a complete description of the offence charged, that it should set forth the facts constituting the crime, so that the accused may have notice of what he is to meet, of the act done, which it behooves him to controvert; and so that the Court, applying the law to the facts charged against him, may see that a crime has been committed. *Lamberton* v. *State*, 11 Stanton 282.

496. A count describing one offence with sufficient accuracy, and containing no sufficient description of any other offence, is not bad for duplicity. *State* v. *Palmer*, 35 Maine R. 9.

497. The use of Arabic numeral characters has been long adopted in contracts and other documents, and no want of certainty is perceived to be the result; and the nature and cause of a

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criminal complaint is not rendered obscure in any degree by reason of dates being in those characters. *State* v. *Reed*, 35 Maine R. 489.

498. There must be certainty in an indictment, in order to furnish a bar to another prosecution for the same offence; but figures are a part of the English language, and are admissible in indictments. *Kelly* v. *the State*, 3 Smed. & Marsh. 518.

499. By the act of 1801, ch. 30, § 1, it is enacted that no bill of indictment shall be preferred to the grand jury in the State, without a prosecutor marked thereon; and, if omitted, the omission need not be pleaded in abatement, advantage may be taken of it at any time. *Medaris* v. *the State*, 10 Yerg. 239.

500. Where an indictment contained two counts, one for rape, and the other for an assault with intent to commit a rape; held not bad for misjoinder of counts. *Stephen, a slave* v. *the State*, 11 Ga. 225.

501. Several counts in the indictment are allowed, because a person may be indicted for different offences of the same nature, in the same bill. If an indictment thus framed, charge two or more persons who are put on trial together for different offences, and the testimony does not implicate all of them in each offence, the inconvenience may be obviated and the rights of the accused be protected, by requiring the prosecuting officer to elect for which offence he will proceed. *State* v. *McAllister*, 13 Maine 374

502. One count may refer to another, and thereby that which if alone considered would be defective, may be sufficient. But a defective count can be thus aided, only when there is a reference to another count, for the allegation or fact required to make the defective count perfect. *Ib.*

503. Where an indictment contains two counts, and charges a misdemeanor in one, and a felony in the other, it will be held good. *Burk* v. *State*, Harris & John. 426.

504. The name of the prosecutor, in the United States Courts, need not be written at the foot of the indictment. *United States* v. *Mundell*, 6 Call 245.

505. An indictment may conclude contra formam statuti, when the offence is indictable at Common Law, and also punishable under a statute. *Davis* v. *State*, 3 Har. & John. 154.

506. Where the larceny mentioned in the indictment was not expressly charged to have been committed within the jurisdiction of the Court, it was held to be immaterial, especially after verdict. *Taylor* v. *Com.*, 2 Virg. Cas. 94.

507. In general, mere surplusage will not render an indictment bad; and hence, a conclusion contra formam statuti, in an indictment for an offence at Common Law, will not vitiate the indictment. *State* v. *Wimberly*, 3 McCord 190.

508. Where an indictment for transporting slaves alleged that they were transported from M. to C., and the proof was from N. to C.; it was held that, the words of the statute being followed in the indictment, no averment of place was necessary, and that the proof supported the indictment. *U. States* v. *Vicken*, 1 Har. & John. 427.

509. It is no objection to an indictment when it contains two counts, one at Common Law, and the other on a statute. *State* v. *Williams*, 2 McCord 301.

510. Where an indictment contained on a sheet of paper, was wrapped in a *blank half-sheet* of paper of like size, upon which blank sheet the prosecuting attorney had endorsed "Commonwealth *v.* Joseph Burgess; indictment;" and underneath the foreman of the grand jury had written, "a true bill; Robert Hamilton, foreman." It was held by the General Court of Virginia, that the indictment, though "not connected with the blank half-sheet on which the said endorsements were, only so far as it was rolled up in it, was nevertheless the indictment on which the prisoner had been tried, and on which the grand jury had passed, and that, after verdict, no objection could be made on the ground of such irregularity." *Burgess* v. *Com.*, 2 Virg. Cas. 483.

511. It is not necessary in an indictment for disturbing a religious congregation, to set out the means by which the disturbance or disquieting was offered. *Com.* v. *Daniels*, 2 Virg. Cas. 402.

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II. Indictment for Statutory Offences.

512. Where an indictment under the statute prohibiting the torture of animals, is founded on the mere act of tying brush or boards to the tail of a horse, unaccompanied with averments declaring the effects of the act, it is bad; such act does not of necessity produce torture. *The State* v. *Pugh*, 15 Mo. 509.

513. In Missouri, by the act concerning crimes and punishments (R. C. 1845), an indictment charging the defendant with permitting a gaming device to be "set up and used," was held not bad for duplicity. *The State* v. *Fletcher*, 18 Mo. (3 Bennett) 425.

514. In Missouri it is an indictable offence, under the statute, to run a horse upon a public highway, "so as to interrupt travellers thereon." Held that an indictment which charged a running of a horse "so as to interrupt travellers," was bad. *The State* v. *Fleetwood*, 16 Mo.

515. The keeper of a shop for the sale of spirituous liquors, who permits the promiscuous assembling about his shop of persons who cause disturbance by loud noises, quarrelling and swearing, and such disturbance being the probable consequence of his conduct, is indictable for keeping a disorderly house. *The State* v. *Thornton*, Bush. N. C. R. 252.

516. Indictment for selling spirits to a slave, the property of one William Michaels, the true name was William H. Michal. Held there was no variance. *The State* v. *Houser*, Bush. N. C. 410.

517. Where a statute defines an offence, making it indictable, and prescribes the punishment, an indictment for it is wholly founded on this statute, although it contains a reference to a former statute giving a penalty to a common informer for the same act. *The State* v. *Abernathy*, Bush. N. C. 428.

518. Therefore, if the indictment concludes against the statutes, it is fatally defective, and judgment will be arrested after verdict. *Ib.*

519. Under an indictment for stealing and carrying away a slave (Rev. Stat. ch. 34 sec. 10), the venue must be laid, and the person tried in the county where the original felonious capture took place. *The State* v. *Groves*, Bush. N. C. 191.

520. Where an indictment under the R. S. 1843, was laid as follows: the grand jurors impanelled, &c., upon their oath present, that A. B. on, &c., at the County, &c., aforesaid, and continuously from that day until the day of the finding of this bill of indictment, had possessed a house, a room, a shed, and a tenement, situate in said county, and that said B. there, during all the time aforesaid, did keep, and suffer his said house, room, shed, and tenement to be used and occupied for gaming, contrary, &c. Held that the indictment was good. Held, also, that to support the indictment, it was sufficient to show that the defendant kept either of the places specified for any length of time, to be used, &c., for gaming. *McAlpin* v. *the State*, 3 Ind. 567.

521. To support the indictment it is not necessary to prove that the gaming actually took place at the house, but the commission of the offence may be inferred from circumstances. *Ib.*

522. An indictment for keeping a gaming-house was held not to be defective for alleging that the defendant kept a house, instead of *his* house, to be used for gaming, the latter term being employed by the statute defining the offence. *The State* v. *Hubbard* 3 Ind. 530.

523. Where an indictment for retailing spirituous liquor alleged that the liquor was sold to a person whose name was unknown to the grand jurors, and one witness only was examined at the trial, and he testified to whom the liquor was sold, that he was a witness before the grand jury when the indictment was found, and that he then knew the name of the person to whom the liquor was sold, and would have disclosed the name to the grand jury if they had asked him what it was; held that as the grand jury upon proper inquiry of the witness could have ascertained the name, the indictment could not be maintained. *Blodget* v. *the State*, 3 Ind. 403.

524. In Alabama, where an indictment

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founded on the act of 1828, against gaming, charges the offence to have been "playing at cards," while the words of the statute are "playing at a game with cards." *Holland* v. *the State*, 3 Porter 292.

525. In North Carolina, where a defendant is indicted under the act of 1830, against gaming with slaves, it is not necessary to allege in the indictment the name of the game played. *State* v. *Ritchie*, 2 Dev. & Batt. 29.

526. In Tennessee, where an indictment was found against one for maliciously killing beasts, under the act of 1835, and the words "one horse beast" used in the indictment; held that the description was sufficiently certain. *State* v. *Pearce*, Peck 66.

527. Several distinct acts of selling liquor without license were set forth in the same counts of an indictment for such selling. Held that the several acts of selling constituted but one offence, and, therefore, the indictment was not liable to the objection that distinct offences were charged in the same counts. *Storrs* v. *State*, 3 Mo. 9.

528. A count in an indictment on the statute relative to lotteries, being in substance as follows: That the defendant in, &c., at, &c., unlawfully made a certain lottery for a division of property, to be determined by chance, the making of which not being authorized by law, contrary to the statutes. Held that the indictment was defective, after judgment, for not stating the species of property. *Markle* v. *the State*, 3 Ind. 535.

529. It is a general rule that whatever is essential to the gravamen of the indictment must be alleged particularly. *Ib.*

530. Where an indictment under the R. S. 1843, against A. B. contains two counts, the second, after the usual introduction, alleged that the said A. B. on, &c., at and in the county aforesaid (the county of P.), did then and there, knowingly keep, and suffer his house in which he kept his grocery, to be used and occupied for the purpose of gaming at and with cards for money and other valuable articles, contrary, &c. Held that the indictment was good. *The State* v. *Staker*, 3 Ind. 570.

531. Section 121, of the general road law of 1849, providing a remedy by action of debt, at the suit of the supervisor, for the obstructing of a public highway, does not do away with the remedy by indictment, authorized by sec. 65, ch. 53, R. S. 1843, for the same offence, but gives a cumulative remedy. *The State* v. *Virt*, 3 Ind. 447.

532. Where the charge in an indictment was as follows: That the defendant on, &c., at, &c, unlawfully sold to one P. W. a quantity of spirituous liquors by retail, less than a quart, to wit: one half pint of spirituous liquor for five cents in money, he, the defendant, not being licensed to vend spiritual liquors by retail, contrary, &c. Held that the indictment was not defective for using the word spiritual instead of spirituous. *State* v. *Clark*, 3 Ind. 451.

533. Where an indictment for gaming contained two counts, the first for money won, and the second for money lost at a bet upon the result of a game of cards played by the defendant and others; the indictment did not state whether the bet was made with the persons played with, or with a third person; held that the indictment was defective. *The State* v. *Stallings*, 3 Ind. 531.

534. An indictment for betting at faro bank need not set out the particular nature of the game, nor the name of the person with whom the bet was made. *The State* v. *Ames*, 1 Mo. 524.

535. In an indictment founded on the 2d and 3d secs. of the act of April 20th, 1818, ch. 86, against carrying on the slave trade, an averment that "heretofore and after the 20th day of April, 1818, that is to say, at some time between the day of the month and year last mentioned, and the 12th day of February now last past, the defendant committed the offence," was held to be sufficient. *United States* v. *Smith*, 2 Mason 143.

536. In an indictment founded on such act of Congress, it is not necessary to allege that the defendant knowingly committed the offence. *Ib.*

537. And in such case it is not necessary that the indictment should conclude in the technical words "against

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the form of the statute in such case made and provided." Equivalent expressions are just as sufficient in point of law, and hence where it concludes "contrary to the true intent and meaning of the act of Congress of the United States, in such case made and provided," it is held sufficient. *Ib.*

538. In an indictment under the act of Congress of April 20, 1818, ch. 86, §§ 2 and 3, the offence was alleged to have been committed on the 3d day of January, now last past, and on divers days and times before and since the last-mentioned day, and after the said 20th day of April, 1818. Held that the allegation of the commission of the offence was certain to a proper extent, though wanting in technical accuracy; the offence being alleged to have been committed on a day certain, the words "on divers days and times," could be rejected as surplusage. *United States* v. *La Coste* 2 Mason 129.

539. Where the indictment in such case does not allege and charge that the negroes and persons of color were to be transported to the United States, or the territories thereof; or that they were free, and not bound to service; or that the defendant was a citizen or resident within the United States; or that the offence was committed on board an American vessel; held that the indictment in this respect followed the language of the act, and was sufficient. And when in an indictment under this act, the phrase "persons of color" is used, it is held to be sufficiently definite, being the chosen phrase of the act itself. *Ib.*

540. And the indictment in such case charging that the defendant did, "as master for some other person, the name whereof being to the jurors yet unknown," cause a certain vessel, &c., was held good. *Ib.*

541. Whenever a statute prohibits a matter of public grievance to the liberty and security of the people, or commands a matter of public convenience, without exacting any penalty for disobeying its prohibition or commands, an offender against such statute is punishable by way of indictment for his contempt of its enactments. *The State* v. *Fletcher*, 5 N. Hamp. 257.

542. He who carries on the business of a taverner without license, is liable to an indictment under the statute. *Ib.*

543. Where, by an act of incorporation of a turnpike road and bridge company, it was made the duty of the president and directors to keep the road in repair, and the neglect to do so was declared a misdemeanor in the president and individual directors for the time being; it was held that an individual director might be indicted for such neglect either separately or jointly with his co-directors, and, on conviction, might be punished separately, although the board of directors consisted of several members, and the concurrence of a majority was necessary to the doing of a corporate act. *Kane* v. *People*, 8 Wend. 203.

544. Where an indictment is found under the act of Congress of 1813, ch. 34, §§ 7 and 9, and the certificate required to be sworn to by such sections is described in the indictment as being a false declaration; and the indictment alleged that the defendant had produced to the collector a paper, intended to be a description of the length, breadth, &c., of the vessel, which gave a description of the vessel as being of 14 $\frac{54}{93}$ tons burthen; but on the production of the paper it appeared that the number of tons were 14 $\frac{50}{93}$ of a ton, instead of 14 $\frac{54}{93}$ of a ton; held that the variance was fatal to the indictment. *United States* v. *Lakeman*, 2 Mason 229.

545. Where a defendant was indicted under the statute of 1791, ch. 58, § 3, which provides, that no innholder, &c., shall entertain, or suffer any of the inhabitants of the respective towns where they dwell, or others, not being travellers, strangers, or lodgers in such house, to abide or remain in their houses, &c., drinking on the Lord's day on the penalty of ten shillings. It is necessary that the indictment should allege the exact number of persons so entertained, and should also allege that they were not travellers. *Commonwealth* v. *Maxwell*, 2 Pick. 139.

546. Where an indictment is founded on the statute of 1814, ch. 175, which provides "that if any person not being authorized by the board of health or

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the selectmen of any town in this Commonwealth," &c., such person shall be imprisoned, &c., and alleged the act to have been committed without authority by the board of health or selectmen of the town of S ; held that the averment in the indictment was sufficient, though it did not follow the exact words of the statute. *Commonwealth* v. *Loring*, 8 Pick. 370.

547. And an indictment under the 2d section of the same act, will be sustained, if the evidence has a tendency to prove, though it does not clearly prove, an offence under the 1st section. *Ib.*

548. Where a defendant who is alleged to be an innholder, is indicted for permitting persons to play at cards and other unlawful games in his house, an averment in the indictment, that the defendant was duly licensed as an innholder, is defective, unless it also sets forth the fact that the defendant was actually keeping an inn at the time of the playing cards in his house. *State* v. *Balkom*, 3 Pick. 281.

549. In an indictment under the Mass. act of 1785, ch. 75, § 6, which imposes a penalty of twenty shillings for disorderly conduct at town meetings ; it is necessary to allege that the offender persisted in his disorderly behavior after notice from the moderator, or the indictment will be defective. *Commonwealth* v. *Hoxey*, 16 Miss. 385.

550. An indictment concluding against the form of a statute, if the facts charged amount to an offence at Common Law, and are not within the purview of any statute, can still be maintained. *Ib.*

551. Where a defendant was indicted under the act of 3d March, 1825, relating to the post-office department, for advising the mail-carrier to rob the mail ; held that the offence charged in such indictment was a misdemeanor, where all were principals, and the doctrine applicable to principal and accessory in cases of felony did not apply. *U. States* v. *Mills*, 7 Peters 138.

552. In an indictment under the Mass. act of 1798, ch. 20, charging that the defendant suffered and allowed sundry persons "to play at cards and other unlawful games," &c. ; held that the indictment was sufficiently certain, and that the words, "and other unlawful games," might be rejected as surplusage. *Commonwealth* v. *Balkom*, 3 Pick. 281.

553. In an indictment under the tything act of 1791, ch. 58, it is not necessory to allege that the tything-man was sworn into office ; nor is it necessary to allege that the tything-man had any wand or badge of office ; nor is it necessary to allege that the defendant knew the person examining to be a tything-man. *Commonwealth* v. *Caldwell*, 14 Mass. 330.

554. An indictment for vending clocks without license, must allege a sale or some other disposition of a clock in the way of trade, but it is not necessary to allege to whom the clock was sold, or the price that was given. *Page* v. *State*, 6 Mo. 205.

555. An indictment charging that defendant did suffer a gambling device to be set up and used in his house, at which a game of chance called lots was played, &c., was held to be good. *State* v. *Foster*, 2 Mo. 210.

556. The act of March 16, 1802, providing against purchasing a soldier's arms, in an indictment under such act, it must be shown that the soldier was in lawful possession of the arms, or was the special bailee of them, or the indictment will not stand. *U. States* v. *Brown*, 1 Mason 151.

557. Where an indictment is laid for an offence against a statute, "in force in the State of South Carolina," and concludes "against the peace and dignity of the same State," it will be held good. *State* v. *Washington*, 1 Bay 120.

558. Where a particular statute is relied on in an indictment, the words of the act must be conformed to in the indictment. *Updegraff* v. *Commonwealth*, 6 Serg. & Rawle 5.

559. In an indictment under an act to prevent gaming at cards, which contains an excepting clause ; if the defendant is merely charged with permitting persons to play cards at her house, while it appears from the excepting clause, that such an act would not, under all circumstances, be unlawful ; held that the indictment would be

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defective. *Reynolds* v. *State*, 2 Nott & McCord 365.

560. Where a party is authorized by several statutes, to exercise a particular trade, it is necessary that an indictment for a breach of either of such statutes should negative any authority to act under the others. *Neales* v. *State*, 10 Mo. 498.

561. If an offence is defined by statute, the substance of the statute definition should be embraced in an indictment. *United States* v. *Dickey*, 1 Morris 412.

562. An allegation in an indictment, that the nose of the prosecutor was bitten off, is within the meaning of the New Jersey statute, so as to imply a cutting off of the nose. *State* v. *Mairs*, Coxe 453.

563. Though the language of the statute creating the offence, be in the disjunctive, viz: "burn or cause to be burned," and the indictment charges the offence in the conjunctive, viz.: that the defendant "burned and caused to be burned," the allegation is sufficient. *State* v. *Price*, 6 Halst. 203.

564. An averment in an indictment for burning a barn, in the language following: "That Z. P. late of, &c., at the township aforesaid, &c., one barn of the property of N. R. not parcel of the dwelling-house of the said N. R," there situate, "wilfully and maliciously did burn and cause to be burned," is a sufficient averment of the locality of the barn. *Ib.*

565. Where the statute of Mass. of 1816, ch. 112, § 1, makes it an indictable offence to keep open a victualling shop on the evening of the Lord's day; held that an indictment for such offence would be sustained if the offence was shown to have been committed on Sunday evening, that is, the evening following that day, no reference being had in the act to the evening preceding that day. *Commonwealth* v. *Newton*, 8 Pick. 234.

566. If an officer of customs is in fact obstructed or impeded in the discharge of his duties, by a person knowing him to be an officer then engaged in his duties, the case is within the acts of Congress of 1799, ch. 128, § 71; 1815, ch. 246, § 3; and 1823, ch. 186, § 3; and it is wholly immaterial on an indictment therefor, that the defendant has another object in view, such as to avenge a supposed wrong or affront, or to inflict a personal chastisement. *U. States* v. *Keen*, 5 Mason 453.

567. The statute of 1807, in Alabama, which provides that no person accused of any criminal offence shall be set at liberty before his trial, on account of any irregularity or informality in the warrant of commitment, or imperfection in his indictment, relates to and governs all criminal prosecutions without regard to the nature of the offence charged. *State* v. *Brown*, 4 Porter 410.

568. To sustain an indictment against a slave under the Alabama statute of 1814, which enacts that "any slave found guilty of the manslaughter of any free person shall, on conviction, suffer death;" it is necessary to allege in the indictment that the master or other person so killed was a free person. *State* v. *Moses*, Minor 393.

569. An indictment being found under the 45th sec. of the Post-Office law, for concealing treasury notes, which the defendant knew had been stolen from the United States mails, and one of the notes was described as "a promissory note called a treasury note for the payment of $50 with interest, at the rate of one per centum," but upon being introduced as evidence, it was found to be all properly described in the indictment, except that the rate of interest was one M. per cent.; held that the variance was fatal. *U. States* v, *Hardiman*, 13 Peter's 176.

570. In an indictment under the 40th sec. of this act for the punishment of crimes (Rev. Laws, 254), for stealing a voucher, an allegation that the instrument stolen is a "voucher," is a sufficient averment of its validity, and imposes upon the prosecution "all such consequences, and gives the defendant all such advantages, as may legally result if it should appear false and spurious." *State* v. *Hickman*, 3 Halst. 299.

571. An express averment that the instrument is subsisting or remains unsatisfied, is not required in an indictment grounded upon the 40th sec. of

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the act for the punishment of crimes (Rev. Laws, 254). *Ib.*

572. A variance between the language of the statute creating the offence, and the indictment, will not vitiate the indictment if the words used in the indictment are equivalent to those of the statute. *Ib.*

573. To make an indictment good under the South Carolina act of 1737, in relation to stealing bank-bills, it must contain an allegation that there was something due in the bank-notes, and not satisfied at the time of the theft. *State* v. *Thomas*, 2 McCord 527.

574. In North Carolina, an indictment under the act of 1826, c. 13, charging that the defendant, on a particular day, and on divers other days before that day, sold and delivered spirits to certain slaves whose names were to the jurors unknown, is defective for uncertainty in embracing the transactions of divers days with divers persons; and as the names of the slaves were not given, it is also defective for not stating the owners of the slaves, or averring that the owners were unknown, if the facts were so. *State* v. *Blythe*, 1 Dev. & Batt. 199.

575. Where an indictment charges that the defendant, without license, did commonly and publicly sell and retail liquor, it need not contain an allegation that he sold in less quantities than twenty-eight gallons. *Commonwealth* v. *Eaton*, 9 Pick. 165.

576. In an indictment for selling liquor without license, in quantities less than a gallon, it need not be alleged that there were selectment to grant license, nor that the defendant had no license from the Court of Common Pleas. *State* v. *Adams*, 6 N. Hamp. 532.

577. So, also, in Indiana, an indictment for selling liquor to divers persons without license, is bad. The name of the person to whom the liquor was sold should be stated, or if unknown, that fact should be stated. *State* v. *Stuckey*, 2 Blackf. 289.

578. An indictment for selling liquor by small measure, which only alleges that the defendant did not obtain a license according to the act concerning Inns and Taverns, is insufficient, and will be quashed. *State* v. *Webster*, 5 Halst. 293.

579. Where an indictment is founded on the act of 1825, ch. 184, for causing lottery tickets to be advertised for sale, it need not state that they were advertised as for sale within the Commonwealth: nor need it state that the lottery was in the State, and against the law of the Commonwealth; nor need it set forth the lottery of which tickets were advertised. *Commonwealth* v. *Clapp*, 5 Pick. 41.

580. An indictment alleging "that F., of Concord, &c., unlawfully did sell to one E., a part of a ticket, that is to say, one-quarter part of a ticket, at and for the price of fifty cents, in a certain lottery not authorized by the Legislature of said State, contrary to the form of the statute in such case made and provided, there being no description of the ticket, and the lottery to which it belonged not being stated, was held good, since there were no tickets in any lottery which were not within the prohibition of the statute. *State* v. *Follet*, 6 N. Hamp. 53.

581. Where an indictment is laid for carrying and having in possession counterfeit bank-bills with intent to pass them; the indictment need not allege that the intent was to pass them in the State of Mass., and it seems the offence is created under the statute if the intent be to pass them in some other State. *Commonwealth* v. *Cone*, 2 Mass. 132.

582. An indictment, under the Mass. statute of 1825, ch. 185, § 1, which provides that "if any person or persons shall sell or offer for sale, or shall advertise or cause to be advertised for sale, any lottery ticket or tickets, or part or parts of any lottery tickets, &c., he or they shall severally forfeit, &c., charging the defendant with unlawfully offering for sale and actually selling one-half of a lottery ticket; was held not to be bad on the ground of duplicity, as offering to sell and selling, was held to be but one offence. *Commonwealth* v. *Eaton*, 15 Pick. 273.

583. Where an indictment is laid for burning a meeting-house, under the statute of Maine of 1821, ch. 4, § 2, it was held that the indictment need

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not state who was the owner of the house. *State* v. *Temple*, 3 Fairf. 214.

584. Nor is it necessary in such case to set forth the value of the house. *Ib.*

585. Nor that the burning was vi et armis. *Ib.*

586. And it seems it is not necessary to state that the house was being used as a place for public worship. *Ib.*

587. Where an indictment for suffering gaming, does not allege the Christian name of one of the persons charged, but so charges the offence as to bring it within the words of the statute, with the necessary allegations as to time and place; held that the indictment was good. *Commonwealth* v. *Lampton*, 4 Bibb 261.

588. In Kentucky, an indictment will lie, under the act of 1799, against one for permitting gaming in a house he is in possession of. *Ib.*

589. Where a defendant is charged in an indictment under the statute of 1798, ch. 20, as "being an innholder duly licensed, &c., and permitting persons to play at the game of cards in his house, where he was then and there licensed as an innholder," the indictment was held good, and the words "the game of" were considered as surplusage. *Commonwealth* v. *Arnold*, 4 Pick. 251.

590. Where a defendant is indicted for allowing gaming in his house, and the house is described as being at ——, in the County of T.; held that this was a sufficient description of the place where the house was situated, and the offence committed. *Covy* v. *State*, 4 Porter 186.

591. In Alabama, where a person is indicted for permitting gaming in his house, and the language of the act of 1826 is, "on the premises;" held that the indictment was sufficient in description of the place where the offence was committed. *Ib.*

592. Where an indictment is laid for horse-stealing, the name of the owner should be the name he has the reputation of being known by as his true name. *State* v. *France*, 1 Overt. 434.

593. Where the commission of the offence only is alleged in the words of the statute, the indictment will not be sustained. The indictment must allege the nature of the offence and the circumstances in addition. *State* v. *Raines*, 3 McCord 533.

594. An indictment, in a case of a misdemeanor, containing an allegation involving a negative of the words of the statute which creates the offence, will be good. *Sword* v. *State*, 5 Humph. 102.

595. The statute on which an indictment is founded, need not be recited in the indictment; but if the indictment does recite a statute, it must follow it in every particular, and a slight variance will be fatal. *Butler* v. *State*, 3 McCord 383.

596. The conclusion of an indictment must be contra formam statuti; and not contra formam statutorum, when founded on a single statute in no way connected with any other statute. *State* v. *Cassel*, 2 Har. & Gill 407.

597. Where the words "utter and publish" are used in an act against forgery, and an indictment under such act makes use of the words, "disposed of and put away," instead of the words in the statute; held that the indictment could not be sustained. *State* v. *Petty*, Harper 59.

598. Where an indictment was laid for selling "wine, beer, ale, cider, brandy, and rum, and other strong liquors by retail," on divers days, from a fixed day to a certain other day, without license, and a general verdict of guilty of the whole charge was rendered; while the vending of ale, cider, and beer by retail, a part of the time set forth in the indictment, was not restricted by law, the conviction, notwithstanding, was held good. *Butman's case*, 8 Greenleaf 113

599. Where there are two statutes relating to the same offence, the one creating the offence, and imposing a penalty, and giving a right of action to recover the same, and the other making the offence indictable, it was held that an indictment for such offence must conclude "contra formam statutorum." *State* v. *Pool*, 2 Dev. 202.

600. Where it is made an indictable offence under the Indiana statute, for a county officer to receive an order on demand against his County for a sum less than what is expressed on its face, it is necessary that the order or demand

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should express the amount on its face, and it will not be sufficient if it may be arrived at by calculation. *Vanlook* v. *State*, 5 Blackf. 450.

601. Where an indictment is laid under the Tennessee act of 1803, ch. 9, for maliciously disfiguring a horse, the act must be charged to have been done maliciously. *Boyd* v. *State*, 2 Humph. 39.

602. When the hair is cut off the tail or mane maliciously, it will be an offence under said statute. *Ib.*

603. An offence at Common Law being a misdemeanor, but raised to the grade of a felony by statute, and the statute making an indictment good in such case when framed according to the Common Law, it is not necessary to allege in the indictment that the offence was committed feloniously in order to sustain a conviction under the statute. *Peck* v. *State*, 2 Humph. 78.

604. On an indictment for horse-stealing, where the statute makes a distinction between the terms "horse" and "gelding," and the indictment charges the defendant with stealing a horse, proof that the defendant stole a gelding will not support the indictment, nor can the variance be cured by showing that it is commonly understood that the word "horse" includes "gelding." *Turley* v. *State*, 3 Humph. 323.

605. Where a defendant was alleged to have been unlawfully, openly, publicly, and notoriouslydrunk on the 5th day of March, 1839; held to be an insufficient description of the offence. *Smith* v. *State*, 1 Humph. 396.

606. Where it is created an offence by statute to keep a tippling-house, or sell rum, brandy, &c., the offence must be particularly described. *State* v. *Raiford*, 7 Porter 101.

607. Under the statute of 1754, of South Carolina, which provides against aiding a slave to run away, an indictment will be good if it charges the offence in the language of the statute. *State* v. *Brown*, 2 Spears 129.

608. And in order to support an indictment under this statute, it need not be alleged that the defendant aided the slave to escape "beyond the limits of the State," since these words do not appear to be used in the act. *Ib.*

609. The 6th and 7th sections of the 3d chapter of the penal code do not create an offence unknown to the Common Law, or increase the punishment of a Common Law offence; the offences, therefore, described in those sections, may be proceeded against and punished, upon an indictment for murder, at Common Law. *State* v. *Jones*, 5 Ala. 666.

610. In an indictment under the act of 1837, p. 8, Stat. at Large, 596, which declares it to be unlawful "for any owner or occupier of a grocery store or retail shop within the limits aforesaid, wherein are vended spirituous liquors, to keep open the said stores, shops, or places, or to trade, traffic, or barter therein with negroes or persons of color at any time on the Sabbath day," &c., it is unnecessary to set out the name of the negro with whom the defendant is charged with trading, or that of the owner, as the act prohibits entirely the trading on the Sabbath, and the written license of the owner would be no justification. *State* v. *Helgen*, 1 Spears 310.

611. For a violation of the second section of the act of 1837 (8 Stat. at Large, 596), an indictment may be sustained. *State* v. *Meyers*, 1 Spears 305.

612. If a statute prohibit an act to be done under a penalty certain, though no mention is made of indictment, the party may be indicted; but if another mode of recovery be prescribed, that must be pursued. *Ib.*

613. Where an indictment was framed under the 2d section of the act of 1837, which provides that "it shall not be lawful for any owner or occupier of any grocery store or retail shop within the limits of Charleston Neck, &c., to keep open the said stores, shops or places, or to trade, traffic or barter therein, with negroes or persons of color, at any time on the Sabbath day, &c., which charged in one count that the defendant, being the owner and occupier of such shop, did keep open the same on the Sabbath day, and did trade, traffic and barter therein with negroes and persons of color;" it was held that the count did not include two distinct offences, but two specifications of the same offence. *Ib.*

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614. Where an indictment is framed upon the statute against keeping billiard tables without license, and pursues the words of the statute in describing the offence, it will be good. *State* v. *Kesslering*, 12 Mo. 565.

615. The Virginia act of February 14th, 1823, which provides in relation to malicious trespass, was designed for such acts of trespass as were committed without any color of title on the part of the defendant :—if the defendant has a bona fide claim of right, he cannot be punished as a trespasser under that act, as for a misdemeanor. *Dye* v. *Commonwealth*, 7 Gratt. 662.

616. Where an indictment is laid for an offence created by a statute, it is not necessary to state the offence in the words of the statute; if the offence be described by words which are equivalent to those used in the statute, it will be sufficient. *State* v. *Bullock*, 13 Ala. 413.

617. In a case where the prisoner was charged in an indictment that, with a certain large knife, at and against the body of the said A., he did cut, thrust, and stab, with the intent the said A. then and there feloniously, wilfully, and of malice aforethought, to kill and murder; held that the intention of committing the offence with a knife was sufficiently stated. *Ib.*

618. The legislature did not by the use of the terms "obstruct or resist" the execution of process, in sec. 2, act 4, part 7, ch. 51, Digest, intend to create two distinct and different offences; and hence an indictment charging that defendant did obstruct and resist the execution of process, would not be double, and charging either obstructions or resistance would be good, the proof corresponding with the allegation. *Slicker* v. *the State*, 8 Eng. 397.

619. In such indictment it is not necessary to set out the process so as to show it to be valid, as on the trial the State could not introduce an invalid process as evidence; but it is sufficient to describe the process so as to identify it, and advise the defendant of what he is called upon to answer. *Ib.*

620. In Texas it is a positive requirement of the Constitution that the indictment conclude against the peace and dignity of the State. Hart, Dig. R. 62, § 9; it is scarcely necessary to say that the Courts have no authority to dispense with that which the Constitution requires. *State* v. *Durst*, 7 Texas 74.

621. The eighth section of the third chapter of the Penal Code (Clay's Digest, 413, § 8), was intended to create a new offence and attach to it a new penalty; and before the penalty denounced by it against the offender can be inflicted the indictment must be framed in reference to the statute, and conform to its letter or substance. *Skains* v. *State*, 21 Ala. 218.

622. An indictment for preventing gambling should set forth the names of the parties who were permitted by the accused to play; or if the names are unknown, it should be so alleged. *Buck* v. *the State*, 1 McCook 61.

623. It is a well-settled rule in criminal pleading, that when a general term is used in a statute creating an offence in connexion with words more precise, limited and definite in their meaning, the indictment must charge the offence in the particular words charged in the statute. *Bell* v. *the State*, 5 Eng. 536.

624. On the same general principle, an indictment could not be good that would charge an offence in the general terms of the statute, when other words were used in that same statute restraining the meaning of these general terms manifestly within narrower limits than they in themselves import. *Ib.*

625. Although it is not proper in an indictment to lay an offence as committed against "the act of Assembly," instead of saying against the "statute," yet the informality is one of those cured by our act of Assembly. *The State* v. *Tribatt*, 10 Iredell's 151.

626. In general, it is sufficient certainty in an indictment upon a statute to allege the offence in the very terms of the act. But there are cases where more particularity is required, either from the obvious intention of the legislature, or from the application of known principles of law. *Moffett* v. *the State*, 6 Eng. 169.

627. Judge Story declares, in the case of the *United States* v. *Gooding* (12 Wheaton), that no general rule can

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be laid down in such cases, and each offence is to be decided upon its own particular circumstances. *Ib.*

628. An indictment grounded on the act of 1847, ch. 193, against a regularly licensed ordinary keeper, for unlawfully exposing for sale and selling spirituous liquors, to wit: brandy, &c., on a Sunday, ought to name the person to whom the liquor was sold, or if his name be unknown to the jurors, then the indictment may describe him as a certain "person to the jurors aforesaid unknown." *Capritz* v. *State*, 1 Md. 569.

629. Where the indictment avers that the offence was committed wilfully, unlawfully and maliciously, without negativing the proviso of the 55th section of the code; held this averment was sufficient. *Worley* v. *State*, 11 Humph. 172.

630. Where an indictment for buying cotton of a slave, stated that "seventy-five pounds of cotton" were purchased, the offence was as sufficiently charged as if it had contained the additional averment that the same "was a product or commodity," because that averment would not have rendered any more certain or definite the nature of the offence, than the language used had already done. *The State* v. *Borroum*, 23 Miss. 477.

631. The first section of the 14th division of the penal code of Georgia declares that "every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offence in the terms and language of the code, or so plainly that the nature of the offence charged may be easily understood by the jury. Held this provision was obviously intended to sweep away all technical exceptions to indictments. *Studstill* v. *the State*, 7 Ga. 21.

632. Where the indictment concludes by alleging that the offence was against the form of the "statute," and not "statutes," in such case made and provided, it has been decided—that under such an indictment an offence may be proved, and the indictment sustained, although the offence may be the creation of a number of statutes. *State* v. *Wilbor*, 1 Rhode Island 199.

633. Where in an indictment the venue is laid in the margin; and it is alleged that the defendant, on, &c., did unlawfully, maliciously, &c., destroy, &c., a certain mare, &c., by then and there fastening, &c., held that the word "there," in the place it occurs, plainly refers to the venue in the margin, and thus sufficiently shows the place where the offence was committed. *The State* v *Slocum*, 8 Black. 315.

634. The statute on which the indictment is founded, says, that every person who shall maliciously or mischievously destroy or injure, or cause to be destroyed or injured, any property of another, &c., shall be deemed guilty, &c. (R. S. 1843, p. 975.) The charge in the indictment is, that the defendant did unlawfully, maliciously, &c., destroy and injure, and cause to be destroyed and injured, a certain mare, &c. This charge is not objectionable for multifariousness or uncertainty. *Ib.*

635. Where the words used as descriptive of the offence are not the same as those used in the statute, and the indictment does not contain the words "put off," but words of the same legal import and equally comprehensive are used, to wit: the words "pass and utter," which are substantially the same, as they include the words "put off," and are even more significant of the offence charged; held that the indictment in that particular was a substantial compliance with the statute. *Ib.*

636. Where the allegation in an indictment under the R. S. of Mass., ch. 58, was that the defendant "did set up and promote" an exhibition; held that it did not make the indictment objectionable for duplicity, but charged only one offence. *Commonwealth* v. *Twitchell*, 4 Cush. 75.

637. The Rev. Stats., c. 58, of Miss., impose a penalty on any person who shall set up or promote any exhibition, to which admission is obtained by payment of money, without a license first obtained; and where an indictment alleges that the defendant set up and promoted such an exhibition, without first being duly licensed therefor, and contrary to the form of the statute, this sufficiently shows that the exhibi-

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tion was unlawful, and was unlawfully set up and promoted, without an express allegation that it was so. *Ib.*

638. When the fact laid in an indictment appears to be unlawful, it is not necessary to allege it to have been unlawfully done, unless it be part of the description of the offence as defined by the statute. *Ib.*

639. An allegation in such case that the exhibition purported to be an exhibition of certain performances, is all that was necessary, and perhaps all that was safe, to be inserted in the indictment. *Ib.*

640. An allegation that the exhibition actually was what it purported to be—that is, what the defendant represented it to be—might have enabled him to escape through a variance between the allegation and the proof, though the exhibition as made was contrary to the statute. *Ib.*

641. Where it is objected to an indictment that it does not charge the offence created by the statute, and depends upon the simple question, whether the allegation that "he cut" a timber tree, &c., is identical in meaning with this, that "he cut down" a timber tree, &c., which is the language of the statute; it was held that the indictment was defective in this particular. *Maskill* v. *the State*, 8 Blackf. 299.

642. Where three distinct violations of a statute are shown in an indictment, containing but one count, it would be bad for duplicity. *The State* v. *Shields*, 8 Blackf. 151.

643. Where the time for the prosecution of an offence is limited by statute, the time, as averred in the indictment, should appear to be within the limit. *The State* v. *Rust*, 8 Blackf. 195.

644. To bring a person within the provision of the R. S., 1838, p. 216, for selling clocks without license, it must appear in the indictment that he was bound to procure a license, or, in other words, that he made vending clocks his business or occupation, otherwise the act of selling without a license was lawful, and could not be a fraud upon the revenue. *Alcott* v. *the State*, 8 Blackf. 6.

645. In an indictment, under the act of March 6, 1848 (Pamphlet Acts), charging the defendant with being "engaged in the business of hawking and peddling," it is unnecessary to allege the facts which constitute hawking and peddling. The gist of the offence, under the statute, is being engaged in the business of hawking, &c. *Sterne* v. *the State*, 20 Ala. 43.

646. Where the offence charged is complicated, consisting of a repetition of acts, or where it includes a continuation of acts, it is not necessary to set them out in the indictment. *Ib.*

647. The act of 1848 having prescribed a specific and different penalty for each of the several classes of peddlers who may violate its provisions, an indictment under it must designate the class to which the accused belongs, otherwise no judgment can be rendered upon it. *Hirchfelder* v. *the State*, 18 Ala. 112.

648. Where the indictment charges that the sale of spirituous liquors was made on the 3d day of December, 1850, and that said third day of December was not on Sunday; held that the day of the month was immaterial, the gist of the offence being that the spirituous liquor was sold on Sunday; and whether the day of the month was correctly stated, is no more important in this than in other offences. *The State* v. *Eskridge*, 1 Swan's R. 413.

649. Where the offence and the penalty are declared by the same statute, and the indictment is founded on that statute; held there was no necessity that it should refer to any other, or conclude contra formam statutorum. *Crawford* v. *the State*, 2 Carter's R. 132.

650. When one statute defines an offence, and another prescribes the punishment, the indictment must conclude in the plural, contra formam statutorum. *King* v. *the State*, 2 Carter's R. 523.

651. Where one statute continues a former one in part, or explains what was doubtful, or regulates its operation, the conclusion of the indictment should be in the singular. *Ib.*

652. An indictment, under the 98th section of the Revenue Act of 1848, for keeping a ten-pin alley without a license, should aver that the defendant

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"was engaged in the business or employment of keeping" such an establishment. The simple averment that he "did keep one" is insufficient. *Eubanks* v. *State*, 17 Ala. 181.

653. An indictment for an act which was a misdemeanor at the Common Law, and which, by the penal code, has been made a felony, need not allege that the act was feloniously done. *Beasley* v. *State*, 18 Ala. 535.

654. Where a statute creating an offence describes its constituents, an indictment is sufficient, if it charge the offence in the language of the act. *Batre* v. *the State*, 18 Ala. 119.

655. An indictment, therefore, under the statute, for refusing to testify before the grand jury in reference to gaming, is good, which alleges the issuance of a summons by the solicitor, requiring the defendant to appear before the grand jury, and give evidence of any gaming, &c., its service by the sheriff, the appearance of the defendant in obedience to its mandate, and his refusal to testify when there. *Ib.*

656. In an indictment for permitting a gaming-table to be exhibited and carried on in a house occupied by the defendant, it is not necessary to aver that the defendant does not come within the proviso of the statute. Clay's Dig., 434, § 16. *Clarke* v. *the State*, 19 Ala. 552.

657. When a new offence is created by statute, an indictment which describes the offence in the language of the statute, is sufficient. *Ib.*

658. An indictment under the statute against permitting gaming-tables to be exhibited, need not allege the name of the person by whom the table was exhibited, nor that his name is unknown. *Ib.*

659. Where two defendants were jointly indicted for gaming, and they did not ask to sever in their pleadings, the fine was assessed severally, and judgment rendered jointly for cost. *Colico* v. *the State*, 4 Ark. 430.

660. Where an indictment is not under the code of 1817, for gaming, it is indispensable that a prosecutor should be marked upon the indictment. *The State* v. *Smith* 1 Meigs R. 99.

661. An indictment which charged that A. B. did construct and use a public gaming place in the town of H., in the county of H., at which a game of chance was played, and that the defendant, at said town of H., did play at the said game, "and did then and there bet money with the said A. B., at and upon the said game," is not good; it does not sufficiently charge that the playing and betting by the defendant were at any public gaming place. The words "then and there," have reference only to the time and to the venue, the county of H., and not to the public place of gaming before mentioned. *State* v. *Braxton*, 3 Ire. R. 354.

662. An indictment under the act of 1816, to prevent gaming, which charges the defendant with gaming, and keeping a public place or house, used as a place for gaming, is bad. *The State* v. *Howe*, 1 Richard 260.

663. In an indictment for gaming, the offence charged was, "that the defendant unlawfully played and bet at cards, for money;" held sufficiently certain without specifying the particular game of cards at which he played, or averring any specified amount of money bet. *Dean* v. *the State*, 1 Martin & Yerger 127.

664. The body of an indictment need not show in what Court the indictment was found; it is sufficient that the fact appear in the caption. *Ib.*

665. The act of 1831, ch. 82, provides that all prosecutions by presentment or indictment, for misdemeanors, shall be commenced within twelve months after such offence shall have been committed, and not afterwards; it is held to refer to the commencement of the prosecution, and not the new finding of the indictment. *The State* v. *Miller*, 11 Humph. 505.

666. Where a specific term in a statute is followed by one of more comprehensive meaning, an indictment for the offence designated by the more definite term, must be equally specific in charging it. *Bush, et al.* v. *State*, 18 Ala. 415.

667. Where, therefore, a party indicted under the statute against gaming, is charged with playing cards "at a public place," proof of his playing in

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"a public highway" does not support the charge as laid in the indictment, and will not authorize a conviction. *Ib.*

668. In an indictment under the statute for an assault with intent to murder, it is necessary to specify the acts which constitute the assault. *Beasley* v. *State*, 18 Ala. 535.

669. A charge of "persuading and inducing a negro woman slave, named A., the property of J. K., to leave her master's premises and employ, with a view to take said slave to another State and convert her to his own use," though not in the technical language of the statute, is a substantial description of an offence embraced by its provisions. *State* v. *Weaver*, 18 Ala. 293.

670. In an indictment for camp-hunting, under the act of February 5, 1846, (Pamphlet Acts, p. 134), a count which only charges the defendants with having formed themselves into a company consisting of more than five, for the purpose of camp-hunting, is fatally defective. *Underwood, et als.* v. *State*, 19 Ala. 532.

671. A count which charges that the defendants came into the county of Covington for the purpose of camp-hunting, and that they did camp-hunt therein, but does not allege that they hunted together, or in a company of more than five persons, is also defective. *Ib.*

672. The act of February 5, 1846, does not prevent citizens of other counties from camp-hunting in the county of Covington, except in companies of more than five. *Ib.*

673. The statute of Arkansas does not make every possible malicious or contemptuous disturbance or disquietude of a congregation or private family assembled for religious worship, a misdemeanor, although its provisions are very general, and embrace almost every such case that may occur; it is, therefore, necessary that a disturbance proceeded for in an indictment, should be described, as well in order that it may be determined whether or not the statutory offence has been charged, as that the accused may know the "nature and cause of the accusation against him." *State* v. *Mynyard*, 7 Eng. 156.

674. The penal code of Tennessee is not applicable to offences committed by slaves; but it does not follow that offences committed by white persons upon the persons of slaves, shall not be punishable under this code. It does apply to such offences, and a white person may be indicted and convicted under this code for murder, mayhem, or manslaughter, committed upon the person of a slave. *Worley* v. *State*, 11 Humph. 172.

675. An indictment grounded on the act of 1847, c. 193, against a licensed ordinary keeper for unlawfully exposing for sale and selling spirituous liquors, to-wit: brandy, &c., on a Sunday, ought to name the person to whom the liquor was sold; or if his name be unknown to the jurors, then the indictment may describe him as a certain "person to the jurors aforesaid unknown." *Capritz* v. *State*, 1 Md. 569.

676. Held, that where an indictment was founded on two statutes, it was defective if it did not conclude contrary to the form of the statutes. *Francisco* v. *State*, 1 Carter's R. 179.

677. Where a new statute adds a new penalty to an offence prohibited by a former statute, "considering that the precedents in these cases generally conclude contra formam statuti, and the prosecution in truth depends on the addition made by the latter statute, which seems of itself alone sufficient to support it, it may be reasonably argued, and seems agreeable to the latter opinions, that such a conclusion may be allowed in these cases." "It no more appears from cont. form. statutorum, what statute the prosecution is founded upon, than from cont. form. statuti." *State* v. *Robins*, 1 Strobh. 355.

678. Where the indictment framed within the statute, 1 Revised Code, c. 111, § 30, has departed from the terms of the statute in substituting the word "removed" in the place of the word "carried," and has wholly omitted an averment that the removal of the slave was "without the consent of the owner;" held that the indictment was defective. *Com.* v. *Pease*, 2 Gratt. 629.

679. Where the exception is in the

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body of the statute which enacts the offence, and enters into it as part of its description, it becomes necessary to state all the facts which constitute the offence; and to do this, the exception in such case must be negatived. *State* v. *Barker*, 18 Vt. 195.

680. Where the statute (Rev. Stat. 394) prohibits any one from exercising on the Sabbath "any secular labor, business or employment, except such only as works of necessity and charity," it is necessary then to allege, in order to constitute a violation of this statute, that the work complained of was not work of necessity or charity; and the effect is the same as if the exception in the statute had been in this form, not being works of necessity or charity. *Ib.*

681. Where the statement of the act itself necessarily includes a knowledge of the illegality of the act, no averment of knowledge or bad intent is necessary. *Com.* v. *Stout*, 7 Monr. 247.

682. An indictment in the words of a statute is not always sufficient; whether sufficient or not depends upon the manner of stating the offence in the statute; if every fact necessary to constitute the offence is charged or necessarily implied by following the language of the statute, the indictment in the words of the statute is undoubtedly sufficient; otherwise it is not. *Ib.*

683. Where the words of a statute are descriptive of the nature of the offence, there it is necessary to specify it in the particular words of such statute. *State* v. *Stedman*, 7 Porter 495.

684. And where the statute does not employ any terms descriptive of the offence, and merely declares what shall be the punishment of an offence known to the Common Law, in order to frame an indictment understandingly, reference must be made to that branch of jurisprudence in connection with the statute. *Ib.*

685. Where the indictment is in the language of the act, except that it adds to the charge that it was unlawfully and wilfully done, and an indictment so drawn and so plainly that "the nature of the offence may be easily understood by the jury," has been sustained under the statute of Illinois. *Chambers* v. *People*, 4 Scam. 351.

686. Where a statute creates an offence, the indictment itself must charge the facts and circumstances which constitute the offence, as mentioned in the statute, and it is better to pursue strictly the words of the statute, as it precludes all question about the meaning of the expressions used; but where a word not in the statute, is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than it, and includes it, the indictment will be sufficient. *Peek* v. *the State*, 2 Humph. 78.

687. Where the word "imitation" in the statute, is represented in the indictment by the words likeness and similitude, it was on the above principle held good. *Ib.*

688. In an indictment against "D." founded on the act to suppress private bank-notes, it was proved that D. was secretary or cashier of a certain private banking establishment, and resided in Wisconsin T., and signed the notes of said concern as such cashier; that the president, whose signature was also attached to the notes, resided in St. Louis, and kept a broker's office; that the president had exchanged two of said notes for two notes on the Illinois bank, at the request of witness; that said notes were seen in circulation in the city of St. Louis, and had been redeemed at the office of the president; that D. had been seen once in St. Louis only, when he made some inquiries into his liability on said notes; held that there was no evidence of a circulation of said notes by D. *Downing* v. *State of Missouri*, 4 Mo. 572.

689. An indictment describing a note as purporting to be payable to the holder, when on its face it purports to be payable to bearer, is bad. *Ib.*

690. Where an instrument is to be set forth, the description that it purports a particular fact, necessarily means that what is stated as the purport of the instrument, appears on the face of the instrument itself. *Ib.*

691. In an indictment for retailing, the day alleged is not material, and

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any day before the finding of the bill may be proved. *State* v. *Anderson*, 3 Richard. 172.

692. An indictment for retailing is not bad, on the ground of duplicity or misjoinder, because various acts of retailing to different persons are grouped together in one count, as constituting a single offence; and if the proof shows a retailing to either of the persons named, the defendant may be convicted. *Ib.*

693. Wherever the statute speaks of disabling a limb or member, a permanent injury is contemplated, as such was the Common Law notion of the extent of the injury necessary to constitute a mayhem; a temporary disabling of a finger, an arm, or an eye, would not be sufficient to constitute the statutory offence, but it would at all times be exceedingly difficult to frame an indictment with a view to a specific description of the exact injury sustained; this precision of description is as unnecessary as it is dangerous in indictments on statutes; and all that the law requires is a description of the offence, in the words of the statute creating it. *The State* v. *Briley*, 8 Porter 472.

694. The only exception that is known to exist to this general rule, is where a statute makes use of a technical term known to the law, as burglary, robbery, &c. *Ib.*

695. An indictment should charge an offender against a statute, with doing on purpose, and of malice aforethought, unlawfully, the act complained of; this, with the proper allegations of time and place, with a formal commencement and conclusion, would constitute a sufficient indictment. *Ib.*

696. An objection was taken to an indictment, that it contained no averment that the offence was committed after the 1st May, 1792, which, it is alleged, is essential upon an indictment on a statute which prohibits an offence after a specified time; but the rule is, where the prohibiting statute is recent, it is usual to allege expressly, that the offence was committed after the making of the statute; but where the statute is ancient, this is not usual, and does not seem to be in any case necessary. *State* v. *Chandler*, 2 Hawks 439.

697. To indict a person for violating the whole of any particular statute, without specifications, is not sufficient to call for a conviction; but the rule is, after a verdict of "guilty," on an indictment containing several counts, if there is one good count, it is sufficient to sustain the conviction. *Klifield* v. *the State*, 4 Howard's R. 304.

698. In an indictment on a statute, there must be an averment that the act was done without consent, when it is a substantial part of the offence; but it is not always the duty of the prosecutor to introduce direct testimony to prove it. *State* v. *Whittier*, 21 Maine 341.

699. The act of February, 1836–'7, p. 60, amendatory to the act of March 20th, 1835, concerning crimes and punishments, providing for the punishment of certain felonies, when committed by slaves, was not designed to alter the nature of the offence, but merely to substitute another mode of punishment; and the offence being still a felony, the name of the prosecutor is not required to be endorsed on the indictment. *Lucy* v. *the State*, 8 Mo. 134.

700. When a statute is made, giving a new remedy, &c., either remedy may be pursued; at Common Law, keeping swine in the city of London, was a nuisance, and, of course, indictable; by the statute the hogs were liable to be seized, &c., but it was held that notwithstanding this statute, the offence was still indictable at Common Law. *Jenning* v. *the Commonwealth*, 17 Pick. 80.

701. One count in an indictment charged the buying of corn from a slave, another the selling of liquor; the defendant, who was not a vender of spirits by profession, had traded the liquor for the corn. A general verdict of guilty was held good, for the two counts charged the same act, and the same offence. *The State* v. *Priester*, Cheves' R. 103.

702. It seems that it would have been otherwise, had the defendant been a distiller, vender, or retailer by profession, for then the offence in the second count would have been created by

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A. A., 1834, while the first charged a violation of the A. A., 1817. *Ib.*

703. An indictment upon a penal statute is to be construed strictly; it must show what offence has been committed, what penalty incurred, &c., by positive averment; it is not sufficient that they appear by inference. *Com.* v. *Waters*, 7 Dana 29.

704. In an indictment for selling ardent spirits without license, it is not necessary to aver that the liquor sold was not compounded, and intended to be used as a medicine. *Townley* v. *the State*, 3 Harrison's R. 311.

705. Such an averment is only necessary in an indictment on the second clause of the fifth section of the statute of March 1st, 1838, Elm. Dig. 249, for selling a composition of which wine, or rum, or other ardent spirits is the chief ingredient. *Ib.*

706. An indictment under the third clause of said section, for selling "mixed liquors" by a less quantity than five gallons, must show that the mixture is composed of some intoxicating liquors. *Ib.*

707. The word "all" in the sixth section of the statute, must be restricted to mean, all the indictments for selling wine, or some other of the simple and unmixed liquors named in the statute. *Ib.*

708. An averment in an indictment concluding against the law in such case provided, leaves it entirely uncertain whether the offence charged was committed against the statute or the Common Law, and is insufficient. *Commonwealth* v. *Inhabitants of Stockbridge*, 11 Mass. 279.

709. An indictment charging that defendant "did exercise the business of a public auctioneer, and then and there sold goods as such auctioneer," &c., pursues the essential descriptive words of the statute, and is good. *Vaughan* v. *State of Missouri*, 4 Mo. 530.

710. It is error to charge two persons with jointly exercising the trade of an auctioneer. *Ib.*

711. All indictments founded on particular acts, are required to conclude against the form of the act in such case made and provided; but it is not necessary to state when the act was passed. *The State* v. *Turnage*, 2 Nott & McCord 158.

712. Charging the offence in the alternative, following the words of the statute, is not fatal, when the descriptive words in the statute are synonymous. V. 4 Mo. 474.

713. An indictment under the second section of the act concerning grocers, passed in 1837 (see Sess. acts of 1837, page 64), charging that defendant "did sell, retail and deliver ten pounds of nails, &c., without a license," &c., is defective, because it is not specified that defendants dealt in the selling of such articles, and that they were goods, wares and merchandise not the growth or manufacture of the State. *State* v. *Hunter*, 5 Mo. 360.

714. An indictment under the act concerning "groceries and dram-shops," Laws of Missouri, session 1840–1, page 42, for keeping a "grocery" without a license, should contain an averment that the liquors sold were "not to be drank at the place of sale." If the liquors were sold to be drank at the place of sale, the vender would be indictable for keeping a "dram-shop," without license, without regard to the quantity sold, and could not be indicted for keeping a "grocery." *The State* v. *Auberry*, 7 Mo. 304.

715. An indictment under the act to license and tax merchants, charging that "defendant did sell, retail, and deliver six yards of cloth, without first obtaining a license," &c., is bad; the law being directed against those who "deal in selling of goods, wares, and merchandise," at any store, stand, &c.; the indictment must pursue the words of the statute. *State* v. *Martin* 5 Mo. 361.

716. An indictment under the thirty-first section, second article, of the act concerning crimes and punishments, charged that defendant "feloniously, unlawfully, and with malice aforethought, did shoot at," &c., it should have adopted the words of the statute "on purpose and of his malice aforethought," error held fatal. *State* v. *Comfort*, 5 Mo. 357. In such an indictment, it will be sufficient to charge the intent, in the words of the act, and it need not

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be stated "with intent feloniously to kill." *Ib.*

717. In an indictment under the eighth section of eighth article of the act concerning "crimes and punishments," (R. C. 1835, p. 206,) for lewdly and lasciviously abiding and cohabiting, it is sufficient to charge the offence as having been committed on a certain day, and it is not necessary to charge the offence with a continuendo; it seems that proof of a single act of such criminal intercourse, would not of itself be sufficient to sustain the indictment. *Hinson* v. *the State*, 7 Mo. 244.

718. Where an indictment is laid for selling spirituous liquors without license, it is not necessary to specify the names of the persons to whom the sales were made. *The People* v. *Adams*, 17 Wend. 475.

719. In an indictment for gaming, under the sixteenth section of the eighth article of the act concerning crimes and punishments (Rev. Stat. 1835, p. 208), if the offence charged be described in the words of the statute, it is sufficient. *Spratt* v. *the State*, 8 Mo. 247.

720. An endorsement on an indictment, as follows: "A true bill," signed by the foreman, is a sufficient certifying of the indictment. *Ib.*

721. In an indictment for "open, gross lewdness, or lascivious behavior," under the eighth section of the eighth article of the act concerning "crimes and punishments" (Rev. Stat. 1835, p. 206), it is not sufficient to charge the defendant generally in the words of the statute, with being guilty of "open, gross lewdness and lascivious behavior," by then and there publicly cohabiting with one F., &c.; but the specific act in which the lewdness or lasciviousness is displayed, must be specified with the degree of certainty that would advise the accused of the specific charge he is called upon to answer. *Demaron* v. *the State*, 8 Mo. 494.

722. Where the statute adopts a Common Law offence, all the Common Law requirements in defining the offence, should be followed in the indictment. *State of Alabama* v. *Absence*, 4 Port. 397.

723. A ticket in a lottery, which entitles the holder to one-fourth of the prize drawn to its numbers, although usually called a quarter of a ticket, is a lottery ticket, within the meaning of the act of December 19, 1842, "to abolish lotteries, and to prohibit the sale of lottery tickets within this State," and may be so described in an indictment under this act. *Freleigh* v. *the State*, 8 Mo. 606.

724. If the offence in an indictment under the act of February 16, 1841, entitled "an act to regulate groceries and dram-shops," be described in the words of the statute, the indictment will be bad. See contra, *the State* v. *Comfort*, 5 Mo. R. 357; *the State* v. *Martin*, ib. 361; *the State*, v. *Mitchell*, 6 Mo. Rep. 147; *the State* v. *Brown*, 8 Mo. 210.

725. The act of March 18th, 1835, entitled "an act to regulate inns and taverns," is with the exception of the thirty-third section, in force, and an indictment for dealing in wines and spirituous liquors, should charge that the defendant had no license for that purpose. If the indictment charges in the words of the statute, that the defendant sold such wines, &c., without having a dram-shop license continuing in force, the indictment will be bad. *Ib.*

726. When an offence is created by statute in general, it is sufficient for the indictment to charge the offence in the terms used in the statute; but if superfluous allegations are added, and these show a case not within the statute, the indictment is bad on demurrer. *State* v. *Mahan*, 2 Ala. 340.

727. In an indictment for inveigling, &c., Edmond, the slave of J. L. Cross, it was held not necessary that J. L. C. was the owner or employer of said slave. It is sufficient if the charge is laid, "one negro slave of L. J. C." *The State* v. *La Creux*, 1 McMullan 488.

728. The material words of the statute under which an indictment is framed must be used. *Ib.*

729. It is not necssary to allege in an indictment, by what means, or how the prisoner aided the slave in departing from the service of his master. *Ib.*

730. An offence punishable otherwise than by death, or imprisonment

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in the penitentiary, is not a felony within the meaning of the statute of 1835, concerning crimes and punishments, (Rev. Stat. p. 216, § 36), therefore, in an indictment against a negro or mulatto, for an attempt to commit a rape on a white female, which offence is punishable by castration, it is not necessary to aver that the act was done feloniously or with a felonious intent. (Rev. Stat. 1835, p. 170, § 28.) *Nathan* v. *the State*, 8 Mo. 631.

731. Indictments framed on statutes, must conform strictly to the words of the enactment. *State of Alabama* v. *Brown*, 4 Port. 410.

732. Thus, an indictment under the statute of this State, for stealing slaves, omitting an allegation that they were stolen out of, or from the possession of the master or overseer; held bad. *Ib.*

733. An indictment under the act of December 19, 1842, to abolish lotteries, and to prohibit the sale of lottery tickets in this State, for selling a lottery ticket contrary to the provisions of said act, it is not necessary to set out the ticket by its tenor or purport; it is sufficient to describe the ticket as a "certain lottery ticket." *Freleigh* v. *State*, 8 Mo. 606.

734. An indictment will lie, on the above act, for the sale of a lottery ticket, although the statute is in the plural, prohibiting the sale of lottery tickets. *Ib.*

735. An indictment under the statute 22 and 23, ch. 2, § 7, for killing a horse, which contains a general description of the offence in the words of the statute, will be sufficient, although the manner of the killing be not described. *The State* v. *Cantrell*, 2 Hill S. C. 389.

736. In general, it may be said that it is sufficient certainty in an indictment to allege the offence in the very terms of the statute. *U. States* v. *Gooding*, 12 Wheaton 460.

737. The duty of repairing highways is enjoined on towns by statute; and an indictment against a town for neglect of this duty, must allege the offence contra formam statuti, or it will be quashed. *Com.* v. *the Inhabitants of Springfield*, 7 Mass. 9.

738. Where a statute describes an act as a crime or misdemeanor of particular grade, the indictment need not state the legal conclusion that such act amounts to such crime or misdemeanor. *State* v. *Absence*, 4 Porter 397.

739. Thus in an indictment for mayhem, it is not essential to charge the offence to have been committed feloniously. *Ib.*

740. An indictment for biting off the ear, under the second section of the act of 1791 (Rev. St. 339), must state the offence to have been done on purpose, as well as unlawfully. *The State* v. *Ormond*, 1 Dev. & Batt. 119.

741. The penalty, by the act of 1820, for keeping a tippling-house, "under the pretence of keeping a tavern,"—two hundred dollars for every three months—applies only where the house is licensed: hence an indictment under the act which does not charge that the accused was licensed to keep a tavern, is bad; so, also, if it fails to aver that the tippling-house had been kept for three months. *Com.* v. *Macuboy*, 3 Dana 70.

742. The penalty, by the act of 1831, for keeping a tippling house—fifty dollars, in addition to ten dollars imposed by a previous act—applies to a house without any license; and the indictment must charge that the house was not licensed as a tavern. *Ib.*

743. Every indictment must identify and charge the specific offence; showing by averment, not by inference merely, what statute has been violated, so that it may appear what penalty has been incurred. Vide supra. *Ib.*

744. An indictment for trading with a slave in the day-time, by selling him spirituous liquor, must negative an order of the owner or manager, as well as a delivery for the owner. *State* v. *Miller*, 7 Iredell 275.

745. But an indictment for selling spirituous liquor to a slave in the night-time, need not contain such a negation, for the offence is complete, whether the slave had a written permission from his owner or not. *Ib.*

746. An indictment under the 35th sec. 2 art. of an act concerning crimes and punishments, R. C. 1835, should state the circumstances attending the commission of the offence. *Jennings* v. *the State*, 9 Mo. 852.

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747. It is sufficient to state them thus: "that on, &c., with force and arms, did feloniously make an assault on the body of one G., with a large iron auger, and then and there did feloniously wound, disfigure and inflict on the body of said G., with the said auger, great harm." The words in the act, "in a case and under circumstances," &c., may be rejected as surplusage. *Ib.*

748. An indictment against a free person of color, which charges that he did "buy of, traffic with, and receive from a certain negro slave, &c., one peck of corn," &c., is good, although the act making the offence of a free person of color dealing with a slave, only uses the words, "if he shall trade with any slave, either buying of, or selling to him," &c. The other words used in the indictment are mere surplusage. *State* v. *Cozens*, 6 Iredell 82.

749. Where, in an indictment, a statutory offence is charged in the words of the enacting clause, it is all that the strictest rules of criminal pleadings require. *The State* v. *Williams*, 2 Strobh. 474.

750. Where the indictment, under the act of 1826, charged the defendant with taking grain from a field, and the proof was that he had taken a half-bushel of peas; on appeal, the Court held that peas were included in the general expression "other grain," which is used in the act. *Ib.*

751. If, in the description of it, the offence is stated in the terms and language of the Penal Code, or so plainly that the nature of it may be easily understood by the jury, it is sufficient. *Camp* v. *the State*, 3 Kelly's R. 417.

752. Where the defendant is charged in an indictment with wounding a steer, without alleging that a steer is "cattle or other beast," which are the words of the statute, it was held sufficient. *State* v. *Abbott*, 20 Vermont 537.

753. An indictment founded upon a statute, must charge all the facts and circumstances which constitute the statute offence, so as to bring the accused perfectly within the provisions of the statute. *The People* v. *Allen*, 5 Denio 76.

754. Therefore an indictment for embezzlement under the statute concerning the offence (2 R. S. 678, § 59), must charge that the accused was a clerk or servant of some person, (or an officer or agent of a corporation,) and that the property he is charged with embezzling came to his possession, or under his care, by virtue of such employment. *Ib.*

755. A count alleging that the accused received the property as the agent of an individual, is bad. *Ib.*

756. So, also, it is bad if it allege that the accused received the property as the agent of an individual named, though the count afterwards proceed to charge that it came to defendant's possession and under his care as such servant as aforesaid, and that while he was such servant he converted it. The construction being, that such servant meant such a servant as an agent may be. *Ib.*

757. In an indictment for felony under the act of March 4th, 1846, relative to abortions, the intent to destroy the child must be averred. *The People* v. *Lohman*, 2 Barb. 216.

758. In Alabama, an indictment under the statute of 1848 (art. 32, § 98), for keeping an establishment for the sale of confectionery, &c., without license, is not demurable, because it was not preferred at the instance of an informer. *Williamson* v. *the State*, 16 Ala. 431.

759. A count for selling liquor during the year that the act of 1845 (stat. p. 322) was in force, which besides alleging that the defendant had sold without a license, is sustainable under the provisions of the Revised Statutes, notwithstanding the additional allegation. *Hodgman* v. *the People*, 4 Denio 235.

760. An indictment for selling liquor might have been found under the act of 1845, while that act was in force. *Ib.*

761. In North Carolina, in an indictment under the stat. 1846–7, ch. 7, for injury to a dwelling-house of which a lessee, his term yet unexpired, has the actual possession, the indictment, if it can lie at all, must state the property to be in the lessee. *The State* v. *Mason*, 13 Iredell 341.

762. But the act does not embrace the case of destruction or damage to buildings, &c., by the owner himself;

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and, in law, the lessee is the owner during the continuance of his term. *Ib.*

763. In a summary process under the ordinance of the city of Charleston against loitering, in describing the negroes, it is not necessary either to set forth the sex of the negroes or their names, or the names of their owners. *The City Council* v. *Seeba*, 4 Strobh. 319.

764. Where the offence is created by statute, or the statute declares a Common Law offence, committed under peculiar circumstances, not necessarily embraced in the original offence, punishable in a different manner from what it would be punished in the absence of such circumstances, or where the nature of the Common Law offence is changed by statute from a lower to a higher grade, as where a misdemeanor is declared a felony; the indictment must be drawn in reference to the provisions of the statute, and conclude contra formam statuti; but where the statute is only declaratory of what was previously an offence at Common Law, without adding to or altering the punishment, the indictment need not conclude contra formam, &c. *People* v. *Enoch*, 13 Wend. 159.

765. Where there is a misrecital of a public act which need not be set out, and the indictment would be good without it, if the indictment conclude contrary to the form of the act in such case made and provided, the recital may be rejected as surplusage; but otherwise if the act be referred to in the conclusion as the said statute. *State* v. *Fearson*, 2 Md. 310.

766. If this indictment had specifically referred to the act of 1817, reciting the first section correctly but misreciting the seventh, the general conclusion, contrary to the form of the statute in such case made and provided, would have cured the defect. *Ib.*

767. The act of 1817, ch. 227, is not a private statute, but a public, local law, relating to the administration of justice in three of the counties of the State, and need not be recited at length in an indictment. *Ib.*

768. If an indictment for a statutory offence charges all the facts which the statute requires to constitute the offence, this, as a general rule, is held to be sufficient. *People* v. *Stockham*, 1 Parker's Crim. R. 424.

769. Where an indictment alleged that the defendant administer to one A. D., a pregnant woman, a certain medicine and drug, and used and employed upon her body a certain instrument, with intent to procure the miscarriage of the said A. D., contra formam statuti, &c., it was held that the facts were sufficient to constitute a misdemeanor, under the act of May 13, 1845, to prevent the procurement of abortion. *Ib.*

770. As a general rule, it is sufficient in an indictment, to state an offence in the words of the statute which creates it. *The State* v. *James*, 3 Strobhart's R. 269; *State* v. *Mitchell*, 6 Mo. 147; *State* v. *Click*, 2 Ala. 26; *State* v. *Hunter*, 8 Blackf. 212; *Buckley* v. *State*, 2 Iowa 162; *State* v. *Hereford*, 13 Mo. 3; *Simmon* v. *State*, 12 Miss. 268; *State* v. *Noel*, 5 Blackf. 548; *Howell* v. *Com.*, 6 Gratt. 664; *State* v. *Brougham*, 3 Blackf. 307; *State* v. *O'Bannan*, 1 Bailey 144; *State* v. *Cosados*, 1 Nott & McC. 91; *Hamilton* v. *Com.*, 3 Penn. 142; *State* v. *Foster*, 3 McCord 442; *State* v. *Fleetwood*, 16 Mason 448; *Com.* v. *Tuck*, 20 Pick. 356; *Hampton's case*, 3 Gratt. 590; contra, *State* v. *Bachelder*, 2 Gallis 15; *State* v. *Little*, 1 Vermont 331, where it was held the exact words of the statute need not be used.

771. Where the offence is charged in the indictment substantially and sufficiently pursuant to the statute, it will be held good, provided words agreeing in sense are used, instead of those in the statute. *The State* v. *Vill*, 2 Brevard 262.

772. It is a well-settled rule, that indictments upon statutes, particularly of a highly penal character, must state all the circumstances which constitute the definition of the offence in the act, so as to bring the defendant judicially within it; they must also be clear and certain to every intent, and pursue the precise and technical language employed in the statute in the description of the offence. *Ike* v. *the State*, 23 Miss. 525.

773. It is not necessary in an indictment for selling liquor to slaves, to

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set forth the names of the owners of the slaves mentioned in said indictment. *The Commonwealth* v. *Smith*, 1 Gratt. 553.

774. Where an indictment is founded on a statute, it must allege that the offence was committed against the statute, or it will be defective. *McCullough* v. *Commonwealth*, Hardin 95.

775. Where a statute, creating an offence, describes its ingredients, an indictment under it must conform to the description thus given. *Eubanks* v. *the State*, 17 Ala. 181.

776. The general rule is, that when the exceptions are contained in the enacting clause, the indictment must negative them, and state that the respondent does not come within them; but when they are contained in a separate section, *quere*,—whether the respondent must show in defence that he comes within them. *State* v. *Palmer*, 18 Vermont R. 570; vide *State* v. *Keen*, 34 Maine 500; *Reynolds* v. *State*, 2 Nott & McCord 365; *State* v. *Rice*, 12 Gill & John. 260.

777. Where an offence is created by statute, and there is an exception in the enacting clause, the indictment must negative the exception. But if there be a proviso, which furnishes matter of excuse for the defendant, it need not be negatived in the indictment, but he must plead it. *State* v. *Godfrey*, 24 Maine 232.

778. Where a statute contains provisos and exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisos it contains. *Britton* v. *the State*, 5 Eng. 299.

779. But on the contrary, if the exceptions themselves are stated in the enacting clause, it will be necessary to negative them, in order that the description of the crime may in all respects correspond with the statute. *Ib.*; vide *Metzker's case*, 14 Illinois 101; *Bouser* v. *State*, 1 Smith 408; *Elkins* v. *State*, 13 Geo. 435; *Commonwealth* v. *Hill*, 5 Gratt. 682.

780. While all the exceptions in the enacting clause are required to be negatived, it is immaterial what precise words are used, if they clearly and explicitly accomplish that purpose. *State* v. *Keen*, 34 Maine 500.

781. It is a well-established principle of criminal pleading, that where a generic term is used in a statute creating an offence, in connection with words more precise and definite in their meaning, the indictment must charge the offence in the particular words used in the statute. *The State* v. *Raiford*, 7 Porter 101.

782. Where an indictment charges the stealing of a horse, and the proof was it was a gelding, on the principle above stated the Court determined that the prosecution could not be maintained. *Ib.*

783. The general rule is that the charge must be laid in the indictment so as to bring the case within the description of the offence as given in the statute, alleging distinctly all the essential requisites that constitute it. Nothing is to be left to implication or intendment. *State* v. *Eldridge*, 7 Eng. 608.

784. Generally speaking, it is sufficient to pursue the words of the act, but if in pursuing them there should be any ambiguity, or uncertainty in charging the offence, the pleader should regard the substance and legal effect of the enactment. *Ib.*

785. And when the words or terms of art are used in the description that have technical meaning at Common Law, these should be followed; being the only terms to express, in apt and legal language, the nature and character of the crime. *Ib.*

786. In all cases of felonies at Common Law, and some also by statute, the felonious intent is deemed an essential ingredient in constituting the offence, and hence the indictment will be defective, even after verdict, unless the intent is averred. *Ib.*

787. Where the indictment concludes by alleging that the offence was "against the form of the statute" and not "statutes" in such case made and provided, it has been decided, that under such an indictment, an offence may be proved, and the indictment sustained, although the offence may be the creation of a number of statutes. *State* v. *Wilbor*, 1 Rhode Island 199.

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788. If the indictment charges the offence in the language of the code creating it, or so plainly and distinctly that the jury can clearly understand its nature, the Court will hold it sufficient. *Cook* v. *State*, 11 Ga. 53.

789. Where an indictment charged the offence to have been committed on a day certain, to wit: the 1st day of May, 1851, it proceeds to say, and on other divers days and times, before and after that day; held that the words "divers other days" may be rejected as surplusage, a day certain having been charged. *Ib.*

790. Any day previous to the finding of the indictment will do, except when time enters into the nature of the offence; and the offence may be proven on any day within the period of limitations, dating back from the finding of the bill. *Ib.*

791. Where there is but one statute, an indictment which concludes against the form of the statutes, is bad, and after conviction, judgment will be arrested. *State* v. *Sandy*, 3 Iredell's R. 570; contra, *Townley* v. *State*, 3 Harrison 311.

792. Where there are more than one statute, a conclusion against the form of the statute, is also bad. *Ib.* Vide *State* v. *Hunter*, 8 Blackf. 212; *Tevis* v. *State*, 8 Blackf. 303.

793. A conclusion against the form of the statute (in the singular), is sufficient in all cases where the offence is distinctly within more than one independent statute. *U. States* v. *Gibert*, 2 Sumner 19.

794. Where there are two statutes, the first creating an offence and affixing a penalty therefor, and the second, subsequently passed, affixing an additional penalty to that of the first; held that the indictment might conclude in such case, contra formam statuti. *Butman's case*, 8 Greenleaf 113.

795. If an offence was punishable by a single statute only, and the conclusion (of the indictment) was against the form of the statutes (in the plural), it would, in point of law, be a good conclusion. *Carter* v. *State*, 2 Carter 617.

796. It is settled law, that when an offence is created by one statute, and a penalty for its violation is affixed by another, an indictment for a commission of the offence prohibited, must conclude against the form of the statutes. *State* v. *Moses*, 7 Blackf. 244.

797. Where an offence is entirely created by statute, the indictment ought to conclude contra formam statuti. *Fuller* v. *State*, 1 Blackf. 63.

III. Sufficiency of Indictment—Misnomer and Name.

798. It is a well-established principle, that if all the facts alleged in an indictment may be true, and yet constitute no offence, the indictment is insufficient; a verdict does nothing more than to verify the facts charged; and if these do not show the party guilty, he cannot be considered as having violated the law. *State* v. *Godfrey*, 24 Maine 232.

799. The legal sufficiency of an indictment cannot be contested upon demurrer to the scire facias issued on a forfeited recognizance; but the defendant should appear and answer to the indictment itself. *State* v. *Weaver*, 18 Ala. 293.

800. An indictment found by a grand jury composed of less than fifteen persons, having the qualifications required by the statute, is not sufficient to put the accused upon trial; and a plea to the indictment that one of the grand jurors had not the requisite statutory qualifications, is a good plea in bar. *Doyle* v. *State*, 17 Ohio 222.

801. Where the sufficiency of an indictment is not involved in some decision made, or opinion advanced at the trial, the only way of reaching a defect in the indictment, is by a motion in arrest of judgment, or by a writ of error brought on the record of judgment itself. *People* v. *Stockham*, 1 Park. Crim. R. 424.

802. Where the name of Hutson is used for the name of Herdson in an indictment, it is not a misnomer. *State* v. *Hutson*, 15 Mo. 512.

803. A misnomer is only matter of abatement, and it is not a good cause for arrest of judgment, even in crim-

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inal prosecutions. *Com.* v. *Dedham*, 16 Mass. 141.

804. After a prisoner has pleaded not guilty, he may not avail himself of a misnomer in the indictment, either on his trial or in arrest of judgment, or on motion for a new trial. *State* v. *Thompson*, Cheeves 31.

805. Where a plea of not guilty has been put in, a defendant cannot avail himself of the fact that the defendant has been indicted by a wrong name. *People* v. *Smith*, 1 Park. Crim. 329.

806. Where the indictment was laid against Donald, and the prisoner's true name was Donnel; held that judgment could not be rendered against Donnel. *Donnel* v. *U. States*, 1 Morris 141.

807. If an indictment makes reference to third persons, their names should be given; or if their names are unknown, that fact should be alleged. *State* v. *Irvin*, 5 Blackf. 343.

808. If a person's surname is usually written with an abbreviation, and there is a prefix to the surname, a name so written in an indictment will be sufficient. *State* v. *Kean*, 10 N. Hamp. 347.

809. In Tennessee, an indictment for malicious mischief must allege the name of the owner, and a mistake in that would be fatal. *Haworth* v. *State*, Peck 89.

810. The law knows only of one Christian name, and the middle letter forms no part of it; so that its insertion or omission makes no difference, and may be disregarded. *Edmundson* v. *State*, 17 Ala. 179.

811. Where an indictment was found against the inhabitants of a certain town for neglecting to repair a certain bridge within their town, and the legislature, while the indictment was pending, changed the name of the town, it was held, on a motion to quash the indictment, that the change of the name of the town was no occasion for quashing the indictment. *Com.* v. *the inhabitants of Phillipsburg*, 10 Mass. 78.

812. Junior is no part of the name. *Com.* v. *Perkins*, 1 Pick. 388.

813. The addition of junior to the defendant's name, when he has no such addition, is not considered such a defect as to defeat the indictment for that reason. *Ib.*

814. The law does not consider the middle name of a person as any part of his Christian name. *State* v. *Martin*, 10 Mo. 391.

815. It is necessary that the name of the person assaulted be proved as laid in the indictment; otherwise the variance is fatal; and the name in the indictment must be idem sonans with the true name; but the prosecutor is not to be held, as to names, to the correct orthography. *Haney* v. *State*, 5 Ark. 72.

816. Where a person by the name of T. H. P. was indicted by the name of T. P., Junior, it was held that the indictment must give the prisoner his right Christian name. *Com.* v. *Perkins*, 1 Pick. 388.

IV. Caption.

817. The record or caption of the indictment must state by what judge, and at what place in the county the court was holden at which the indictment was found, and by what jurors it was returned. *Thomas* v. *the State*, 5 Howard's R. 31; *Joseph* v. *the State*, 5 Howard 20.

818. It is necessary to set out in the caption of an indictment distinctly the court wherein the indictment was found, who the jurors were, and the place and time when it was presented. *State* v. *Williams*, 2 McCord 301.

819. If the dates in the caption of an indictment are made in Arabic figures, it will not be a valid objection to the indictment. *State* v. *Smith*, Peck 165.

820. It is necessary that the caption of an indictment should indicate the county in which the court is held, and it should also show that the grand jury had been sworn. *State* v. *Fields*, Peck 140.

821. Whatever belongs to the caption of the indictment, if inserted in the body of the indictment, may be rejected as surplusage. *Rose* v. *State*, Minor 28.

822. It is not necessary to set forth in the caption of an indictment by whom, and by what authority the persons sworn, affirmed, and charged as mem-

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bers of the grand jury, were summoned. *State* v. *Price*, 6 Halst. 203.

823. It is not necessary that the caption to an indictment should set out the specific qualifications of the grand jurors. It is sufficient if it describe them as good and lawful men. *Ib.*

824. A caption stating, "that at a court, &c., held before, &c., at, &c., on, &c., by the oaths and affirmations of A. B., &c., &c., good and lawful men, sworn, and affirmed, and charged, to inquire, it is presented." Omitting "then and there," sworn, &c., is sufficient. *Ib.*

825. A caption stating that, "at a Court of Oyer and Terminer and general jail delivery, held the fourth Tuesday in May, 1827, before the Hon. G. H. Ford, one of the justices, &c., and J. G., &c., their fellows, it is presented," sufficiently indicates the Court to whom the grand jury made their presentment. *Ib.*

826. One count in an indictment may be stricken out without affecting the caption of the indictment. *Duncan* v. *People*, 1 Scam. 456.

827. A caption to an indictment as, "Virginia, Prince William County, to wit," omitting the usual form of "the Superior Court of Law for the county of Prince William," will be deemed sufficient. *Burgess* v. *Com.*, 2 Virg. Cas. 483.

828. Where the Court acts under a special commission, then a caption to to an indictment cannot be dispensed with; but where the authority by which the Court sits is a public law, then it is the duty of every one to take notice of it. *State* v. *Warden*, 2 Taylor 163.

829. The caption of the indictment need not set forth the title of the court. It is sufficient if the county is contained in the caption. *Taylor* v. *Com.*, 2 Virg. Cas. 940.

830. Where the caption was endorsed on an indictment thus, "State of North Carolina, Franklin County, March sessions;" held that the Court before which it was presented was sufficiently described. *State* v. *Jeffreys*, C. & N. 364.

831. It should appear with reasonable certainty, in the caption of an indictment, that the grand jurors impanelled and sworn to inquire of, and presentment make, of the guilt or innocence of the party, were of the proper county. *Cornelius* v. *the State*, 23 Miss. 782.

832. Where the caption of an indictment was in the following words, to wit: "The grand jurors of the State of Mississippi, impanelled and sworn in and for the county of Warren," &c.; held to be sufficient. *Ib.*

833. Where the indictment commences with the Commonwealth of Kentucky, proceeds in the caption in the name and by the authority of the Commonwealth of Kentucky, and concludes against the peace and dignity of the Commonwealth, it will be held good. *Commonwealth* v. *Young*, 7 Monr. 1.

834. The insertion of the words contra formam statuti (or what is tantamount in English), in indictments for forcible entry, &c., is not error, where there is no statute, and the offence charged is indictable at Common Law; these words will be rejected as surplusage. If a caption says, "the foregoing bills of indictment are true bills," without it appearing on the record that the bill set out was one of them, the omission is fatal. *Cruiser* v. *the State*, 3 Harrison 206.

835. Where the caption of the indictment represents the grand jurors to be "good and lawful men," this general representation of the qualifications of grand jurors has always been held to be sufficient, even whenthe record comes from a Court of special and limited jurisdiction. If it comes from a superior Court even, the omission of these words is not fatal, because all men shall be presumed to be "good and lawful" until the contrary appears. *Beauchamp* v. *the State*, 6 Blackf. 299.

836. In the State of Indiana, where the caption of an indictment from the Circuit Court represented the grand jury that found the bill to be "good and lawful men;" held that this was a sufficient description of the qualifications of the jurors. *Ib.*

837. The caption is no part of the indictment itself, being only the style or preamble, and it may be amended,

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on motion, so as to make it agree with the original record, at any time during the term at which it is found; therefore a material error in the caption is not a fatal objection in arrest of judgment. *The State* v. *Creight*, 1 Brev. 169.

838. It should appear with reasonable certainty in the caption of the indictment, that the grand jurors impanelled and sworn to inquire of, and presentment make, of the guilt or innocence of the party charged, were of the proper county; and if it does not, it will be a fatal defect. *Byrd* v. *the State*, 1 How. 163.

839. And where the caption of the indictment was in the following words, to wit: the grand jurors of the State of Mississippi, impanelled and sworn in and for the County of Warren, &c.; it was held good. *Ib.*

840. The venire of the grand jury, as well as the names of the grand jurors, constitute a part of the caption, and need not be introduced in the indictment. *The State* v. *Murphy*, 9 Porter 487.

841. The day when the offence was committed may be rendered certain by reference to the year stated in the caption to the indictment. *Jacobs* v. *the Commonwealth*, 5 Serg. & Rawle 315.

842. When the county is mentioned in the caption, the last words, "then and there," in the body of the indictment, will be understood as referring to that county. *State* v. *Bell*, 3 Iredell 506.

843. The caption forms no part of the indictment. *Kirk* v. *the State*, 6 Mo. 469.

844. The omission to state in the caption in what Court, or at what term of the Court the bill was found, is immaterial. *Ib.*

845. If the caption to an indictment state the grand jurors to be "good and lawful men," it is sufficient, without alleging they are freeholders or householders. *Bonds* v. *State*, 1 Mart. & Yerg. 143.

846. The caption of an indictment may, by leave of the Court, be amended by the prosecuting attorney. *Moody* v. *State*, 7 Blackf. 424.

847. It is sufficient that the caption of an indictment state that the grand jurors were good and lawful men; if they be such, they must be freeholders and householders. *Cornwell* v. *the State*, 1 Mart. & Yerg. 147.

848. The principal object of the caption is to show that the indictment was found in a Court of competent jurisdiction; and where the caption states that the grand jury impanelled and sworn at the Circuit Court of, &c., at its September term, held, &c., found the indictment. This is equivalent to saying the jury was impanelled, &c., in open court; and as the Circuit Court possesses extensive and general criminal jurisdiction, it was not necessary to specify the qualifications of the jurors, or to allege that they were good and lawful men. *Weinzorpflin* v. *State*, 7 Blackf. 186.

849. If the caption to an indictment shows that the Court was open, as the law directs, on the first day of the term, by the clerk, and adjourned by him from day to day until the judge appears in Court, the presumption will be that the Court was held on each day, at such place and time as the law prescribes. *Smith* v. *State*, 9 Humph. 9.

850. As to the caption of an indictment, showing that the grand jurors are good and lawful men of the county, &c. *Cornelius* v. *State*, 7 Eng. 782.

851. It is correct in the caption of an indictment to style the Court of Oyer and Terminer, "the Court of Oyer and Terminer, and general jail delivery in and for the county of M.," without saying "of the State of New Jersey." *Berrian* v. *the State*, 2 Zabris. R. 9.

852. Where the caption to an indictment describes the Court and the term at which it was returned, and says that it was found by "the grand jurors of the Commonwealth, on their oath," it is matter of record who the grand jurors are, and who is their foreman, and that they were sworn and qualified, according to law; to all of them the same oath was administered, and therefore it is said properly that the presentment was made on their oath. *Commonwealth* v. *Johnson*, Thacher's Crim. Cas. 284.

853. The caption of an indictment is that entry of record showing when and

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where the Court is held, who presided as judge, the venire, and who were summoned and sworn as grand jurors; and this caption is a part of every indictment, and need not be repeated in any part of it. *Reeves* v. *the State*, 20 Ala. 33.

854. The caption of an indictment need not state the qualifications of the grand jurors, nor recite the facts which give the Court in which it is found jurisdiction, where such Court is invested with general criminal jurisdiction. *The State* v. *McCarty*, 2 Chand. (Wis.) 199.

V. Verdict on the Trial of Indictments.

855. At Common Law, the defects of some of the counts in an indictment, did not affect the validity of the remainder, but judgment might be given against the defendant upon those which are valid; though in a civil action a different rule prevailed, and if one count in the declaration was bad, and the jury found a general verdict, the judgment had to be arrested. In conformity with this doctrine of the Common Law, it was held in the State of New York, in the case of the *People* v. *Alcott* (2 John's. Cas. 311), that if one, count of an indictment be good, although the others may be defective, it will be sufficient to support a general verdict of guilty. *Parker* v. *Commonwealth*, 8 Monr. 30.

856. Where there is a general verdict on an indictment which contains good and bad counts, the finding of the jury will be referred to the good counts, and the judgment of the Court thereupon sustained. *Shaw* v. *the State*, 18 Ala. 547; *Brown* v. *State*, 5 Eng. 607; *Turk* v. *State*, 7 Ohio (Part 2), 240; *State* v. *Jennings*, 18 Mo. 435; *Curtis* v. *People*, Breese 197; *Harris* v. *Purdy*, 1 Stewart 231.

857. It is well settled in the State of Mississippi, that in prosecutions for misdemeanors, where there is a general verdict of guilty, and there is any good count in the indictment, it will be referred to that and supported. *Wash* v. *State*, 14 Smedes & Marsh. 120.

858. And there is no good reason why the same principle should not be sanctioned as well in capital cases as in prosecutions for misdemeanors. *Ib.*

859. Where the offence charged in an indictment containing several counts were all of the same nature, founded on the same section of the statute, and upon which the same judgment could have been rendered if the evidence sustained any of the counts, the jury had a right to find a general verdict, as there was no misjoinder. *Frasier* v. *State*, 5 Mo. 536.

860. By statute in Mississippi, it is provided "that upon an indictment for an offence consisting of different degrees, the jury may find the defendant not guilty of the offence charged, but guilty of an inferior degree of such offence, and such conviction shall be a bar to any other indictment for any other degree of the same offence." *Brantly* v. *State*, 13 Smedes & Marsh. 468.

861. Where there are two counts in an indictment, and one defective, a general verdict may be rendered on that count upon which the prisoner could be tried, and where the jury in returning their verdict, write "account" instead of "count," the Court may correct this mistake in orthography. *Roberts* v. *the State*, 14 Ga. 8.

862. Where the jury, on the trial of an indictment, returned a written verdict of guilty, which was not signed, and the verdict was then read in their hearing and recorded, and the prisoner's counsel declined to poll the jury; it was held that this irregularity was not a ground for setting aside the verdict. *Ib.*

863. Where a verdict in a criminal case is appropriate to one or more good counts in an indictment, and can be considered to have been passed upon and disposed of the others, the good counts are established; and held that the verdict will stand, notwithstanding there may be bad counts in the indictment; but if it appear that some of the counts are undisposed of by the verdict, the judgment rendered on such verdict will be reversed. *Baron* v. *the People*, 1 Parker's Crim. Rep. 246.

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864. It is not error to poll the jury, and when each juror agrees to the same verdict, to enter it as the verdict of the whole jury. *The State* v. *John, a slave*, 8 Iredell's R. 330.

865. It cannot be material of what part of the indictment the defendant is found not guilty, if the charge of which he is convicted contains in itself a full and specific offence. *Durham* v. *State*, 1 Blackf 33.

866. If one person be charged as principal and another as accessory, the indictment will be supported if the jury find either guilty as principal, and the other as accessory. *State* v. *Mairs*, Coxe 453.

867. A judgment on a verdict of guilty in an indictment should be certain and final, and subject to no future decision, nor dependent on any contingency. *Morris* v. *State*, 1 Blackf. 37.

868. Where an indictment contains a count for a riot and assault, and the grand jury find "A. guilty of a riot;" held to be only a partial finding of that count, and therefore bad. *State* v. *Creighton*, 1 Nott & McCord 256.

869. Where the jury find an informal verdict on an indictment, the jury may, on the motion of the attorney for the prosecution, with the consent of the Court, alter it, in such manner as to give it the form of a general verdict of guilty. *McGregg* v. *State*, 4 Blackf. 101.

870. If the jury do not pass upon one of the counts in an indictment, the Court may allow a discontinuance of such count. *U. States* v. *Keen*, 1 McLean 429.

871. The rule in criminal cases, that a general verdict of guilty is good on an indictment that contains several counts, some good and some bad, does not apply in Virginia in cases of penitentiary crimes, in which the jury are to fix the term of imprisonment, because the evidence on the bad counts may have a tendency to aggravate the punishment fixed by the verdict. *Mowbray's case*, 11 Leigh 643.

872. Where there are three counts in an indictment, and the prisoner is convicted on the second, and there is no finding as to the first and third, the verdict ought to stand, and judgment to be entered on it; and a judgment of acquittal as to the other two, notwithstanding the conviction on the second count. *Commonwealth* v. *Bennett*, 2 Virg. Cas. 235.

873. Where a general verdict of guilty is rendered on an indictment containing several counts, all of which are bad save one, judgment may, notwithstanding, be rendered; per Cowen, J. *People* v. *Wiley*, 3 Hill 194.

874. Where one, indicted for a larceny, stood mute upon his arraignment, a jury was impanelled who returned their verdict that he stood mute, fraudulently, wilfully, and obstinately; whereupon he was sentenced as upon conviction. *Commonwealth* v. *Moore*, 9 Mass. 402

875. Where two counts are united in one indictment, and the indictment is submitted on a plea of not guilty, to the jury, the jury must find both issues by their verdict; and should the prisoner be found guilty upon one issue, as for example, upon the inferior offence alleged in the indictment, and should there be no finding on the other issue, the verdict would be erroneous, and a new trial would be awarded. *State* v. *Sutton*, 4 Gill. 494.

876. As the jury may find a general verdict, they are judges both of law and fact, and may, if they think proper to do so, disregard the opinion of the Court upon the law. *State* v. *Jones*, 5 Ala. 666.

877. Where a jury render a verdict of not guilty in a criminal case, this is a final termination of the prosecution; no new trial or appeal can be had. *State* v. *Burris*, 3 Texas 118.

878. A jury would be warranted in finding a habitual or general wearing of concealed weapons, from evidence that the defendant was once seen wearing concealed weapons under circumstances which satisfied them that it was his general practice. *Hicks* v. *the Commonwealth*, 7 Gratt. 597.

879. Where the question of variance between the note set out in the indictment, and produced in evidence, is properly submitted to the jury, their verdict is conclusive. *State v. Potts*, 4 Halst. 26.

880. The statute of Jeofails does not

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extend to criminal prosecutions; a defective indictment cannot be cured by verdict, if the crime be not correctly described; no judgment can be rendered either upon verdict or plea of guilty. *Com.* v. *Tuck*, 20 Pick. 356.

881. Where the verdict was general on an indictment containing several counts, it is to be understood that the jury found the respondent guilty upon all the counts; and if any one or more of the counts is sufficient, the Court will render judgment upon such as are good; if all are good, then judgment will be rendered upon the count charging the highest offence. *State* v. *Hooker*, 17 Vermont 658.

882. Where the statute defines three degrees of a crime, by particularly declaring the circumstances which constitute either the one or the other, and before any judgmentcan be pronounced, it must be as certained by verdict in which of these degrees the defendants are guilty. *Thomas* v. *the State*, 5 Howard's R. 20.

883. According to the principles of the Common Law, in all capital cases, the verdict must be received in open court, and in the presence of the prissoner. *Holliday* v. *the People*, 4 Gilman's R. 111.

884. The verdict, whatever may be its effect, must, in all cases of felony and treason, be delivered in the presence of the defendant in open court, and cannot be either privily given, or promulgated while he is absent. *Ib.*

885. And in all cases where the jury are commanded "to look on him," as in larceny, and all accusations subjecting him to any species of mutilation or loss of limb, the same rule applies, without exception. *Ib.*

886. In all trials for inferior misdemeanors, however, a privy verdict may be given, and there is no occasion for the presence of the defendant. *Ib.*

887. Where the punishment is identically the same for each of two offences, a general verdict would suffice, although there might be a defective count in the indictment. *The State* v. *Anderson*, 1 Strobh. 455.

888. Offences under the acts of 1817 and 1834, of South Carolina, are different offences, but still, according to the rules of criminal pleadings, may be joined in the same indictment, but not in the same count; yet on a general verdict of guilty, the Court would not know on which count to pass sentence, and the verdict would be bad. *Ib.*

889. Where the verdict of the jury was, that the prisoner was guilty upon the second, third, and fourth counts, without an express finding upon the first count, it was held a good verdict, and tantamount to an acquittal on the first count. *Morris* v. *the State*, 8 Smed. & Marsh. 762.

890. And a new trial in such a case must be confined to the second, third, and fourth counts, the defendant having been acquitted upon the first count. *Ib.*

891. Where the verdict recited in the judgment-entry affirms the defendant's guilt as charged in the indictment, but is defectively stated in what follows the consideratum est, the latter recital, as it is not a necessary part of the judgment, may be rejected as surplusage. *Hawkins* v. *State*, 9 Ala. 137.

892. Where the jury returned a general verdict of guilty, after having been instructed that there was no sufficient proof to sustain the second count in an indictment; and after having separated and dined, they were asked whether they found the accused guilty on both counts, and they answered they found him guilty on the first and not on the second; held that in such case it was not necessary to set aside the verdict, for the purpose of correcting any error in finding or receiving it; that the accused was not injured by limiting the finding to the count on which he might have properly been found guilty, and if it had been so limited, the attorney for the State might have cured the difficulty by entering a nolle prosequi of the second count. *State* v. *Whittier*, 21 Maine 341.

893. A special verdict is in itself a verdict of guilty, as the facts found in it do or do not constitute in law the offence charged. There is nothing to do on it but to enter a judmgent thereon for or against the accused, unless the Court should deem the verdict as found not to be sustained by the evidence, when they may set it aside, and order

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a venire de novo. *State* v. *Moore*, 7 Iredell 228.

894. Where, on the trial of an indictment, the jury find a verdict of guilty generally, and that appears on the record, this Court cannot consider it as a special verdict, subject to the opinion of the Court, notwithstanding the statement of the case by the judge so reports it. *State* v. *Cox*, 6 Iredell 440.

895. Where the defendant has once been put in jeopardy, within the meaning of the Constitution, on the two last counts of an indictment; held that as to those counts the proceedings against him are equivalent to an express verdict of not guilty; that he can plead those proceedings in bar of a future prosecution for the offences, or either of them, if they be differently charged in the two last counts, and that the verdict must stand as it would have stood, had it in addition to the finding of guilty on the first count, contained an express finding of not guilty on the two last counts. *Weinzorflin* v. *the State*, 7 Blackf. 186.

896. And the nolle prosequi of the second and third counts, of which there was no finding, was a mere nullity. *Ib.*

897. Upon the trial of an indictment for an affray, after the jury had returned into Court and intimated an intention to acquit one of the defendants, but had not announced their verdict, the Court told them that if they believed the evidence, both of the defendants were guilty; whereupon the solicitor for the State directed the clerk to enter a verdict of guilty as to both, which was done, and the jury being asked if that was their verdict, made no direct assent, but by a nod from each of them. Held that this proceeding was so irregular and contrary to the established mode, that the judgment should be set aside. *The State* v. *Anthony*, 10 Iredell 153.

898. If the prosecutor be permitted to charge the prisoner with divers crimes, subject to different shades of penalties, all in the same indictment, the plea of not guilty by the accused, puts in issue the truth of all the charges, and the finding by the jury should be equally extensive. *Wilson* v. *the State*, 20 Ohio R. 26.

899. In a case in bar, where the jury, on an indictment containing two counts, have found the defendant guilty of an "assault, with intent to murder," which is punishable by imprisonment in the penitentiary for a term not more than seven years, and have said nothing with regard to the charge of "shooting with intent to kill," which last crime may be punished by imprisonment in the penitentiary for twenty years. Held that these were distinct and independent offences; and if permitted to be joined at all in the same indictment, they should be responded to by the verdict. *Ib.*

900. A verdict in either a civil or criminal case must be considered an entire thing. It must respond to the whole declaration, and to every count in the indictment, or the Court cannot legally receive it as the verdict of the jury. *Ib.*

901. The Court considers it prudent in the case of distinct and independent offences, especially where they are made so by the statute, and are subjected to different degrees of punishment, to require the jury, in the absence of a general verdict, to affirm or negative each charge, in their finding. *Ib.*

VI. Proof Necessary to Support an Indictment.

902. If an indictment is found against a woman, and describes her as B. C., "the wife of E. G.," the latter words will be regarded as a mere addition, which it will not be necessary to prove. *Commonwealth* v. *Lewis*, 1 Metcf. 151.

903. Such matters as are not charged in the indictment, are not material to be proved or considered. *Cowen* v. *The People*, 14 Ill. 348.

904. An indictment charging the defendant with going into a religious congregation engaged in actual service, and then and there exhibiting himself drunk, and by cursing and swearing with a loud voice, and by making indecent gestures and grimaces, disturbing them, is not sustained by proving that he disturbed them by striking the meet-

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ing-house on the outside with a stick. *State* v. *Sherrill*, 1 Jones' N. C. 508.

905. In Ohio, where a person is indicted for keeping a disorderly tavern, the State is not obliged to produce on the trial the tavern-keeper's license, nor need any notice be given him to produce it. The journal of the Court, with the entry of granting license, is sufficient evidence or proof that the party did in fact keep a tavern. *Baldwin* v. *State*, 6 Ohio 15.

906. The Judges of the Court of Sessions, in licensing innholders, act merely as ministerial officers, and not as a Court of Record, and their minutes are sufficient evidence, in an indictment against one for permitting gaming in his hotel, to show that the accused was duly licensed. *Commonwealth* v. *Balkom*, 3 Pick. 281.

907. On an indictment under the statute for peddling goods not of the production or manufacture of this country, the burden of proof is on the Government to show conclusively that the goods were foreign. *Commonwealth* v. *Samuel*, 2 Pick. 103.

908. The prosecution must prove a valid insurance in an indictment against one for casting away and destroying a vessel, with the intention of injuring the underwriters. *U. States* v. *Johns*, 1 Wash. C. C. 363.

909. Where the indictment is laid for giving "one mortal bruise," evidence of any deadly wound or bruise will sustain the indictment. *State* v. *Crank*, 2 Bailey 66.

910. Where it is alleged in an indictment that an affidavit was made, purporting to have been made by J. N. P., when, in fact, the affidavit was signed by J. P.; held that the fact was at variance with the allegation in the indictment, and the allegation was not, therefore, supported. *Perkins* v. *State*, 6 Ohio 274.

911. On an indictment founded on the 31st section of the 8th article of the act concerning crimes and punishments, it is not necessary to prove the commission of the offence on the particular Sunday laid in the indictment, for though time is undoubtedly of the essence of the offence, so far as the day of the week is concerned, yet the particular Sunday or day of the month laid, provided the same be within twelve months before the finding of the indictment, is perfectly immaterial. *Frazier* v. *State*, 4 Mo. 536.

912. *Quere*—whether in order to sustain an indictment against a slave for a capital crime, his ownership must be proved as alleged in the indictment; but when the slave is described in the indictment as the property of A., proof that he is the property of A. B. will be sufficient. *Wash* v. *State*, 14 Smedes & Marsh. 120.

913. And if in such case it has been proved that the ownership of the slave belongs or is in A., it will not be error to exclude testimony on the part of the defence going to show ownership in A. and B. *Ib.*

914. If an indictment alleges matter not important or foreign to the cause, such allegation must be proved. *U. States* v. *Porter*, 3 Day 283.

915. Where the allegations contained in an indictment against a town for a defect in the highway were, that the defect had been continued "without any sufficient railing or fence, and without any sufficient light hung out or placed in the night-time to prevent the injury and damage that might happen;" held that they were not necessary or material to a perfect description of the offence, and need not be proved. *State* v. *Bangor*, 30 Maine 341.

916. If an indictment contains allegations or averments suited only to negative a defence anticipated, proof of them is not necessary to authorize a conviction. *Ib.*

917. What is not charged in the indictment is not material to be proved or considered. *Cowen* v. *People*, 14 Illinois 348.

918. In an indictment for disturbing a religious congregation assembled for worship in a church, or other place, the place of assembly is descriptive of the offence, and must be proved as alleged. *Stratton* v. *State*, 8 Eng. 688.

919. An indictment for disturbing a religious congregation assembled in a certain church, is not sustained by proof that defendant disturbed a congregation assembled in the open air, at a place temporarily prepared for wor-

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ship, about forty yards from the meeting-house. *Ib.*

920. So the mode of disturbance must be proved as alleged. *Ib.* An indictment charging defendant with disturbing a congregation by using indecent gestures and threatening language in the presence and hearing of such congregation, is not sustained by proof that while the preacher was discoursing he made some remarks of a controversial character, upon which the defendant, who was also a preacher of another denomination, interrupted his discourse by declaring "the doctrines you advance are untrue and false! I hold the Word of God in my hand, and am prepared to defend it at all times;" the defendant being excited, and producing confusion in the congregation, but using no gestures or threatening language. *Ib.*

921. The ownership of a dam, on an indictment for breaking down a dam, being alleged, must be proved. *State* v. *Weeks*, 30 Maine 182.

922. *Quere*—whether it is essential to warrant the conviction of a slave charged with the commission of a capital offence, to prove his ownership as laid in the indictment. *Wash* v. *State*, 14 Smedes & Marsh. 120.

923. By the Common Law it was necessary to insert in the indictment the name of the owner of the goods alleged to have been stolen, and to prove the ownership as charged; for the reason that a restitution would be ordered of the stolen property, if found, to the owner. *Ib.*

924. When the time of the commission of the offence charged is averred in an indictment under a videlicit, the prosecutor is not held to proof of it as laid, but he may prove that the offence was committed at any time before the finding of the indictment within the period described as above. *McDade* v. *State*, 20 Ala. 81.

925. The general rule in regard to the proof of indictments is, that it is incumbent on the prosecutor to prove at the trial every fact and circumstance stated in the indictment; but what is not a necessary ingredient in the offence, may be rejected as surplusage, and need not be proved at the trial. *John* v. *State*, 24 Miss. 569.

926. But this rule has never been held to apply to allegations which, however unnecessary, are nevertheless connected with and descriptive of that which is material; or, in other words, to averments which might with propriety have been dispensed with, but being inserted in the indictment, are descriptive of the identity of that which is legally essential to the charge. *Ib.*

927. On an indictment against a slave, the ownership of the prisoner was in no respect an ingredient in the offence charged, which was complete when it was shown that one human being was wilfully, feloniously, and maliciously killed by another human being; but the fact of the ownership being alleged, it became a part of the identity of the prisoner—quite as much so as the name under which he was indicted; it was, at least, a statement of an unnecessary particular, but in connection with and as descriptive of that which it was essential to allege. *Ib.*

928. Where an indictment states that the original and genuine deed of assignment, which the respondent was charged with altering, was signed, sealed and witnessed by two witnesses, and duly and legally recorded in the registry of deeds of Rockingham county, and the assignment to Noah Clark, produced in evidence, was not recorded; held that the evidence was at variance with the indictment, and did not sustain it. *State* v. *Clark*, 3 Foster's R. 429.

929. The principal office of the arraignment is to fix the personal identity of the accused; having been arraigned and pleaded to the indictment, there was no necessity of other proof of his identity. *Hendrick* v. *State*, 6 Texas 341.

930. An indictment against D., founded on the act to suppress private bank-notes, it was proved that D. was secretary or cashier of a certain private bank establishment, and resided in Wisconsin Territory, and signed the notes of said concern as such cashier; that the president, whose signature was also attached to the bank-notes, resided in St. Louis, and kept a broker's office; that the president had exchanged two of said notes for two notes on the Illinois Bank, at the request of witness; that

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said notes were seen in circulation in the city of St. Louis, and had been redeemed at the office of the president; that D. had been seen once in St. Louis, only, when he made some inquiries into his liability on said notes; held that there was no evidence of a circulation of said notes by D. *Downing* v. *State*, 4 Mo. 572.

931. In criminal prosecutions it may be advanced as an undeniable axiom, that the offence charged must be distinctly and plainly made to appear, leaving no room for conjecture or doubt as to the law under which the accusation is founded, or the material circumstances which make the accused liable to its sanction. *State* v. *Sanford*, 1 Nott & McCord 512.

932. Where the name of a third person is introduced into an indictment as descriptive of some person or thing, that name must be proved as laid. *State* v. *Hughes*, 1 Swan 262.

933. Where a person or thing, necessary to be mentioned in an indictment, is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved, otherwise it would not appear that the person or thing is the same as that described in the indictment. *Ib.*

934. It is a general rule, that sums of money stated in an indictment need not be proved as laid, unless they form part of the description of a written instrument, or the exact sum be of the essence of the offence. *Parsons* v. *State*, 2 Cart. 499.

935. In cases where, from the precise and special nature of the allegation, the due appointment of the party to an office or situation must be proved, then, according to the general rule, it must be proved by the best evidence the nature of the case will admit of—that is, by the production and proof of the original appointment, where it is in writing. *State* v. *Copp*, 15 N. Hamp. 212.

936. Where an allegation contains matter of description, if the proof given be different from the statement, the variance will be fatal. *Ib.*

937. An indictment for stopping the mail, which (unnecessarily) alleged a contract between the Postmaster-General and the mail carrier, was held not to be supported without proof of such contract. *Ib.*

938. If an averment may be entirely omitted without affecting the charge against the prisoner, and without detriment to the indictment, it will be considered as surplusage, and may be disregarded in evidence. *Ib.*

939. On the trial of an indictment for breaking into the ticket office of a railroad company, the depôt building of the railroad, or the passenger room, into which defendants broke and entered, cannot properly be considered the office of the railroad corporation, as the term "office" is used in the statute. *Com.* v. *White*, 6 Cush. 181.

940. But though necessary that the time when an offence was committed should be alleged, it is not requisite to prove that the act was done on the precise day alleged. *State* v. *Baker*, 34 Maine 52.

941. Where the whole of the evidence is certified in the record, and there was no proof that the offence of which the prisoner was convicted, was perpetrated within the county of M., as alleged in the indictment; held that the judgment must be reversed. *Green* v. *State*, 23 Miss. 509.

942. The defendant and others are charged in an indictment with an assault and battery on Thomas Adams, a deputy sheriff. At the trial in the Court of Common Pleas, it appeared that the person upon whom the assault and battery were committed, was commissioned as a deputy-sheriff by the name and addition of Thomas Adams, Jr.; and thereupon the defendant's counsel objected to the proof, on the ground of its variance from the allegation in the indictment; this objection was overruled. To support the indictment, it must be proved that the person named therein and in the commission, was one and the same person; and after verdict it must be presumed that it was so proved. *Com.* v. *Beckley*, 3 Metc. 330.

943. It is not necessary that all the averments in an indictment should be proved as laid, in order to warrant a conviction; the general rule is, that every material averment must be

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proved; yet it does not follow that it is necessary to prove the offence charged to the whole extent laid—it is enough if so much of a charge be proved as constitutes an offence punishable by law. *Swinney* v. *State*, 8 Smedes & Marsh. 576.

944. If, on the trial of an indictment for stealing letters out of the mail, the letter had been presented, and the direction of it varied from the allegation in the indictment, it could not have been received in evidence; for, although the direction of the letter need not to have been stated in the indictment, yet, having been stated, the proof must correspond with the allegation; but where the letter was not produced, and the statement of the witness not being positive as to the variance, and the jury having found the defendant guilty generally, the verdict should not be set aside. *U. States* v. *Burroughs*, 3 McLean 405.

945. The time laid in the indictment is not material, and proof may have been given on the trial that the prosecution was commenced within the limitation of the act. *Johnson* v. *U. States*, 3 McLean 89.

946. If the prosecutor chose to state the offence with greater particularity than is required by the statute, he will be bound by the statement, and must prove it as laid *State* v. *Brown*, 3 McLean 233.

947. If the averments be mere facts disconnected with the offence, they need not be proved. *Ib.*

948. The State must show that the offence was committed where the venue is laid. *Hite* v. *the State*, 9 Yerg. 382.

949. And proof of showing that the offence was committed at a particular place which is recognized by a public statute, is sufficient. *Ib.*

950. In an indictment for an offence wholly at Common Law, every fact and circumstance which is not a necessary ingredient, may be rejected as surplusage, and need not be proved at the trial. *The State* v. *Stedman*, 7 Porter 495.

951. The day mentioned in an indictment, on which the offence was alleged to have been committed, is not material. All that is required to support the allegation, is to prove that the fact was done at some time before the bill was found by the grand jury. *Com.* v. *Braynord*, Thacher's Crim. Cas. 146.

952. The time laid in an indictment is not material, and does not confine the proofs within the limit of that period. The indictment will be satisfied by proof of the offence at any anterior day. *Oliver* v. *the State*, 5 Howard's R. 14.

953. On the trial of an indictment or presentment, proof fixing the time when the offence was committed, is not essential, except where time enters into the character of the offence. *Com.* v. *Alfred*, 4 Dana 495.

954. An indictment does not fail because one witness for the State differs from another in points more or less material, or even in some directly contradicts him. *State* v. *Potts*, 4 Halst. 26.

955. The time of committing an offence being laid in an indictment, is, in general, wholly immaterial, and any other time may be proved. *The People* v. *Santvoord & others*, 9 Cow. 654.

956. In an indictment for murder, if it appear that the party was killed by a different weapon from that described in the indictment, it will still maintain the indictment; as, for example, if the wound or killing be alleged to be by a sword, and it be proved to be by an axe or staff; or is alleged to be by a wooden staff, and it be proved to be with a stone. *U. States* v. *Howard*, 3 Sumner 12.

957. So, if the indictment be of a death by one sort of poisoning, and it turns out in the evidence to be by another sort of poisoning, the difference is not material. *Ib.*

958. But if the indictment charge a death by poisoning, it will not be supported by the proof of a death entirely different, as by shooting, starving, or strangling. *Ib.*

959. By an act of Assembly passed in 1842, a part of the county of Burke, and a part of the county of Rutherford, were constituted a new county, by the name of McDowell, and, by a supplemental act, jurisdiction of all criminal offences committed in that part of McDowell taken from Burke, was given to the Superior Court of Burke. But an

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indictment for a criminal offence, alleging it to have been committed in Burke county, cannot be supported by evidence showing the offence to have been committed in McDowell, after the establishment of the latter county. The jurisdiction of the offence is given to the Superior Court of Burke, but its locality must be truly averred in the indictment. *State* v. *Fish*, 4 Iredell 219.

960. Proof that the defendant cut down a black oak tree upon the land of the persons named in the indictment, will not support the indictment against the defendant, for cutting down ten white oaks. *Com.* v. *Butcher*, 4 Gratt. 544.

961. Every fact and circumstance laid in an indictment, which is not a necessary ingredient in the offence, may be rejected as surplusage, and need not be proved on the trial. *State* v. *Brown*, 8 Humph. 89.

962. An indictment cannot be sustained without proof that the offence was committed in the county where the venue is laid. *Moody* v. *the State*, 7 Blackf. 424.

963. The offence is complete under the law, when it is established that defendant has kept open a tippling-house on the Sabbath day, without further proof of injury to individuals or the neighborhood. *Hall* v. *State*, 3 Kelly 18.

964. Wherever it is material to aver in an indictment, it is necessary to prove the material allegations of the indictment; or those which charge the facts and circumstances which constitute the particular offence alleged, must be sustained by sufficient proof to authorize a conviction; and on a trial for any offence, it is certainly material to instruct a jury in regard to the cardinal principles which should regulate their finding, and in refusing such instruction the Court would err. *McGuire* v. *the State*, 13 Smed. & Marsh. 257.

VII. Quashing the Indictment.

965. Where one of several counts in an indictment is good, a motion to quash will be overruled. The defendant ought to move to quash the defective count, and not the whole indictment. *The State* v. *Wishon*, 15 Mo. 503.

966. Motions to quash indictments are always in the discretion of the Court to grant or refuse; the Court can overrule such motions, and compel the defendant to plead or demur. *Ib.*

967. It is error to quash an indictment which contains a good count. *State* v. *Starker*, 3 Indiana 570.

968. Where there are two counts in an indictment for a misdemeanor, one good and the other bad, and the defendant is convicted, the indictment will not be quashed on demurrer, nor the judgment arrested or revised for that cause. *Kane* v. *People*, 3 Wend. 363.

969. An indictment will not be quashed because the magistrate made a mistake in the date of the warrant summoning the justices, or in the recital that he had on that day committed the prisoner. *Com.* v. *Murray*, 2 Virg. Cas. 504.

970. Where a defendant was indicted for stealing one gelding of a dark bay color, and a transcript of the record of the examining court showed that he had been examined for stealing a dark bay horse; these variances were held to be immaterial, and not sufficient cause for quashing the indictment. *Halkem* v. *Com.*, 2 Virg. Cas. 4.

971. And where the examination was for stealing two horses, halter, chain, and collar, worth $150, and the indictment only alleging a stealing of the horses, worth $75 each; it would be no ground for quashing the indictment. *Ib.*

972. A husband having been indicted for maltreating and separating from his wife, while there was at the same time a suit pending for alimony; held that a presentment could not be made by the same grand jury for the same offence, and if made, would be quashed. *Ex parte Chauvin*, T. U. P. Charlton 14.

973. Where the charge in a presentment against a public officer is too general and not sufficiently specific, and the names of the witnesses are not set forth, the presentment will be quashed. *State* v. *Mitchell*, 1 Bay 267.

974. Where an indictment charges an offence on the 25th day of August,

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1824, in the county of W., and the law creating the county of W. did not pass until the November following, the Court will notice the discrepancy and quash the indictment. *State* v. *Jones*, 3 Halst. 307.

975. An indictment will not be quashed, unless it be a clear case. *Respublica* v. *Cleaver*, 4 Yeates 69.

976. Where a sheriff summons a jury, who find an indictment without a proper process, the indictment will be quashed on motion. *Nicholls* v. *State*, South. 539.

977. An indictment, having been found by the grand jury upon the mere statement of a witness, without oath, was quashed for that reason. *U. States* v. *Coolidge*, 2 Gallis 364.

978. Where a party moves to quash an indictment on the ground that the penalty for the offence is fifty dollars for the use of the town, and the foreman of the grand jury who found the bill a taxable inhabitant of such town; held that this objection to the indictment was invalid. *Com.* v. *Ryan*, 5 Mass. 90.

979. In cases of felony where two or more distinct and separate offences are contained in the same indictment, it may be quashed, or the prosecutor compelled to elect upon which charge he will proceed; but such election will not be required to be made where several counts are inserted in an indictment solely for the purpose of meeting the evidence as it may transpire on the trial, the charges being substantially for the same offence. In cases of misdemeanor, however, punishable by fine and imprisonment, the prosecutor may join several distinct offences in the same indictment and try them at the same time. *Kane* v. *People*, 8 Wend. 203.

980. The Court will in no case inquire into the character of the testimony which has influenced the grand jury in finding an indictment, with a view to quash the indictment. *State* v. *Boyd*, 2 Hill S. C. 288.

981. In Virginia, where the prisoner excepts to the opinion of the examining court, and spreads the warrant of commitment on the bill of exceptions, and prays that the warrant of commitment be made a part of the record, which is done, and it then appears from the whole record of the examining court, that he was examined for the very offence for which he now is indicted, the indictment will be held good, and will not be quashed. *Commonwealth* v. *Murray*, 2 Virg. Cas. 504.

982. Where a water-course is so obstructed as to overflow a highway, an indictment for such offence will be quashed where there is no proof, of any authority, to lay out the highway. *Pennsylvania* v. *Oliphant*, Addis. 345.

983. An indictment will not be quashed because the names of the grand jurors are not set forth in the indictment, nor because there is no offence specified on the docket. *State* v. *Cook*, Riley 234.

984. To induce the Court to quash an indictment for a defect in the caption, the defect must be of a clear and decisive character. *State* v. *Hickman*, 3 Halst. 299.

985. The courts in this country have adopted the rule not to recognize a presentment on which the attorney for the government thinks it not proper to proceed, and therefore the Court will overrule a motion to quash an indictment after a nolle prosequi has been entered. *U. States* v. *Hill*, 1 Brock. 156.

986. Where the name, title, or profession of the prosecutor has not been written at the foot of an indictment, this will be no cause for exception, either by way of a motion to quash, or by plea in abatement. *Dever's case*, 10 Leigh 685.

987. In a case of counterfeiting, an indictment was quashed, were it appeared that the day of the month when the offence was committed, was omitted in the indictment. *State* v. *Roach*, 2 Hayw. 552.

988. An indictment cannot be quashed on the ground of any extensive matters, or for any cause which does not appear on the body of the indictment; for such matters can only be by way of defence on the trial before the jury. *Commonwealth* v. *Church*, 1 Penn. State R. 105.

989. After a prisoner has plead to the general issue, "not guilty," no motion will lie to quash the indictment. *State* v. *Burlingham*, 3 Shepley 104.

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990. After a motion to quash an indictment containing two counts, one of which is defective, the officer prosecuting for the State may enter a nolle prosequi as to the defective count, which will remove the grounds for the motion to quash, and leave the defendant to be tried upon the charge contained in the good count. *The State* v. *Buchanan, et al*, 1 Iredell 59.

991. If one of several counts in an indictment be defective, it may be reached by motion to quash, or by demurrer. *State* v. *Coleman*, 5 Porter 32.

992. When a bill is found by the same grand jury that made the presentment, upon the testimony of some of their own body not sworn in court as witnesses, such proceeding is in opposition to the act of 1797, ch. 2, § 3, and the bill must be quashed. *State* v. *Caine & Price*, 1 Hawks 352.

993. Where an indictment does not charge any criminal offence, it may be quashed on motion. *Commonwealth* v. *Clark*, 6 Gratt. 675.

994. Where an indictment contains two counts, one good, and the other a bad count, no motion to quash the indictment, will lie. *State* v. *Rector*, 11 Mo. 28.

995. Where the grand jury have omitted to write at the foot of an indictment, the names of the witnesses on whose testimony the indictment was found, it will be no ground for quashing the indictment. *Commonwealth* v. *Williams*, 5 Gratt. 702.

996. The Superior Court of Missouri will not review a motion to quash an indictment made in the Court below, unless exceptions are taken to the judgment of that Court. *State* v. *Fortune*, 10 Missouri 466.

997. After a conviction an indictment will not be quashed on the ground that during the pendency of the trial, a *second indictment* for the *same offence* was found by the grand jury. *People* v. *Monroe*, Oyer and Terminer, 20 Wend. 108.

998. The mere finding of a *second indictment* is not *per se* a supersedeas to the first indictment, a motion to quash must be made and made too before the trial on the first indictment has commenced, at all events before the cause is submitted to the jury. Ordinarily a motion to quash must be made previous to plea pleaded, or any evidence given in the case. *Ib.*

999. Where a motion is made to quash an indictment, it is always addressed to the discretion of the Court, and the Court in the exercise of that discretion, will be governed by established rules. *Click* v. *State*, 3 Texas 282.

1000. The conclusion of an indictment contra formam statuti is mere matter of form, and the statute (Dig., p. 402, sec. 98) declaring that the want of such conclusion shall not be ground to quash the indictment, arrest or reverse the judgment, is not in conflict with the clause in the bill of rights securing to the accused a trial on indictment, &c. *Brown* v. *the State*, 8 Eng. 96.

1001. A person ought not to be charged with distinct felonies in different counts of the same indictment. But this irregularity does not constitute a ground for a motion in arrest of judgment. If the objection had been made before plea pleaded, it might have been good ground for quashing the indictment; and even after the case had been put to the jury, the court upon the application of the prisoner, might have compelled the prosecuting attorney to his election, as to which charge he would proceed on. *Wash.* v. *State*, 14 Smedes & Marsh. 120.

1002. An indictment returned without a prosecutor endorsed upon it, is invalid, and might be quashed on motion; but if the defect escapes the notice of the defendant and his counsel, or if they do not choose to avail themselves of the error, and process issues upon it, the officer of the court is not bound to inquire into the regularity of the proceedings, his duty is to obey the mandate of the writ, and he is entitled to his fees. *Towle* v. *the State*, 3 Florida R. 202.

1003. If it appear that four counts charge separate and distinct felonies, and not one and the same felony, in different modes, the Court would act rightly in quashing the whole indictment. *The State* v. *Smith*, 8 Blackford's R. 489. *Quere*—whether joinder of distinct felonies is a good ground for quashing a part of an indictment. *Ib.*

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1004. Whether the title of matron, given to the defendant in an indictment, would have been sufficient before the provision of the statute c. 172, § 38, it is not necessary to consider, for the statute prohibits the quashing of any indictment or arresting judgment, for any omission or misstatement which does not tend to the prejudice of the defendant. *State* v. *Nelson*, 29 Maine 329.

1005. An application to quash an indictment for insufficiency on the part of the defendant, is not a matter of right, but only allowed at the discretion of the Court. *The State* v. *Dayton*, 3 Zabris. 49.

1006. That an indictment was found by the grand jury, upon illegal evidence, or without legal evidence, cannot be taken advantage of by the defendant on a motion to quash by plea in abatement or in any other way. The court may, where the administration of justice requires it, in their discretion quash an indictment for misconduct in the grand jury. *Ib.*

1007. A motion to quash an indictment is addressed to the discretion of the Court, and in cases of felony and other serious offences, Courts, when the motion is made by defendant, usually refuse to quash, unless upon the plainest and clearest grounds, but leave the party to a demurrer, or motion in arrest of judgment, or writ of error. *Bell* v. *the Commonwealth*, 8 Gratt. 600.

1008. The cases in which the Court, on the motion of the party accused, ought to quash, are, where the Court has no jurisdiction; where no indictable offence is charged; or where there is some other substantial and material defect. *Ib.*

1009. The setting forth in the indictment, the style of the Court, or the term of the Court at which the indictment was found, if it be not surplusage is certainly useless; and for the insertion of useless matter, an indictment ought not to be quashed. *Ib.*

1010. Where there is a defect in the indictment, in not setting forth with sufficient certainty the county in which the larceny was committed, the judgment must be reversed. *Ib.*

1011. Where Campbell County is mentioned in the caption, and in the body of the indictment, the county in which the larceny was committed is set forth in the following words: "that Alonza G. Bell, late of the county of Roanoke, in the State of Virginia, laborer, on the 10th day of March, in the year of our Lord one thousand eight hundred and fifty, with force and arms at the parish of Russell, and in the county aforesaid;" held that the indictment was too uncertain. *Ib.*

1012. It is no ground to quash an indictment, that the name of one of the grand jurors in the caption, is substantially different from his name in the panels, if in reality it was the same person. It is a mere misprision of the clerk, which is, of course, amendable. *The State* v. *Norton*, 3 Zabris. 33.

1013. It is proper to insert several counts in an indictment, charging the same transaction, though amounting to a felony, in different modes, in order to meet the proofs in the case; and if it do not appear that different transactions or felonies are charged, the indictment should not be quashed for this cause. *Engleman* v. *State*, 2 Carter 91.

1014. It is a matter entirely discretionary with the District Attorney, who has the power to enter a nolle prosequi, or quash the indictment, if he sees fit to do so, until the defendant is arraigned and put upon his trial on the indictment. *Clarke* v. *the State*, 23 Miss. 261.

1015. Until after arraignment, and the impanelling of the jury, the power of quashing an indictment rests in the discretion of the District Attorney; and is not an act of which the defendant can complain, it not being to his prejudice. *Ib.*

1016. Where the Court refused to quash an indictment on the ground that it appeared on the minutes of the Court, that one of the grand jurors had been discharged from further service on the jury, during the term of the Court, and before the entry of the minutes of the Court of the return of the bill of indictment against the defendant; held that the entry on the minutes of the Court on the same day,

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that a true bill was found by the grand jury against the defendant; that one of the grand jurors, who had been sworn, was excused for the balance of the term, did not furnish even presumptive evidence against the presence of the grand juror at the time the bill was found by the body of which he was a member; especially when the name of the juror was inserted in the bill of indictment. *Thompson* v. *the State*, 9 Ga. R. 210.

1017. Where a motion was made to quash an indictment for malicious trespass, because of the omission of the words of the statute, but not feloniously, it was overruled, for the reason that such words form no element or ingredient of, and constitute no part of the description or definition of the offence. *Dye* v. *Com.*, 7 Gratt. 662.

1018. If one of the grand jurors who present a bill of indictment against a town for not making and opening a road, is, at the time, a ratable inhabitant of such town, it is no cause why such indictment should be quashed. *State* v. *Town of Newfane*, 12 Vermont 422.

1019. A judge is not bound to quash a defective count in a bill of indictment; yet he may do so, provided it does not leave the other counts defective, and that it will not be error so to do, inasmuch as the prisoner is not injured thereby, and the cause is simplified by being freed from the entanglement which would sometimes be produced by a general verdict upon a bill of indictment, one of the counts of which is defective. *Jones* v. *the State*, 6 Humph. 435.

1020. The Court is under no legal obligation to quash an indictment before the trial is finished, if it be defective; for the party had his remedy by a demurrer, or by a motion in arrest. *State* v. *Stuart*, 23 Maine 111.

1021. The prisoner may be charged in different ways, in several counts in the same indictment; and should there be several indictments for the same identical offence, he may plead the matter in bar; and, if his plea is supported by proof, may have all the indictments except one, quashed. *The State* v. *Whitmore*, 5 Ark. 247.

1022. In cases of doubt, the Court will not quash an indictment. It is due to the State, and to the rights of the citizen, to have the facts inquired into by a jury; and if the facts charged be affirmed by their verdict, the defendant can have the same advantage of legal points upon a motion in arrest, as upon a motion to quash. Therefore the Court denied the motion to quash an indictment which charged "that the defendant fraudulently intending to injure A. B., unlawfully and fraudulently procured a certificate of a survey on an entry of lands in the entry-taker's office of Brunswick county, to be made by C. D., the surveyor of said county, which certificate set forth, that the lands described therein had been surveyed, and that H. and G. were chain carriers, when in fact, and in truth, the lands described in the certificate were not surveyed, and when, &c., H. and G. were not chain carriers." *The State* v. *Smith*, 1 Murph. 213.

1023. It is in the discretion of the Court to quash an indictment on the ground of insufficiency, or put the party to a motion in arrest; and when the question is doubtful, they will put him to the latter, otherwise where it is clear. *Ib.*

1024. Quashing an indictment as to one of several defendants, has the effect of quashing it as to all. *Ib.*

1025. If the caption of an indictment do not show distinctly the names and style of office of the Judges composing the Court to which it is presented, the indictment will be quashed. *The State* v. *Zule*, 5 Halst. 348.

1026. An indictment found by a grand jury summoned by a sheriff, without process, will be quashed on motion. Defendant may withdraw the plea of not guilty, in order to make the motion to quash. *Nicholls at suit of the State*, 2 South. 539.

1027. The manner of selecting the grand jury is not a matter of which the Court can take cognizance, on a motion to quash an indictment. *The State* v. *Bolt*, 7 Blackf. 19.

1028. The illegal selection of the grand jurors is no cause for quashing an indictment on motion. *The State* v. *Henley*, 7 Blackf. 324.

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1029. Distinct and separate felonies cannot regularly be joined in the same indictment; and such joinder is good cause to quash an indictment, on motion made, before the defendant has pleaded to the issue; but if the objection be not urged until after plea, it lies in the discretion of the Court whether to compel the State to elect on which count to try the defendant, or not; and is no ground of error if the Court refuse to compel the election, though the felonies joined may be punished with different degrees of severity. *Weinzorflin* v. *the State*, 7 Blackf. 186.

1030. An objection for duplicity should be taken by demurrer, or motion to quash, and cannot be made the subject of a motion in arrest. *State* v. *Brown*, 8 Humph. 89.

1031. At Common Law, an objection that counts are misjoined, could not have been made available either upon demurrer or in arrest of judgment, but only upon a motion to quash, or to compel the prosecutor to elect on which count he would proceed. *Brantly* v. *the State*, 13 Smed. & Marsh. 468.

1032. The Court of Errors of Mississippi, after a plea of not guilty and trial without objection, will not go back to look for defects in the organization of the grand jury. *Ib.*

1033. Where it was error in the court to sit at any other place than the one designated by law, and as it stood admitted upon the record that it did so; it was held that the judgment upon a plea in abatement should be that the indictment be quashed. *Sam, a slave* v. *the State*, 13 Smed. & Marsh. 189.

1034. A motion to quash is addressed to the sound discretion of the court in which an indictment is pending, and if refused is not a proper subject of exception. *Com.* v. *Eastman*, 1 Cush. 189.

1035. Such a motion should not be allowed to prevail in a doubtful case; but only when the insufficiency of an indictment is so palpable, as clearly to satisfy the presiding judge that a verdict thereon would not authorize a judgment against the defendant. *Ib.*

1036. Motions to quash indictments are addressed to the discretion of the presiding judge. *State* v. *Barnes*, 29 Maine 561.

1037. After a party has pleaded, and after verdict against him, a motion to quash the indictment is not regularly before the court, and the overruling it is not subject to exceptions. *Ib.*

1038. The Rev. Statutes of Arkansas, providing, "If there shall be at any time pending against the same defendant two indictments for the same offence, or two indictments for the same matter, although charged as different offences, the indictment first found shall be deemed to be superseded by such second indictment, and shall be quashed." This statute simply declares the effect of the pendency of another prosecution; and to take advantage of this or any other matter dehors the record, a party would most unquestionably be required to bring such matter before the Court by an appropriate plea. *The State* v. *Barkman*, 2 Eng. 387.

1039. Where a defendant put in a plea in abatement to an indictment, alleging that he had not been tried by an examining court; whereupon the attorney for the Commonwealth put in a defective replication, and the indictment was quashed; and a new indictment having been found, the same plea in abatement was filed to the second indictment, and the record of the first indictment was produced, with the replication, to show that the prisoner had been tried by an examining court; and the prisoner put in a rejoinder, alleging the quashing of the former indictment as a bar to the second indictment, which was founded on the first examination; held that it was no bar to the second indictment. *Souther* v. *Com.*, 7 Gratt. 673.

1040. The courts in the State of Connecticut will not entertain a motion, written or oral, in a criminal cause, to quash it or erase it from the docket, except for defects appearing upon the face of the proceedings. *Wickwire* v. *the State*, 19 Conn. 477.

1041. The general court of Virginia held that a count in an indictment ought to be quashed, because the Constitutional conclusion, "against the peace and dignity of the Commonwealth," was not added to the count. *Commonwealth* v. *Carney*, 4 Gratt. 546.

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VIII.—Record on the Trial of Indictments.

1042. It is clear from authority that it should appear in the record of an indictment, not only that the court was holden for the proper county, but that it was holden at the proper place within the county. *Carpenter* v. *the State*, 4 Howard's R. 163.

1043. An indictment may sometimes be quashed for causes which do not appear on its face; and the action of the court and the ground thereof should be made a part of the record, by bill of exceptions, or the Superior Court will not disturb the judgment of the court below. But it is not a necessary consequence, that every motion made in a cause becomes a part of the record, because the clerk may insert it in his copy of the proceedings. *State* v. *Batchelor*, 15 Mo. 207; *The State* v. *Kitchen*, Ib.; *The State* v. *Wall*, Ib. 208.

1044. Neither the indictment, nor any other part of the record, should discover how the panel of jurors were drawn. And if it were a material part of the record, it would appear from the venire itself that the jury were regularly drawn. *Collier* v. *State*, 2 Stewart 388.

1045. Nor need it appear from any part of the record, that the grand jury were selected from the panel by lot; any words of an equivalent import are equally good as those employed by the statute; and where it appears from the record that the grand jurors were "selected as the statute in that case provides," it was held sufficient. *Ib.*

1046. In Indiana, if the record of conviction does not show the indictment to have been endorsed a "true bill," by the foreman of the grand jury, a judgment against a prisoner will not be set aside for this reason. *Townsend* v. *State*, 2 Blackf. 151.

1047. It is not necessary that it should appear on the record of the indictment, by what authority and before whom the traverse jury were returned and impanelled. It is sufficient if the following statement appears on the record: "And the jurors of the said jury by B. H., Esq., sheriff of the said county, for this purpose impanelled and returned agreeably to the statute in such case made and provided, to wit: J. C., &c." *State* v. *Price*, 6 Halst. 203.

1048. It is not necessary that the record of indictment should state "when, where, and before whom the traverse jurors were sworn or affirmed." *Ib.*

1049. Though the record of the indictment state the award of the venire in the usual form, "Wherefore let a jury thereupon come, &c., &c., to recognize upon their oaths whether the said Z. P. be guilty," &c., and it appear that one of the jurors was affirmed, the record is sufficient. *Ib.*

1050. The general court of Virginia held that it ought to appear in the record of the proceedings of the examining court for what fact the prisoner was remanded; and if that fact could not be ascertained without looking into the testimony dehors, the court ought to quash the indictment. *Commonwealth* v. *McCaul*, 1 Virg. Cas. 271.

1051. Where the record shows that two indictments were found by the grand jurors against surveyors of roads, without naming the surveyors; held that the record did not show a sufficient finding by the grand jury. *Snider's case*, 8 Leigh 744.

1052. Where it appeared from the record that the court was held at L., and that the jurors came from L. county, and that the grand jurors were sworn to inquire for L. county; held that it was not necessary to allege expressly that the court was held for the county of L., that circumstance sufficiently appearing from the record. *Melton* v. *State*, 3 Humph. 389.

1053. In the State of North Carolina, it is not proper to state in the record of an indictment that it was taken "at a Superior Court of Law and Equity." It should be "at a Superior Court of Law." *State* v. *Kimbrough*, 2 Dev. 431.

1054. Where two have been tried on an indictment, and the record sent to the Supreme Court sets forth only the verdict in the case of the one who appealed, and does not state the verdict in the case of the other, this is not an error of which the appellant can take advantage. *State* v. *Martin*, 2 Iredell 101.

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1055. The Court will not presume, where there is no statement in the record of the fact, that an indictment was found by the grand jury of the proper county; it is necessary that the record should show the fact. *Clark* v. *State*, 1 Smith 161.

1056. If it appears from the record of a case conclusively that the form of the oath, which the statute requires to be administered to a jury on a capital trial, has been disregarded, it will be a fatal objection to the verdict and judgment; and when, in such a case, the record only stated that the jury were duly sworn, it will be presumed that the proper oath has been administered to the jury. *Arthur* v. *State*, 3 Texas 403.

1057. Where the record shows that the jury were sworn only, "to try the issue joined," this was irregular; they should also have been sworn to give a true verdict according to law and evidence. Had it been stated on the record that the jury were duly and regularly sworn, the Court would have presumed that the oath had been properly administered. *Bell* v. *State*, 5 Eng. 536.

1058. It is not necessary that the transcript of the record should set forth the names of the witnesses upon whose evidence the indictment was found. *Harriman* v. *the State*, 2 Iowa R. 270.

1059. Where, in case of conviction upon indictment for betting at faro, it does not appear from the record on what ground a motion in arrest of judgment, and a motion for a new trial were predicated (and there is none disclosed in the record), the judgment must be affirmed. *Bailey* v. *the State*, 2 Texas R. 202.

1060. If in the record of a criminal prosecution it nowhere appears that the jury who tried the prisoner were sworn, it is a fatal defect, and the case will be reversed on appeal. *Nels* v. *the State*, 2 Texas 280.

1061. Where an indictment was returned by the grand jury, and endorsed a true bill against J. M. instead of J. D., who was the right person, the Court was of opinion and decided that the sheriff's return of the venire facias, as to J. M., should be quashed, and the said J. discharged from further prosecution upon the indictment, because it did not appear from the record that the said J. had been indicted; and it was not competent for the Court to alter or amend the record in that respect. *Commonwealth* v. *McKinney*, 8 Gratt. 589.

1062. The order of a justice of the peace that a prisoner should remove from the court-room, being merely interlocutory, cannot be considered as a "proceeding," civil or criminal, before him, and, therefore, need not be a matter of record. *The State* v. *Copp*, N. Hamp. 212.

1063. Where it appears from the record that the indictment was found and returned into court by a grand jury, and was treated by the prisoner in the court below as a valid indictment, so found and returned, the judgment cannot be reversed; because the record fails to show that the grand jury was regularly selected and summoned. *Shaw* v. *the State*, 18 Ala. 547.

1064. It cannot be presumed by the Court, in the entire absence of any statement in the record to that effect, that the indictment was found by a grand jury of the proper county; and if it was not a motion to quash, or one in arrest of judgment, should prevail. *Clark* v. *the State*, 1 Cart. R. 253.

1065. A verdict without judgment, in civil cases, cannot be given in evidence; but in criminal cases it is otherwise; and on a plea of autre fois acquit, a verdict of acquittal may be given in evidence without judgment thereon; it is, therefore, no error in a record of conviction that no formal entry of a judgment of acquittal is entered upon the counts on which the defendant was acquitted. *West* v. *the State*, 2 Ala. 212.

1066. Technical errors in the mere making up the record, even in criminal cases, are not to be received with favor, and the better practice is to remit the record for amendment of such defects, even after errors assigned. *Ib.*

1067. It is not necessary, in the record of a criminal conviction, to state where the trial was had. In New Jersey the

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court can be held at but one place, that designated by statute, and it will be intended that the trial was had there. *West* v. *the State*, 2 Zabris. 212.

1068. It is not necessary to aver in the record that the trial-jury were "good and lawful men." *Ib.*

1069. In a criminal case, after the caption stating the time and place of holding the court, the record should consist of the indictment properly endorsed, as found by the grand jury; the arraignment of the accused, his plea, the impanelling of the traverse jury, their verdict, and the judgment of the court. *M'Kinney* v. *the People*, 2 Gilman's R. 540.

1070. Where it appears by the record that a trial was held in a certain term, but on a day subsequent to the first day of the term, it is not an error that the record does not show how the cause was continued from the first day of the term to the day of the trial. *Berrian* v. *the State*, 2 Zabris. 9.

1071. In a criminal case, after the caption stating the time and place of holding court, the record should consist of the indictment, properly endorsed, as found by the grand jury; the arraignment of the accused, his plea, the impanelling of the traverse jury, their verdict, and the judgment of the court; this is all, in general, that the record need state. *Harriman* v. *the State*, 2 Iowa R. 270.

1072. It is too late, after verdict, to object to irregularity in the manner of impanelling the jury, when no objection was raised on the trial. *Ib.*

1073. Where the person appears to have been regularly arraigned, and the record entry of the day on which his trial commenced declares that the prisoner was brought into court; and the entry of the day on which the verdict was rendered, refers to the prisoner at the bar; this was held sufficient to show that the prisoner was present during the trial. *Ib.*

1074. The count in an indictment, upon which the prisoner was convicted, was not preferred by the attorney-general of the district, but by one purporting to have been appointed pro tem. by the court; before the court can appoint an attorney-general pro tempore, the record must show that the officer appointed by the State is absent; and if this is not done, the count on which the verdict is predicated, is a nullity. *Hite* v. *the State*, 9 Yerg. 198.

1075. Where the first section of the 10th chapter of the penal code (Clay's Dig. 409, sec. 1), enacts that, whenever in any criminal case, &c., any point or question shall arise, which, in the opinion of the presiding judge, is novel and difficult, it shall be his duty, on request, to reserve the same distinctly upon the record for the revision of the Supreme Court at its next succeeding term, and the presiding judge shall proceed to render judgment on the conviction; held that the points reserved for revision should be brought before this court at the first term after the trial below; and if the record is not then brought up, the judgment or sentence should be executed in obedience to its directions. *The State* v. *Ivey*, 11 Ala. 47.

1076. Where an indictment was preferred against John L. Bleirns and Armistead Bleirns for an assault and battery, and the record showed that the grand jury came into open court in a body, and returned a bill of indictment against John L. Bleirns for an assault and battery, a true bill, upon which he was tried and convicted; held that the conviction was good, notwithstanding the ambiguity in the record. *Bleirns* v. *the State*, 1 Meigs' R. 82.

1077. Held that an averment, in an indictment, that at the April term of the County Court, 1838, &c., amongst the pleas of said term, a certain issue was duly joined, &c., might be taken as applying to the state of the pleadings at that term; and that a record, showing the issue to have been joined at a preceding term, and tried at the April term, supported the averment. *The State* v. *Davidson*, 12 Vermont R. 300.

1078. A judgment against the defendant, in a criminal case, will not be reversed by default, but the Court must be satisfied that there was error in the record, or proceedings of the court below. *Barron* v. *the People*, 1 Barb. 136.

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1079. All inquiries into the genuineness of the records of the Court are improper, after the case is submitted, and can only have a tendency to withdraw the consideration of the jury from the true matters in issue. *The State* v. *Matthews*, 9 Port. 370.

1080. It is a rule well settled, that if there be an uncertainty in any part of a record, it may be explained by any other part of the record. *Goodwyn* v. *the State*, 4 Smedes & Marsh. 520.

1081. If it really be error in the first entry of the minutes, not to state the character of the offence charged in the indictment, the subsequent entries in the minutes, on the same day, in the same case, and in reference to the same indictment, will remedy the omission. *Ib.*

1082. An indictment is only signed by the foreman of the grand jury; and therefore, unless it appears from the record, that the bill was returned by the jury into open court, "a true bill," it cannot appear that it has been before them, and found by them; not so in the case of a presentment, that is signed by all the jurors, and there is thus an assurance that they have acted on it and found the facts it presents; an entry on the record that they had found the presentment would be no more satisfactory of the existence of that fact than their own signatures to the paper. *The State* v. *Muzingo*, 1 Meigs' R. 112.

1083. If it does not appear of record that a witness on whose evidence an indictment has been found, was sworn in open court, and sent to the grand jury to give evidence in that case, it will not be error. *Gilman* v. *the State*, 1 Humph. 59.

1084. Where the record does not show whether the indictment was or was not correctly endorsed, the decision of the Circuit Court on that point will be held correct. *The State* v. *Wilson*, 3 Mo. 125.

1085. Where the record of the proceedings on an indictment for murder, uses the past tense instead of the present, this is not error. *State* v. *Spencer*, 8 Iredell's R. 19.

1086. The statute which requires the clerk to take down the charges given or refused, and make them a part of the record, without bill of exceptions, does not apply to criminal cases. *Cain* v. *the State*, 13 Smed. & Marsh. 456.

1087. Where the record shows that the jurors were "balloted for, elected, tried, and sworn," but does not state in terms, as is the more usual and formal practice, that they were "good and lawful men, and citizens of the county of Claiborne;" held that the language of the record, by its own proper force and meaning, necessarily imports that the jurors were, in all respects, legal and qualified jurors. *Turner* v. *the State*, 9 Humph. 119.

IX. What Offences are Indictable.

1088. Where a jailer was indicted for allowing a prisoner to keep instruments in his room whereby he might be enabled to break the jail and escape, and for neglecting to look into the condition of the jail at proper intervals and observe the engagements of the prisoner; held that the indictment did not recite an indictable offence. *Connell's case*, 3 Gratt. 587.

1089. Where a side-walk is obstructed, the remedy is by indictment, and not by mandamus. *Reading* v. *Com.*, 11 Penn. State R. 196.

1090. An indictment lies for maliciously, wickedly, and wilfully killing a cow, the property of another. *People* v. *Smith*, 5 Cow. 258.

1091. Acts injurious to private persons, which tend to excite violent resentment, and thus produce a disturbance of the peace, are indictable. *Ib.*

1092. A violent and rude disturbance of the citizens, lawfully assembled in town-meeting, and in the actual exercise of their municipal rights and duties, is an indictable offence at Common Law. *Com.* v. *Hozey*, 16 Mass. 385.

1093. No new misdemeanors are created by the act of 1842, ch. 141, of Tennessee, which provides for punishment by indictment or presentment, of all violations of penal laws, but existing misdemeanors are made indictable. *State* v. *Maze*, 6 Humph. 17.

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1094. At Common Law, eavesdropping is an offence liable to prosecution by an indictment. *State* v. *Williams*, 2 Overt. 108.

1095. In the State of Virginia, an indictment does not lie for counterfeiting the bank-bills of the State of North Carolina. *State* v. *Knight*, 2 Hayw. 109.

1096. It is not necessary to prove express malice in order to sustain an indictment at Common Law, for stabbing the horse of another. *State* v. *Council*, 1 Overt. 305.

1097. At Common Law, it is not an indictable offence to injure the private property of another, though done forcibly, unless the act be accompanied with a breach of the peace. *State* v. *Wheeler*, 3 Vermont 344.

1098. An instrument in writing, not under seal, whereby M. acknowledges to have received of S. four bushels of rye, for which he is to return to the said S. four and a half bushels, the said rye to be sowed on shares between said S. and M., on the farm of M.; said M. not to convey or sell to any person without this restriction, "that S. is to have his pay out of said M.'s part," is not an assurance within the meaning of the sixtieth section of the act for the Punishment of Crimes (Rev. Laws, 260), for the unlawfully or maliciously tearing, of which a man may be indicted. *State* v. *Farrand*, 3 Hals. 333.

1099. Where an instrument is described by name in the indictment, the instrument set out in the indictment or produced in evidence, must correspond therewith. *Ib.*

1100. The law does not make it an offence in the owner, to destroy his vessel to the prejudice of the underwriters, or the cargo. *United States* v. *Johns.*, 1 Wash. C. C. 363.

1101. A forcible entry, as at Common Law, is an indictable offence. *State* v. *Morris*, 3 Mo. 127 (93 revs. ed.)

1102. At Common Law, an indictment will not lie for obtaining possession of a deed placed in the hands of a third person through false representations. *Com.* v. *Hearsey*, 1 Mass. 137.

1103. It is not an indictable offence to stab the horse of another, if the act is done upon a sudden provocation. *State* v. *Landreth*, 2 Law R. 446.

1104. An indictment will not lie for taking up and removing a corner-stone in the boundary line between A. and B., with intent to injure and damage the said B. *State* v. *Burroughs*, 2 Halst. 426.

1105. It is not indictable for a justice of the peace to celebrate the rites of matrimony without a license from the clerk of the county, under the act of 1778. *State* v. *Loftin*, 2 Dev. & Batt. 31.

1106. At Common Law, it is an indictable offence to cheat any man of his money, goods or chattels, by using false weights or false measures. *Com.* v. *Warren*, 6 Mass. 72.

1107. But where one gets possession of the goods of another, simply by lying, without any other fraudulent acts, it constitutes no public indictable offence. *Ib.*

1108. Where a liberty-pole was raised in a riotous manner, contrary to the laws of the State of Pennsylvania, and the United States, and the commissioners appointed by the United States and Pennsylvania insulted; held that such acts were indictable. *Pennsylvania* v. *Morrison*, Addis. 274.

1109. Where the commissioners of the county have put up advertisements for the sale of lands for arrears of taxes, held that the tearing down such advertisements and refusing to put them up again, was an indictable offence. *Pennsylvania* v. *Gillespie*, Addis. 267.

1110. Unlawfully throwing down the roof and chimney of a dwelling-house in the peaceable possession of another, with force and arms, is an offence indictable at Common Law, and not one of those made cognizable before justices of the peace. *State* v. *Wilson*, 3 Mo. 125 (91 new ed.)

1111. The letting of a house to a woman of ill-fame, knowing her to be such, with the intent that it should be used for the purpose of prostitution, is an offence indictable at Common Law. *Com.* v. *Harrington*, 3 Pick. 26.

1112. The offence of breaking into a man's dwelling-house in the night-time,

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and cutting off his ear, is not a felony, either at Common Law or by any statute of Massachusetts, but an indictment lies at Common Law for such offence as for a misdemeanor. *Com.* v. *Newell*, 7 Mass. 245.

1113. The increasing or augmenting the force of any belligerent vessel, which was armed at the time of her arrival within the United States, by adding to the number or size of her guns, prepared for use, or by the addition thereto of any equipment solely applicable to war, was held to be indictable under the fourth section of the act of Congress of 5th June, 1794. *United States* v. *Grassin*, 3 Wash. C. C. 65.

1114. Under the statute of Massachusetts of 1791, ch. 58, which prohibits travelling on the Sabbath day, a mail-carrier, who carries the mail on that day in pursuance of a contract with the Postmaster-General, is not liable to an indictment for travelling on the Lord's day. *Commonwealth* v. *Knox*, 6 Mass. 76. But the same privilege is not extended to those who travel on that day in the mail-carrier's coach. *Ib.*

1115. Where a person utters a bill with a fictitious name as cashier countersigned on it, it will not be an indictable offence, under the Mass. statute of March 6, 1801, but a fraud at Common Law, for which the offender could be punished. *Com.* v. *Boynton*, 2 Mass. 77.

1116. At the Common Law it is an indictable offence to disobey an act of Assembly. *Gearhart* v. *Dixon*, 1 Penn. R. 224.

1117. Where a supervisor of a highway was indicted, and it was alleged that the defendant, having collected a certain fine of A., unlawfully and corruptly failed to return the same to the person who was entitled to it, against the statute in such case made and provided; held that the indictment charged no offence. *State* v. *Shields*, 8 Blackf. 151.

1118. At Common Law it is not indictable to injure the personal property of another, though done forcibly, unless the act be accompanied by a breach of the peace. *Illies* v. *Knight*, 3 Texas R. 312.

1119. In an indictment for altering a brand on a cow, putting an additional brand to the one already on, is an alteration of the brand, although the last may not interfere with or change the figure of the first. *Linnay* v. *the State*, 6 Texas R. 1.

1120. The penal code of Tennessee is not applicable to offences committed by slaves, but it does not follow that offences committed by white persons upon the persons of slaves shall not be punishable under this code; it does apply to such offences, and a white person may be indicted and convicted under this code for murder, mayhem, or manslaughter, committed upon the person of a slave. *Worley* v. *the State*, 11 Humph. 172.

1121. Where an indictment alleged that the defendant, on the 31st day of August, 1836, in the county of Greene, with force and arms, one chestnut sorrel mare, the property of John A. Park, did unlawfully and forcibly take from and out of the possession of the said John A. Park; it was held not an indictable offence. *The State* v. *Farnsworth*, 10 Yerg. 261.

1122. A trespass on lands or goods, when accompanied by a breach of the peace, is indictable. *State* v. *Batchelder*, 5 N. Hamp. 549.

1123. So, also, is a trespass on a dwelling-house in the night-time, when attended with a breach of the peace, an indictable offence. *Ib.*

1124. Neither at Common Law, nor by any statute of Mass., is the destruction of one's own property, unaccompanied by an injury to, or by a design to injure some other person, an indictable offence. *Bloss* v. *Tobey*, 2 Pick. 320.

1125. Where the act of 4th March, 1826, being passed for the purpose of organizing a bridge company, and giving such company three years to complete the bridge, provided that the bridge should be built with a suitable pier on each side of the bridge, at the draw, and the company built the bridge without the piers required by the act, and received toll for more than a year, while the bridge was in that condition; held that an indictment would lie for neglecting to put up the piers, and

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would lie before the three years had elapsed, because the company had completed the bridge, and collected toll. *Commonwealth* v. *the Proprietors of the Newburyport Bridge*, 9 Pick. 142.

1126. And in such case, if the indictment does not allege that a bridge has been built, it will be a fatal omission; though it might be inferred that there was a bridge, yet inferences are not allowed in criminal cases; there ought to be an express allegation to that effect. *Ib.*

1127. Where a party buys three promissory notes against the same person, and each being under $20, and directs his attorney to sue them, without stating the manner in which he wishes them to be sued, and the attorney, at his own option, brings the separate suits before a justice of the peace, and obtains three distinct judgments; and after the judgments are obtained, the party then proceeds to collect the judgments, by virtue of three executions, in such a manner as to indicate an intention to oppress the debtor; held that evidence of these acts showed, without question, an indictable offence, but would not constitute the perpetrator of them a common barrator. *Com.* v. *McCullock*, 15 Mass. 227.

1128. Where the statute gives every qualified voter a right to one vote for every officer to be elected, the person who gives more than one vote infringes and violates the rights of the other voters, and for this offence an indictment lies at Common Law. *Com.* v. *Silsbee*, 9 Mass. 417.

1129. It is not indictable, under the act of 1789, of South Carolina, to kill cattle. The word "kill," in this clause, imposing a penalty for the second offence created by the act, was obviously inserted by mistake, and was probably used instead of the word "marked." *Frierson* v. *Hewitt*, 2 Hill's S. C. 499.

1130. An indictment against one for having in his possession parts of bank-bills, with the intent of putting them together, and making more bills than he had cut up, must allege the completion of his intent, so as to make the offence an indictable one. *Com.* v. *Hayward*, 10 Mass. 34.

1131. An indictment will not lie against one for being in the habit of going frequently to the house of another, and so maltreating his family as to render their lives uncomfortable; it will only be ground for a civil remedy. *Commonwealth* v. *Edwards*, 1 Ashmead 46.

1132. When, by statute, the duty of building and keeping in repair a public bridge is imposed upon any person or corporation, such person or corporation is liable to indictment at Common Law for neglecting such duty, and the allegation contra formam statuti will be applied to the statute as creating the duty and not imposing the penalty. *State* v. *Morris Canal, &c.*, 2 Zabris. 537.

1133. At the Common Law it is an indictable offence to keep a house of ill-fame for lease; and the Mass. statute of 1793, ch. 59, § 8, has not repealed the Common Law, in relation to keeping houses of ill-fame. *Jennings* v. *Com.*, 17 Pick. 80.

1134. Where an indictment for transfer of real property by false pretences, contains two counts, both charging that the defendant, with intent to cheat, &c., obtained from one Robinson Grenell the transfer of a certain valuable thing, to wit, a certain quarter section of land, described in the counts in the indictment, for a consideration, all paid in the notes of the "North River Banking Company." By this false and fraudulent pretence, made by the defendant to said Grenell, to wit, that the "North River Banking Company," so called, was then a good, safe, and solvent banking institution in the State of New York, and that the paper of said bank was good, current, &c., whereby said Grenell was induced to, and did make, the transfer of said land, and receive the consideration therefor, all in the paper of said bank; when, in truth, and in fact, said bank was at the time, and still continues, an exploded and insolvent institution, the paper of which was then, and is now, worthless, as was well known to Layman; held that the description of the notes was good, but that the obtaining a transfer of real estate by false pretences was not an indictable offence. *The State* v. *Layman*, 8 Blackf. 330.

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1135. Where the statute which creates the offence does not make it indictable, but prescribes a penalty; and on general principles, therefore, the specific remedy given, the penalty, excludes the resort to an indictment. *The State* v. *Maze*, 6 Humph. 17.

1136. Where an indictment charged that Adam E. Shell, in the county of Wayne, "with force of arms did unlawfully and maliciously one pair of saddle-bags, of the value of one dollar, the property of J. M. Staggs, destroy," &c.; held that no indictable offence was charged in the indictment. *Shell* v. *the State*, 6 Humph. 283.

1137. There can be no question but the mixture of poisonous ingredients with the food or drink of another, to such an extent as to impair the health of any individual receiving them, is punishable by indictment at Common Law; and water infected with the noisome particles and effluvia of a dead animal thrown into it, must partake of a character so poisonous and unwholesome as properly to come within this class of offences. *State* v. *Buckman*, 8 New Hamp. 203.

1138. If is an offence to good morals for a man to be publicly drunk, and for this offence he may be publicly indicted. *Smith* v. *the State*, 1 Humph. 396.

1139. In Tennessee the Court holds a single act of public and notorious drunkenness to be indictable. *Ib.*

1140. It is only necessary when the act or acts done by a person, or the omission to act by one who ought to act, operate to the annoyance, detriment, or disturbance of the public at large, that the offender is liable to indictment at the Common Law. *State* v. *Debervy*, 5 Iredell 371.

1141. A single act of drunkenness, though it be in the presence of a crowd, is not indictable, if the persons assembled were not thereby annoyed or disturbed. *Ib.*

1142. It is an indictable offence, under the statute of New Jersey, to sell ardent spirits by a less measure than one quart, without license, within the bounds of the city of Newark, where, by the charter and ordinances of the city, penalties are recoverable for such sale, without license from the city authorities. *The State* v. *Plunket*, 3 Harrison 5.

1143. An offender against the statute in such case may be indicted in the Oyer and Terminer and Quarter Sessions, or proceeded against under the city ordinance. *Ib.*

1144. By the 29th and 30th sections, 9th art., of the act concerning crimes and punishments, the jurisdiction of the Circuit Court over offences punishable only by fines, not exceeding one hundred dollars, is taken away; such offences are, therefore, not indictable. *Williams* v. *the State*, 4 Mo. 480.

1145. If the master of a slave in his employ permit such slave to pass about, in view of the public, so meanly clad as not to protect the person of such slave from indecent exposure, the master is indictable for lewdness, or scandalous public indecency. *Bell* v. *the State*, 1 Swan 42.

1146. And it may be laid down in general terms, that all acts and conduct as are of a nature to corrupt the public morals, or to outrage the sense of public decency, are indictable, whether committed by words or acts. *Ib.*

1147. If the criminality of the defendant's conduct depends in each case alone upon the flagrant outrage to public decency, by the utterance of shamelessly obscene language, in reference to certain acts, it cannot be of any consequence whether such language imported that he had done or would do the specific acts. In either case, the offence, so far as public decency is concerned, is identically the same. *Ib.*

1148. To hold that the words must be laid exactly as spoken, or that they must be proved as laid, would, perhaps, in most cases, insure impunity to the offender, because almost every one, not abandoned to all sense of decency, would instinctively turn away his ear from hearing such revolting indecency. *Ib.*

1149. If a married woman commits a misdemeanor with the concurrence of her husband, the husband is liable to indictment. *Williamson* v. *State*, 16 Ala. 431.

1150. Where property has been seized under the act of 1740, as belonging

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to a slave, an indictment will not lie against the master of the slave for taking the property, even after condemnation, out of possession of the captor; the remedy is by civil action. *The State* v. *Mazyck*, 3 Richard. 291.

1151. A mere agreement between two or more to do an unlawful act, without any act done in furtherance of the common design, is not ordinarily an indictable offence. *Torrey* v. *Field*, 10 Vermont 353.

1152. An act of an official character done by a justice of the peace, with a corrupt intent, is an indictable offence. *Wickersham* v. *People*, 1 Scam. 128.

1153. The offence of riding or going armed with unusual and dangerous weapons, to the terror of the people, is an offence at Common Law, and is indictable in this State. *State* v. *Roberts*, 3 Iredell 418.

1154. Where the legislature have specified a "bill, plaint, or information," as to the mode of recovering a fine or penalty, an indictment will not lie. *State of Missouri* v. *Corwin*, 4 Mo. 609.

1155. Every act done in furtherance of a misdemeanor is not the subject of an indictment, but to constitute such it must tend directly and immediately, if not necessarily, to the commission of the misdemeanor. *Brockway* v. *the People*, 2 Hill's R. 558.

1156. Hence the renting of a house to a woman of ill-fame, with the intent that it shall be kept for purposes of public prostitution, is not an offence punishable by indictment, though it be kept so afterward. *Ib.*

1157. An indictment will lie for any wilful neglect of duty on the part of overseers of the poor. *The State* v. *Hoit*, 3 Foster's R. 355.

X. Pleading to the Indictment.

1158. It is not a good plea to an indictment, that one of the grand jurors who found the same, is not a freeholder, &c. *People* v. *Jewett*, 6 Wend. 386.

1159. Where a prisoner, indicted for murder, upon his arraignment pleads not guilty, "and for his trial puts himself on his country," this is sufficient without his saying "on God and his country." *State* v. *Spencer*, 8 Iredell 19.

1160. As to the circumstances under which a person indicted for a misdemeanor may plead by an attorney. *U. States* v. *Mayo*, 1 Curtis' Ct. Ct. 433.

1161. Where the clerk of the Court, upon the arraignment of prisoners, did not proceed further, upon their pleading not guilty, to ask the prisoners how they would be tried, so that they did not make the usual and common reply, "By God and the country;" held that the issue was complete without further express words. *U. States* v. *Gibert*, 2 Sumner 19.

1162. Where the conduct of the grand jury is sought to be impeached in a plea to the indictment, and facts are alleged in such plea contrary to the record, the plea will be held to be bad. *Buck* v. *State*, 7 Ohio (second part) 240.

1163. The plea of guilty in a capital offence will not be received by the Court, except after having advised the prisoner of its consequences, nor without proof that it was done freely, and that the accused was in a sound state of mind. *Commonwealth* v. *Batris*, 1 Mass. 95.

1164. After a demurrer to an indictment has been overruled, the Supreme Court of Vermont have a discretionary power to allow the prisoner to plead over and remand the case to the inferior Court for trial. *State* v. *Wilkins*, 17 Vermont 151.

1165. Where a prisoner was indicted for murder, and on being brought up for trial, made no distinct plea, a jury being impanelled to try whether the accused neglected, by the act of God or wilfully, found the former, and the prisoner was remanded by the Court. *Commonwealth* v. *Braley*, 1 Mass. 103.

1166. In cases of felony, the prisoner must appear in person to be arraigned and to plead, and not by attorney, and so it is with all proceedings subsequent to pleading. And it is necessary that the record should show such an appearance. *Sperry's case*, 9 Leigh 623.

1167. A party before he can be put upon his trial must plead to the indictment. *Sartorius* v. *the State*, 24 Miss. 602.

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1168. To an indictment for an assault, in the Superior Court, the defendant pleaded in abatement, that a prior indictment was still pending against him in the County Court for the same offence ; held that the plea is good ; for the Courts have concurrent jurisdiction, and to avoid the mischief of having two indictments carried on for the same cause against the same person, the jurisdiction shall attach in the County Court by the prior finding of the bill, and shall exclude that of the Superior Court, except in its appellate capacity : unless it be shown that the first is carried on by fraud and covin ; which may be replied by the State to such a plea. *The State* v. *Yarbrough*, 1 Hawks 78.

1169. After sustaining a demurrer to a special plea, the judgment of the Court should be respondeat ouster. *Hine* v. *the State*, 1 McCook's O. R. 15.

1170. In a criminal case in Ohio, a defendant cannot waive a jury trial, in any other way than by a plea of guilty, and a plea of special matter set up by way of avoidance, found insufficient, could in no instance be treated as such an admission of the legal quality of the guilt deducible from the indictment as to answer the purpose of a plea of guilty. *Ib.*

1171. By the criminal code of Illinois, the accused is not permitted to plead guilty until the judge has fully explained to him the consequences of such a plea ; and when the prisoner refuses to plead, the law mercifully directs that a plea of "not guilty" shall be entered, and he can only be convicted by proving his guilt, in the same manner as if he had pleaded not guilty. If the prisoner is either unable or unwilling to employ counsel, the Court invariably assign him counsel. *McKinney* v. *the People*, 2 Gilman's R. 540.

1172. The law undoubtedly is, that the defendant must plead in person ; and in case there was a plea by attorney ; that would be a nullity. *McQuillan* v. *the State*, 8 Smed. & Marsh. 587.

1173. Where the record contains an entry in these words, "This day came the plaintiff, by Fullom E. Anderson, Esq., district attorney, and the defendant in his own proper person, and the said defendant having been arraigned at the last term of this Court, pleaded not guilty, and put himself upon the country, and the district attorney, likewise, and by looking at the record of the previous term, no arraignment is mentioned ;" held that it was incompetent for the clerk, at a subsequent term, to make an entry of what had transpired at the preceding term. *Ib.*

1174. The prisoners, after arraignment, and before they were put on their trial, joined in the general issue, and plead "not guilty ;" the law upon that point is this, "if the principal and accessory appear together, and the principal pleads the general issue, the accessory shall be put to plead also, and that if he likewise plead the general issue, both may be tried by one inquest. But it seems agreed, that if the principal plead a plea in bar, or abatement, or a former acquittal, the accessory shall not be forced to answer till the plea be determined. *State* v. *Calvin*, R. M. Charlton 142.

1175. A defendant, in a criminal case, cannot be compelled to select and rely upon one of several pleas, submitted by him. *State* v. *Greenwood*, 5 Porter 474.

1176. Where a demurrer to an indictment is overruled, and the defendant refuses or neglects to plead further, the Court should direct the plea of not guilty to be entered. *Thomas* v. *State*, 6 Mo. 457.

1177. Defendants in an indictment have a right to plead severally, not guilty; but a general plea of not guilty by all the defendants, is in law a several plea. *State* v. *Smith*, 2 Iredell 402.

1178. Whether the trial shall be separate or not, is a matter of sound discretion to be exercised by the Court under all the circumstances of the case. *Ib.*

1179. After an indictment has been received by the Court, no objection of an irregularity in the impanelling of the grand jury can be received as a plea to such indictment. Quakers are capable of serving as grand jurors. *Commonwealth* v. *Smith*, 9 Mass. 107.

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XI. Competency of Evidence on the Trial of an Indictment.

1180. The Court will allow a party to offer evidence in mitigation of sentence after the plea of guilty, and à fortiori after a plea of nolo contendere. It is only when the party is sued in a civil action for doing the thing for which he was indicted, that the distinction between these pleas is material; the plea of nolo contendere pleaded with a protestation that the party was not guilty, would clearly not conclude the party in his defence against the civil action. *Commonwealth* v. *Horton*, 9 Pick. 206.

1181. Where a defendant is indicted for the commission of an offence in one county, no evidence can be received of his having committed a similar offence in some other county. *Redman* v. *State*, 1 Blackf. 96.

1182. Where a count of an indictment alleges a note to be signed by "Joseph J. President," proof of its being signed by "James J." will not be admissible. *U. States* v. *Keen*, 1 McLean 429.

1183. It is competent to adduce proof of guilt, not only since the day designated in the indictment, and for six months before the indictment was brought, but for any time previously within the statute for prosecuting this offence: *Wingard* v. *the State*, 13 Ga. 396.

1184. Where two are indicted for an affray, proof "that several months before the occurrence of the affray, they had fought together, on which occasion one had attempted to strike the other, and said he would kill him if he could get at him," is not admissible evidence against the one making the threat, when there is no proof connecting this rencounter with the affray for which the parties were on trial, or showing that the latter grew out of the former. *Skains* v. *the State*, 21 Ala. 218.

1185. Where a great crime has been committed, it is important to inquire whether the accused party was influenced by any motive to commit such an offence, for the absence of all motive to commit the offence charged against him, affords a strong presumption of his innocence; whereas, if it appears, on the contrary, that he was influenced by a very strong motive to commit the particular offence charged, the probability of his guilt is necessarily greatly strengthened. *Bullock* v. *the State*, 10 Ga. 46.

1186. Where certain tools and implements were found in the possession of the defendant, and were brought into the court room in mass and exhibited to the jury, as well those that might probably have been used in the alleged burglary as other instruments not adapted to the commission of this particular offence; it was held proper. *Commonwealth* v. *Williams*, 2 Cush. 582.

1187. Such tools, parcel of a larger quantity, found in the possession of the defendant at the time of his arrest, and a part of the articles thus found being of a character that might properly have been submitted to the jury and relied upon as evidence as to the finding of the whole parcel, and the exhibition of the same to the jury were not objectionable. *Ib.*

1188. Upon the trial of an issue formed on an indictment under the statute for refusing to testify before the grand jury in reference to gaming, the defendant cannot be allowed to give evidence in his own favor. The practice of permitting defaulting witnesses, on an application to the Court, to excuse themselves by their own testimony, furnishes no authority for such procedure. *Batre* v. *State*, 18 Ala. 119.

1189. The original indictment, judgment and verdict against the principal in the first degree, is admissible in evidence on the trial of the principal in the second degree. *Studstill* v. *the State*, 7 Ga. 2.

1190. In criminal cases, the accessory or principal in the second degree, will be permitted to show that the offence alleged to have been committed did not amount to felony, or not that species of felony with which the principal was charged. *Ib.*

1191. The warrant and the proceedings had before the committing magistrate, as alleged in the indictment

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ought to be given in evidence on the trial of the slave, so as to show that the justices of the Inferior Court had jurisdiction to try the slave for the alleged offence. *Judge* v. *the State*, Ga. 173.

1192. Where the prosecutor in an indictment for larceny, who was absent when the goods were stolen, and who was called merely to identify some of them as having been in his shop, was asked by defendant's counsel, if after his return he had not expressed suspicions of another person, which being objected to by the attorney-general, the Court decided that any suspicions that the prosecutor might have entertained on any charge made against another, unless founded on facts within his own personal knowledge, were inadmissible as evidence. *Rhea* v. *the State*, 10 Yerg. 258.

1193. Under the Indiana statute of 1838, p. 458, the defendant may give in evidence under the general issue to an indictment, any matter in bar. *Eggleston and another* v. *the State*, 6 Blackf. 436.

1194. On an indictment for rape, the deposition of the injured party (who had died in the meantime) made before a justice on applying for the warrant, and in the absence of the prisoner, is not admissible as evidence against him. *The State* v. *Hill*, 2 Hill, (S. C.) 607.

1195. If the descriptive term "horse" alone in an indictment for horse-stealing had been used, evidence that a gelding was stolen would have been admissible; but as the Legislature have thought proper to particularize and define other objects, the conclusion is obvious, from the reasoning employed, that in an indictment upon the statute it is necessary to be equally specific. *The State* v. *Plunket*, 2 Stewart 12

1196. Where the grand jury came into open court and filed an indictment against Harrison Bennett, for the forgery, in the words and figures following, to wit: here the indictment is inserted, with its endorsement, among which is the following: "a true bill, Jacob Fite, foreman of the grand jury, 7th April, 1846." This, according to the case of *Calhoun* v. *the State*, 4 Humphrey's 477, is record evidence that the bill of indictment upon which the prisoner was tried and convicted, was returned into open court by the grand jury which found it "a true bill." *Bennett* v. *State*, 7 Humph. 118.

1197. On the trial of an indictment for selling liquor without a license, the prosecuting attorney can only give evidence of as many distinct offences as there are counts in the indictment. *Hodgman* v. *the People*, 4 Denio 235.

1198, On the trial of an indictment for keeping an establishment for the sale of confectionery, &c., without license, evidence that the title to the premises, on which the business is carried on, is in a trustee, for the use of the defendant's wife, is wholly irrelevant and properly excluded. *Williamson* v. *State*, 16 Ala. 431.

1199. On the trial of one of two indictments for burglary with intent to steal, in two different dwelling-houses, proof of the identity of the money found with the money stolen, was not necessary to the conviction; for the breaking, entering, and stealing of the money described, might be proved by other evidence, though no money had been found on the defendants, or the money found had not been identified with the money stolen; the identity of the property stolen might be important in another aspect, as affecting the prosecutor's right to have it restored. On this evidence, the Court informed the jury, that if the money found on the defendants corresponded with that stolen, and was found on them with other articles of property stolen at the same time when the house was broken open, the jury might infer that the money produced, in as far as it corresponded with the money stolen, was the same. This was correct, and left the evidence of identity properly to the jury. *Com.* v. *Chilson*, 2 Cush. 15.

1200. The defendant in such case having been convicted on one indictment, when the second trial on the other indictment came on before another jury, and it was objected that the same specie could not be offered in evidence, to enable the prosecutor, Langdon, to select, if he could, any piece of

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coin as his; the Court held the objection was founded in a mistake; it supposed that the whole of this money had been identified and found by the first jury to have been stolen from Damon, the prosecutor in the first indictment; but the verdict in the former case involved no such conclusion, and even if it had, it was a conclusion of fact upon evidence, and it would be difficult to say upon what principle the Court could declare such evidence incompetent upon the trial of another indictment. *Ib.*

XII. Change of Venue on the Trial of Indictments.

1201. Where a criminal case is removed to an adjoining county for trial, a transcript of the record must be sent to the Court to which it is removed, and that will be sufficient. *Price* v. *the State*, 8 Gill 295.

1202. When the accused has been arraigned in the court where the indictment was found, it is not necessary that he be arraigned at the court to which the case is removed, the arraignment not being a part of the trial. *Ib.*

1203. By the construction of the statute, the removal must be made by the Court in which the indictment is found. A second removal would not be warranted. *Ib.*

1204. The purpose of removal, is to secure a fair and impartial trial. The removal must be made before the commencement of the trial, and that is when the panel of twelve jurors is completed by being duly sworn. *Ib.*

1205. The venue is never changed in a criminal cause; but when it appears that an impartial trial cannot be had in the county where the offence is laid, the Court will order a suggestion of this fact to be entered on the record, and a venue is then awarded to the sheriff of another county. *The People* v. *Vermilyea*, 7 Cow. 108.

1206. Whether an indictment removed by certiorari to and pending in the Supreme Court, can be remitted to the court below.—*Quere. Ib.*

1207. Where the Court makes an order to change the venue of an indictment, the order will be conclusive of its own regularity, unless the record shows to the contrary. *McCauley* v. *U. States*, 1 Morris 486.

1208. The Court into which a cause is removed, is bound to infer that all things have been regularly done before the change of venue was ordered; it is therefore bound to presume that the caption of the indictment, and other proceedings, were regular in the court in which the case originated, and it devolves on the prisoner to show a fatal irregularity. *State* v. *Williams*, 3 Stewart 454.

1209. Under statute in Indiana, it is not necessary, in case of change of venue, that the indictment should be recorded in the court where it was found. *Beauchamp* v. *State*, 6 Blackf. 299.

1210. Where a prisoner has been twice arraigned on the same indictment, once in the county where it was found, and the second time in the county to which the case was removed by a change of venue, he cannot lay this as ground for error. *Gardner* v. *People*, 3 Scam. 83.

1211. Where two or more are indicted, it is competent for the Court to order a removal of the trial of one, on his application, to another county, without removing the trial of the others. *State* v. *Martin*, 2 Iredell 101.

1212. It is no ground of reversal, that the order for a change of venue in a criminal case, does not pursue the statute; if there be ground of objection to such order, it is waived if the party does not take advantage of it in the court below. *Brown* v. *State*, 8 Eng. 96.

1213. Where the prisoner swore that the information of the facts which were made the basis of application to change the venue, came to his knowledge on the day the petition was prepared, and the notice was given to the State's attorney that the motion would be made, it is equivalent to a statement that he then received the information for the first time. It negates every inference that the information had been previously acquired. *Barrows* v. *the People*, 11 Illinois 121.

1214. Where the prisoner has shown

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a clear right to a change of venue, which the Court denied him, the subsequent proceedings in the case are erroneous and must be reversed. *Ib.*

1215. It is no objection that an order to transmit a criminal case from Baltimore city court to Howard district, says to Howard district court, instead of the Howard district of Anne Arundel county. *Rawlings* v. *the State*, 1 Maryland 127.

1216. The certificate of the clerk below, appended to a transcript in this Court as to an indictment in a cause which is subjoined, must be taken as true. *State* v. *Greenwood*, 5 Porter 474.

1217. So when papers in a cause are sent from one county to another, by change of a venue, and afterwards removed into this court. It will be presumed from the clerk's certificate, in the absence of any contest as to their verity below, that the clerk has transmitted the proper papers. *Ib.*

1218. An order of removal, directing that the "trial of the prosecution shall be removed," &c., is sufficient, without directing further that "a copy of the record of the said cause be removed," &c. *The State* v. *Shephard*, 8 Iredell R. 195.

1219. Where more persons than one are indicted, and the venue is changed by less than the whole number, those who change the venue must be tried on a copy of the indictment; the original, in such a case, remains in the Court, which retains jurisdiction over the one who does not change the venue. *John* v. *the State*, 2 Ala. 290.

1220. Where an order has been made on the change of venue by one defendant, for the transmission of the original indictment to another county, the Court retaining jurisdiction over the defendant as to whom the venue is not changed, may properly make an order to obtain the custody of the indictment so transmitted to another county, and proceed to trial against the defendant within its jurisdiction. *Ib.*

1221. When the indictment is retransmitted from the Court to which it was irregularly ordered, it is unnecessary that it should be certified by the clerk of the Court. *Ib.*

1222. Whenever a criminal cause is removed from an inferior to a superior court, by certiorari or writ of error, the caption of the indictment must show that the Court before which the indictment was found, had jurisdiction of the offence charged against the prisoner. *Doty* v. *State*, 7 Blackf. 427.

1223. Under the Indiana practice of changing the venue in criminal cases from one Circuit Court to another, it must appear on a writ of error, not only that the Court before which the indictment was found, but also the Court which tried the cause, had jurisdiction of the offence. *Ib.*

1224. The jurisdiction of the latter Court, can only be shown by a statement in the nature of a caption to its proceedings, that the indictment was there filed, and that the prisoner was tried upon it. *Ib.* The indictment should also constitute a part of the record of that Court. *Ib.*

XIII. Arresting Judgment.

1225. Where an indictment is very inartificially drawn, and somewhat obscure, judgment on it will not be arrested on that ground. *Morgan* v. *the State*, Smed. & Marsh. 242.

1226. In Maine, where an indictment of which the District Court had exclusive jurisdiction, was, during the existence of that court transferred to the Supreme Court, for trial, judgment was properly arrested after verdict. *The State* v. *Bonney*, 34 Maine (4 Red.) 223.

1227. Where an indictment contains two counts charging offences committed at the same time, but of different grades, in the same class; held that a judgment on a verdict of guilty as to both counts, would not be arrested. *U. States* v. *Peterson*, 1 W. & M. 305.

1228. And in such case it is discretionary with the district attorney, and allowable for him to enter a nolle prosequi on one of the counts. *Ib.*

1229. A judgment will not be arrested on account of false spelling, provided it does not change the meaning of the word misspelt. *State* v. *Molier*, 1 Dev. 263.

1230. Judgment will be arrested if

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issue has not been joined on the indictment. *State* v. *Monaquas*, T. U. P. Charlton 16.

1231. Where the venire contained but the initials of the Christian names of the grand jury, judgment will not be arrested for this reason. *State* v. *Stedman*, 7 Porter 495.

1232. A day, where a crime was committed, must be laid in an indictment; and when the date is left blank, and it does not appear whether the statute of limitation bars the prosecution or not, judgment will be arrested. *State* v. *Beckwith*, 1 Stewart 318.

1233. Where a case comes before the Supreme Court of Mass. on exceptions taken to the ruling of the court below on an objection made by the defendant, at the trial, to the sufficiency of the indictment, and the objection was overruled, and the jury returned a verdict of guilty; held that the objection was well founded; judgment must be arrested, as the verdict cannot cure an insufficient indictment. *Commonwealth* v. *Collins*, 2 Cush. 556.

1234. Where two counts, for the same transaction, are put in one indictment, the one for a misdemeanor, and the other for a felony, and the prisoner is found guilty on the first count, the judgment will not be arrested. *United States* v. *Stetson*, 3 W. & M. 164.

1235. Where the indictment charges goods alleged to be stolen as the property of persons whose names are unknown, and a witness who appeared before the grand jury swore that he owned a part of the goods; held to be no cause for arresting judgment, and that the objection should have been made the subject of a special plea. *Ib.*

1236. Nothing is good in arrest of judgment, which does not arise from intrinsic causes, appearing upon the face of the record. *Terrell* v. *the State*, 9 Ga. 58.

1237. Whether the facts are properly alleged, or, if proved, would constitute a crime, cannot be raised in the examination of testimony; those points would be properly presented on motion in arrest of judgment. *State* v. *Hart*, 34 Maine 36.

1238. If the first count be bad, there being other counts in the indictment, which are good, on a general verdict of guilty the judgment cannot be arrested. *U. S.* v. *Burroughs*, 3 McLean 405.

1239. Judgment was arrested on an indictment, because of the conclusion of the indictment being against the form of the statute in such case made and provided, and made of force in this State, instead of charging the offence to have been committed against the act of the general assembly. *The State* v. *Holley*, 1 Brevard 35.

1240. If an indictment contains two counts, and there is a general verdict of guilty, the Court will not arrest the sentence of the law, though one of the counts should be insufficient. *State* v. *Davidson*, 12 Vermont 300.

1241. A motion in arrest of judgment must be confined to the sufficiency of the indictment, as returned by the grand jury; all questions in relation to the regularity of the caption, and which may appear on the records of the county court, cannot be noticed; criminal cases are not brought before the Supreme Court of Vermont by writ of error, in which the whole record is certified, but are brought here by exceptions, and only present such questions as might have been raised in the county court; where the indictment and caption are removed into a higher court by writ of error, or certiorari, defects in the caption as well as in the indictment may be heard and determined. *State* v. *Nixon*, 18 Vermont 70.

1242. In the indictment itself the caption may be wholly omitted. *Ib.*

1243. If an indictment, charge that which is an offence at Common Law only, to be contrary to the statute, judgment will not be arrested. *State* v. *Phelps*, 11 Vermont 116.

1244. In an information for stealing a horse, it is no ground of arresting judgment, that the horse is described as being either of a "brown or bay color." *State* v. *Gilbert*, 13 Vermont 647.

1245. A caption of an indictment forms no part of the indictment; and therefore it is not a ground for arresting judgment, that the indictment does not show in its caption that it was taken before a court of North Carolina. *State* v. *Buckell*, 1 Hawks' R. 354.

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1246. Where the verdict does not conform to the indictment, the judgment will be arrested. *The State* v. *Lohmdn*, 3 Hill's S. C. 67.

1247. A count in an indictment which charges two distinct offences, is bad, and if the defendant is found guilty on such count, he may avail himself of the objection by motion in arrest of judgment. *State* v. *Howe*, 1 Richard. 260.

1248. The omission of North Carolina in an indictment found in a court of this State, where the name of the county is inserted in the margin or body of the indictment, is not a cause for arresting the judgment. *State* v. *Lane*, 4 Iredell's R. 113.

1249. Where an indictment lays the time so long before the indictment is found, that the crime appears to be barred by the statute of limitations, this is no ground for arresting judgment. *People* v. *Santvoort*, 9 Cow. 654.

1250. Where it appears from the record that verdict of the jury was written on the indictment, but was not entered on the minutes of the Court at the term when it was returned, and the indictment was of file in the proper office, and constituted a part of the proceedings of the Court; held that the neglect of the clerk to enter it on the minutes, affords no sufficient ground to arrest the judgment. *Hall* v. *State*, 3 Kelly 18.

1251. Where an indictment showed upon its face, that it was barred by the statute of limitations, and did not show on its face anything by which the effect of the statute could be avoided; held that the judgment ought to be arrested. *McLane* v. *the State*, 4 Ga. 335.

1252. Where eight persons are indicted for an unlawful assembly, and out of this number only five appear, and put in a plea of not guilty, and on trial two out of the five are found guilty, and the other three are acquitted; it was held that if all but the two convicted, had been tried and acquitted, no judgment could, in such case, be entered on the verdict against the two. *State* v. *Bailey*, 3 Blackf. 209.

1253. Where it did not appear of record, that the grand jury had returned the indictment into court; it was held that the judgment entered on such indictment was erroneous, and must be setaside. *Rainey* v. *People*, 3 Gilman 71.

1254. Where an indictment contains several counts, and the jury find a verdict of guilty on some of the counts, and make no mention of the other counts, it is proper that a judgment of acquittal should follow upon the counts of which no mention was made in the verdict. *Kirk's case*, 9 Leigh 627.

1255. Where an indictment contains two counts, which charge offences subject to different punishments, and the jury bring in a general verdict of guilty, and fix the punishment according to the offence alleged in the second count, and the Court renders judgment on the first count, punishing the person according to the terms of punishment imposed by the verdict of the jury; it will be held to be erroneous, but the judgment will not be set aside. The case will be sent back to the Court below for judgment, to be entered according to the verdict. *Baker* v. *State*, 4 Ark. 56.

1256. Where an indictment is laid for a misdemeanor, and a judgment is rendered against the defendant on demurrer to such indictment, the judgment is final. *State* v. *Rutledge*, 8 Humph. 32.

1257. Where a demurrer is filed to an indictment, the Court cannot enter judgment assessing punishment of the defendant. It is necessary in all cases, where the defendant does not admit the indictment to be true, to enter a plea of not guilty. *Meader* v. *State*, 11 Mo. 363.

1258. The judgment upon a joint indictment, where more than one is convicted, is several; two individuals were indicted jointly, for keeping a tippling-house, and found guilty by a general verdict; judgment that both pay fines, $60 each, is right. *Caldwell* v. *Commonwealth*, 7 Dana 229.

1259. A judgment on a special verdict, leaves the matter of law distinctly open to review in a higher court. *State* v. *Moore*, 7 Iredell 228.

1260. But where the Court sets aside a special verdict, as they may do, they cannot of themselves enter a general

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verdict of guilty or not guilty. That must be done by a new jury. *Ib.*

1261. Upon conviction on an indictment containing several counts, one of which is good and the others bad, judgment must be rendered for the State upon the good count. *State* v. *Miller*, 7 Iredell 275.

1262. On a joint judgment against county commissioners, on an indictment for refusing to fix the per cent. on taxable property; held that the judgment was erroneous because it was joint. If the defendants were liable on this indictment, they could only be so in their individual capacities, and there should have been a judgment against each of them. *The State* v. *Hopkins*, 7 Blackf. 494.

1263. A judgment which recites that the jury were selected, tried, and sworn to try the prisoner, &c., who was indicted for the crime of murder, and states that the prisoner was thereupon arraigned, and pleaded "not guilty" to the indictment, is erroneous. The plea of the prisoner should have preceded the selection and swearing of the jury. *State* v. *Hughes*, 1 Ala. 655.

XIV. Miscellaneous.

1264. Where a defendant is tried on an indictment, he may demur to evidence, but the prosecution is under no obligation to join in the demurrer. *Commonwealth* v. *Parr*, 5 Watts & Sergeant 345.

1265. Where the offence is punishable by imprisonment, as well as fine, a capias is the proper process to bring the body into court; such process has been long in practice in England, after indictment in cases of misdemeanors, and is the practice here, except in cases punishable by fine only. *McEwen* v. *State*, 3 Smedes & Marsh. 120.

1266. Prisoner indicted for murder in the Common Pleas, when arraigned stands mute, the Court assuming that another indictment against him for the same offence was pending in the Supreme Court, refuses to proceed in the case. Mandamus to proceed a proper remedy. *Turner's case*, 5 Ohio 542.

1267. If after the jury are sworn in a criminal case, and depart from the bar, one of the jurors separates from his fellows, whereby the Court are compelled to discharge the jury, without the consent of the defendant, he may be again put upon his trial on the same indictment. *The State* v. *Hall*, 4 Halst. 256.

1268. Where a defendant demurs to an indictment, and his demurrer is overruled, the Court cannot enter up judgment against him, and assess his punishment; a plea should have been put in, and a trial had by jury. *Ross* v. *State*, 9 Mo. 687.

1269. In criminal cases, a demurrer is not considered as a confession of guilt. *Ib.*

1270. Every one is presumed to wish to offer evidence which can operate in his favor, if it is attainable; and it is a settled principle, that unnecessary omission to do this is a circumstance which the jury may consider with other evidence in the case. *State* v. *McAllister*, 24 (11 Shepley) Maine 139.

1271. On the trial of an indictment for a misdemeanor, for exposing the bodies of the accused naked and uncovered to the public view, the intent with which the act was done is a material ingredient in the offence, and is a question of fact for the consideration of the jury under all the circumstances of the case. *Miller* v. *the People*, 5 Barb. 203.

1272. Where it is contended that the order of the judge, directing the attorney-general to file the bill of indictment ex officio, is not sufficiently specific in its terms to have warranted this action of the attorney-general, that it ought to have stated that no one would prosecute for the offence; it was held not necessary to state it. *Bennett* v. *the State*, 7 Humph. 118.

1273. As the statutes of Jeofails and amendments do not extend to criminal proceedings, it follows that every error which would have been fatal on demurrer, or in arrest of judgment, will be sufficient to procure its reversal. *Kirk* v. *the State*, 13 Smed. & Marsh. 406.

1274. Where the condition of a recognizance was to appear and answer an indictment for gaming, the con-

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dition, as stated in the scire facias, upon the recognizance, was to appear and answer an indictment for keeping a gaming table; held that this was no variance. *Whitfield* v. *the State*, 4 Ark. 171.

1275. A witness, sworn in support of an indictment founded on a statute, which, in case of conviction, gives one-half the penalty to the informer, is not to be considered the informer from the mere fact that he is the only witness in the case. *Williamson* v. *the State*, 16 Ala. 431.

1276. The defendant, in a civil or criminal case, appealed by him, may, in the Appellate Court, plead the same plea as that on which the judgment appealed from was rendered, or any matter of defence subsequent in its nature, which, according to the order of pleading established by the rules of the Common Law, he would have a right to plead in the court below; but he cannot plead any matter which had been pleaded and determined in the court below prior to that so pleaded and determined. *Wickwire* v. *the State*, 19 Conn. 477.

1277. Where the statute requires a copy of the indictment to be delivered to the prisoner two days before the trial, the true meaning is, that the copy should be delivered two days before the cause is tried by the jury, and not before the party is arraigned on the indictment. *United States* v. *Curtis*, 4 Mason's R. 232.

1278. It is the policy of the law, in the furtherance of justice, that the preliminary inquiry before a grand jury should be conducted in secret. No evidence, therefore, will be admitted for the purpose of vitiating an indictment, either from the grand jurors, or from the witnesses before them, or from any other person required by law to be present, as the evidence given on such inquiry. *The State* v. *Fasset*, 16 Conn. 457.

1279. An indictment, found amongst the files of the Court, and recognized as an authentic paper, proves itself, when the question of authenticity is raised on an issue to a plea to the same indictment; and on such an issue no evidence need be produced to sustain the affirmative. *The State* v. *Clarkson*, 3 Ala. 378.

1280. Where the defendants confess themselves guilty in manner and form, as charged against them in the indictment, if no offence against the law is charged, they have not confessed themselves guilty of any. *Fletcher* v. *the State*, 7 Eng. 169.

1281. But if the confession was still broader, and embraced a crime, when the indictment fell short of it, and punishment followed, it would be the punishment of a crime not proceeded for by indictment. *Ib.*

1282. A recognizance to appear and answer an indictment, to be preferred at a future time against the principal recognizor, need not set out the offence charged with the technical accuracy required in the indictment, but it will be sufficient if the offence be substantially described. *The State* v. *Weaver*, 18 Ala. 293.

1283. A waiver of all objections to an irregularity in the finding of the indictment, and to the jurisdiction, "was voluntarily entered of record" by the prisoner; held that the Supreme Court of Maine could not acquire jurisdiction by consent, and a waiver could amount to no more. *The State* v. *Bonney*, 34 Me. 223.

1284. Whatever inconveniences or irregularities a prisoner may complain of, as to the examination, or want of examination, before the examining magistrate, they can have no relevancy as objections to the indictment, which has given the sanction of the grand inquest of the county to the charge for which the magistrate had committed him. *Close's case*, 8 Gratt. 606.

1285. Where a defendant is discharged from an indictment for want of prosecution, by virtue of the first section of the "act relative to indictments," he is discharged only from his imprisonment, or recognizance, but is not acquitted of the crime, or discharged from its penalty. *The State* v. *Garthwaite*, 3 Zabris. 143.

1286. Where an indictment has been quashed, because one of the grand jurors who found it was not a freeholder, it was held that the indictment was not a sufficient foundation for a rule

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upon the party to show cause why an information should not be filed against him. *Commonwealth* v. *Ayres*, 6 Gratt. 668.

1287. Where certain witnesses were called by the government, on the trial of an indictment for vending lottery tickets, and objecting to testify without first seeing the indictment, on the ground that they had reason to suppose that they were also indicted and presented in the same bill, so that they might be better prepared to testify on such trial, and alleging that no process had, to their knowledge, been issued against them; the Court held that it was optional with the attorney for the government to issue process on indictment, and that the indictment could not be shown the witnesses, for their inspection. *Commonwealth* v. *Braynard*, Thacher's Crim. Cas. 146.

1288. Where the clerk fails to enter upon an indictment the day of its return by the grand jury into court, such failure does not authorize the Court to discharge the defendant. *The State* v. *Clark*, 18 Mo. (3 Bennett) 432.

1289. Where a prisoner is sent for further trial by an examining court which sat during the session of the Circuit Court, to which he is sent for further trial; held that that term of the Circuit Court is not one of the two at which the statute directs that he shall be indicted or dischared from imprisonment. *Bell's case*, 8 Gratt. 600.

1290. Where it may be clearly understood from the record of the examining court, that the crime for which the prisoner was indicted is the offence for which he was examined, that will be sufficient. *Ib.*

1291. In Georgia, where a demand for a trial is made in pursuance of the 18th section of the 14th division of the penal code, and a jury is impanelled and qualified to try the prisoner both at the term when the demand is made, and at the term where he moves for a discharge and he is not tried, he is then entitled to be absolutely discharged and acquitted of the crime alleged in the indictment. *Kerese* v. *the State*, 10. Ga. 95.

1292. After an indictment has been removed by certiorari from the Oyer and Terminer to the Supreme Court, carried down to the Circuit for trial, and a verdict rendered for the defendant, the State cannot be permitted to show by a certificate of the clerk of the Oyer and Terminer, or even by the production of an original indictment, that the return made by that Court was untrue. *State* v. *Jones*, 6 Halst. 289.

1293. Where a defendant has been acquitted by reason of a variance between the instrument set forth in the transcript of the indictment and that produced in evidence, although such variance was induced by an accidental omission of the clerk of the Oyer and and Terminer in transcribing the indictment and certifying the same to the Supreme Court to which it was removed by certiorari, this Court will not order the defendant to be held in recognizance to appear at the Oyer and Terminer to answer the original indictment. *Ib.*

1294. The benefit of clergy is not known to the laws of Indiana. *Fuller* v. *State*, 1 Blackf. 63.

1295. In Virginia, offences punishable by confinement in the penitentiary, are excepted from that class of offences for which indictments may contain good and bad counts, and yet be sustained by a general verdict of guilty. *Clere's case*, 3 Gratt. 615.

1296. Where a presentment was made by the grand jury for a particular offence, and a bill of indictment for the same offence was sent by the attorney for the prosecution to the grand jury, who found it "a true bill," afterwards, at a subsequent term, the prosecuting attorney enters a nolle prosequi on the indictment, and it then appearing that the indictment was an amendment of the presentment; the latter ceased to exist with the former. *United States* v. *Hill*, 1 Brock. 156.

1297. The Court should entertain very cautiously a motion to strike off or release a prosecutor to an indictment. *Bartlett* v. *Humphreys*, Hardin 513.

1298. By the act of August 8, 1846, an indictment for a misdemeanor may be sent to the Circuit Court by an order made at a term subsequent to that to which the indictment is return-

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ed, and after the defendant has put in his plea to the indictment, and some proceedings have been had. *U. States* v. *Morris*, 1 Curtis' Ct. Ct. 23.

1299. It may be well pleaded in bar to an indictment for a misdemeanor, that the case was once committed to a jury, and withdrawn before verdict by order of the Court. *Ib.*

INFORMATION.

I. When an Information lies. Who may be an informer.
II. Jurisdiction of an Information.
III. Of the indictment and its requisites.

I. When an Information lies—Who may be an Informer.

1. An indictment for intrusion upon the lands of the Commonwealth, cannot be sustained, unless the Commonwealth shall have acquired possession. *Com.* v. *Hite*, 6 Leigh 588.

2. An information does not lie in this Court against a town, for not being provided with a public protestant teacher of piety, religion, and morality, unless the Sessions have adjudged such town to be of sufficient ability to maintain such a public teacher. *Commonwealth* v. *Inhabitants of Waterborough*, 5 Mass. 257.

3. In Virginia, under the statute 1 Rev. Code, c 169, § 65, upon a presentment in a Circuit Court, for an offence for which the penalty fixed by law does not exceed $20, the Court cannot enter upon proceedings by way of information, but only in a summary way. *Webb's case*, Leigh 721.

4. Where an act which was not criminal before, is prohibited by a substantive clause in a statute, and in another section a special remedy is given, an indictment or information will lie upon the prohibitory clause. *State* v. *Bishop*, 7 Conn. 181.

5. Accordingly, where a miller, on the complaint of a grand juror, for taking excessive toll, in violation of the statute, was convicted and sentenced to pay a fine of two dollars to the treasury of the town where the offence was committed; it was held that this proceeding was legal. *Ib.*

6. At Common Law, an information lies for a show that tends to corrupt the morals of the community, or shocks humanity with its indecency; and if an information in such case alleges that the offence is contrary to the statute, this may be treated as mere surplusage, and will not vitiate the proceedings. *Knowles* v. *State*, 3 Day 103.

7. Where information is granted, it is an official act, devolving solely on the attorney-general, and his action is not limited by leave of Court, or any preliminary inquiry instituted by them. *The State* v. *Dover*, 9 N. Hamp. 468.

8. A free man of color, though he cannot be a witness in any case, except where none but negroes, mulattoes, or Indians are parties, may, by his own oath, require a white man to give security to keep the peace. *Commonwealth* v. *Oldham*, 1 Dana 467.

9. The oath or affirmation of a free man of color, may be received in any case where the oath or affidavit of a party is required or admissible. *Ib.*

II. Jurisdiction of an Information.

10. In Arkansas the Supreme Court has no jurisdiction of an information in the nature of a quo warranto. *The State* v. *Ashley*, 1 Ark. 279

11. Where an information charged the defendant with having committed an assault and battery upon the body of another, and with having in a violent manner and with great force, thrown him upon the ground, and with having dragged him into a brook or pond of water and pressed and held his body and face in the water and mud, and with having, by so holding his body and face in the water and mud, attempted to suffocate and drown him; it was held that such information charged an assault and battery with an at-

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tempt and with intent to kill, but if otherwise, that still the offence alleged was a high crime and misdemeanor at Common Law, and was not therefore within the jurisdiction of County Court. *Southworth* v. *State*, 5 Conn. 325.

12. A justice of the peace cannot hold one to bail for an offence which may by law be prosecuted by information, qui tam, as well as by indictment. *Commonwealth* v. *Cheney*, 6 Mass. 347.

13. Where a statute forbids the doing of an act under a penalty, and gives one moiety to the public, and the other to a common informer, the State may prosecute for the whole, unless a common informer has commenced a qui tam suit for the penalty. *State* v. *Bishop*, 7 Conn. 181.

14. Where an exception is made to a criminal proceeding, on the complaint of a grand juror, before a justice of the peace, that the residence of such justice is not in the town where the offence was committed, it is unavailable after a plea of not guilty. *Ib.*

15. Where the record of each proceeding showed that the offender was arrested and brought before the justice, at his dwelling-house in B.; it was held that the residence of the justice in B., was sufficiently shown. *Ib.*

III. Of the Indictment and its Requisites.

16. In Massachusetts, under the statute of 1832, c. 73, and statute 1833, c. 85, which imposes additional punishment on convicts who had been discharged from former sentences "in due course of law," it was held sufficient to state, in an information for such punishment, that the convict had been discharged from a former sentence in consequence of a pardon. *Evans* v. *Com.*, 3 Met. 453.

17. Where there is an information for additional punishment for a third offence of a convict, who has been before sentenced to additional punishment for a second offence, it is irregular, if not fatally defective, if it merely state the first information on which the two former convictions were averred, instead of directly averring them. *Wilde* v. *the Com.*, 2 Met. 408.

18. Where there is an information for additional punishment, it need not set forth the previous conditions and sentences in extenso, but is well if it set forth the convictions with such particularity as to identify them, and indicate the character of the offence charged, and if it also state the sentences with such exactness as to show that they bring the convict within the law for additional punishment. *Ib.*

19. If an information conclude contra formam statuti, and the offence alleged is not within any statute, these words may be rejected as surplusage. *Southworth* v. *State*, 5 Conn. 325.

20. Where an information is for exhibiting a show, the particular circumstances of indecency, barbarity, or immorality must be set forth, in order that the Court can see whether the offence is within the statute, or whether it is an offence at Common Law, or the information cannot be maintained. *Knowles* v. *State*, 3 Day 103.

21. In an information for a first offence (in contradistinction to a second or third, with an increased penalty), it need not be stated as a first offence; but this will be presumed, in the absence of any allegation of a different import. *Kilbourn* v. *State*, 9 Conn. 560.

22. In Connecticut the acts prohibited by the 7th section of the statute relating to taverns, though distinct in their nature, and committed at different times, and in relation to several persons, may be charged in one count, as constituting but one offence. *Ib.*

23. Where an information for a breach of such statute alleged that the defendant, on the 29th day of July, 1831, and on divers other days, sold and delivered to A., B. and C., rum, brandy, and other strong liquors, to be drunk at the defendant's shop in *M.*, without license, the precise quantity of such rum, brandy, and other liquor being unknown; it was held that this allegation was sufficiently certain. *Ib.*

24. Where an information is by the attorney for the State, it is not necessary to state that he informs under his official oath. *State* v. *Sickle*, Brayt. 132.

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25. To make an information for being a common cheat good, particular acts must be charged. *State* v. *Johnson*, 1 Chip. 129.

26. The information cannot be amended by adding charges. *Com.* v. *Rodes*, 1 Dana 595.

27. Where there is a variance between the presentment and the information, it may be taken advantage of as cause against filing the information, or by motion to quash it. *Jones' case*, 2 Gratt. 555.

28. It is a well-settled principle, that in an information for an offence created by statute, it is sufficient to set forth the offence in the words of the statute; and if in any case the defendant insists upon a greater particularity, it is for him to show that, from the obvious intention of the legislature or the known principles of law, the case falls within some exception to such general rule. *Whiting* v. *State*, 14 Conn. 487.

29. Accordingly, where an information on the statute prohibiting the sale of spirituous liquors without liberty, granted by the town, charged in the language of the statute that the defendant, at a certain time and place, did sell spirituous liquors to one E. R., without such liberty, not specifying the kind, quantity, or value of the liquors so sold, nor stating the terms of the contract, nor alleging the delivery of the liquors, it was held that as the statute specifies neither the kind, quantity, nor value of the liquors which must be sold to constitute the offence, and as these circumstances affected neither the jurisdiction of the Court, nor the nature or degree of punishment, the information was sufficiently precise. *Ib.*

30. When an information is joint, against two, separate pleas of not guilty may be put in; the one putting himself on the Court and the other on the jury for trial. *State* v. *Taylor*, 1 Root 226.

INNS AND LICENSE.

I. License.
II. Construction of Statutes respecting Inns, &c.
III. What constitutes an Offence under the Statutes, and the Offence how punished.
IV. Information and Complaint for Retailing Spirituous Liquors.
V. Indictment under the Statutes regulating Inns, License, &c.
VI. Matters of Defence.
VII. Evidence to sustain the Indictment; Evidence admissible on Information. and Complaint for Retailing, &c.
VIII. Fine and Penalty for Violations.
IX. Warrant.
X. Jurisdiction of the Offence.
XI. Miscellaneous.

I. License.

1. Where the respondent had a license to sell intoxicating liquors at his stand, at the corner of A. and B. streets, and had another stand adjoining this, there being an internal communication between the two, and sold liquors in both, it was held that his license only applied to the place first named. *State* v. *Fredericks*, 16 Mo. (1 Bennett) 382.

2. *Semble.* That the license described in the License Law of July 4, 1838, for the sale of spirituous liquors, must be in writing. *State* v. *Moore*, 14 N. Hamp. 451.

3. In Kentucky, under the general laws of that State, trustees of towns have not authority to license the sale of spirituous liquors. The 12th section of the acts of 1849 applies to those cities and towns which, at the time of its passage, had authority to grant such licenses. *Com.* v. *Voorhies*, 12 B. Monr. 361.

4. Where a party has one license to retail, it will not authorize the person or persons licensed to conduct the business in more than one place. *The State* v. *Walker*, 4 Shep. 241.

5. A license to keep a grocery cannot be assigned. *Lewis* v. *U. States*, 1 Morris 199.

6. In Missouri, it is the province of the County Courts to determine whether a dram shop shall be licensed. *Austin* v. *State*, 10 Mo. 591.

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7. A tavern license confers a personal privilege upon the person to whom it is granted, which is not transferable, nor does the license pass with a lease of the house in which the tavern is kept. *Com.* v. *Rucker*, 9 Dana 310.

8. A license to keep a tavern, under the authority of the act granting licenses, and regulating taverns, passed June 1, 1831, was a license, according to the true intent and meaning of said act, to retail liquors, as well as to keep a tavern. *Hirn* v. *State*, 1 McCook's Rep. 15.

9. License to keep a tavern includes the privilege to retail spirituous liquors. *State* v. *Chamblyss*, 1 Cheves' Rep. 220.

10. Although the charter of the city of Montgomery provides that retailers who procure a license from the city council shall be exonerated from paying anything to the county for the privilege of retailing in the city, yet it does not relieve them from the necessity of obtaining a license from the County Court, as required by the acts of 1835 and 1839. *State* v. *Estabrook*, 6 Ala. 653.

11. A license to retail spirituous liquors can only be granted at the semi-annual term of the County Court, properly so called. *State* v. *Kennedy*, 1 Ala. 31.

12. A tavern license restricts the sale of liquor to the *place* as well as to the *person* licensed. *State* v. *Prettyman*, 3 Harr. Rep. 570.

13. Where a person is licensed as an innholder, common victualler, and retailer, under the statute of 1832, c. 166, § 8, which provides that the county commissioners may license persons, "as innholders, common victuallers, or retailers, or sellers of wine, beer, ale, cider, or any other fermented liquors," he is not warranted, by virtue of his capacity of an innholder and retailer, under such license, to sell spirituous liquors. *Com.* v. *Jordan*, 18 Pick. 228.

14. The certificate of the clerk of the county commissioners, that a person has been licensed by them as an innholder, does not, per se, amount to a license. *The Com.* v. *Spring*, 19 Pick. 396.

15. Nor is such certificate conclusive evidence of the grant of such license, but it may be controlled by the records of the commissioners. *Ib.*

16. Under the statute of 1832, c. 166, a person licensed to be a common victualler, in any other place than Boston, is not authorized to sell distilled spirits. *The Com.* v. *Markoe*, 17 Pick. 465.

II. Construction of Statutes respecting Inns, &c.

17. In Pennsylvania, the statute of 1846, which authorizes "the citizens of certain counties to decide by ballot whether the sale of spirituous liquors shall be continued in said counties," and imposing a penalty for the sale of such liquors, where the majority of the votes has been against the sale, is held to be unconstitutional and void. *Parker* v. *Com.*, 6 Barr 507.

18. In Indiana, the statutes found in the Rev. Stat. of 1843, p. 235, acts of 1847, p. 46, and acts of 1849, p. 83, merely regulate the operation of the 93d section of the 53d c. of Rev. Stat. of 1843, which relates to the sale, &c., of spirituous liquors. *King* v. *State*, 2 Carter (Ind.) 523.

19. The fourth section of the act of 1849, which relates to the retailing of spirituous liquors, is void. *Ib.*

20. In Indiana, the Rev. Stat of 1843, p. 979, § 93, which prohibits the retailing of spirituous liquors without a license, contains no exception in favor of a sale for medicinal purposes. *Donnell* v. *State*, 2 Carter (Ind.) 658.

21. In Indiana, the fourth section of the act of 1848, p. 83, which relates to the retailing of spirituous liquors, contains no prohibition whatever, and is void. *Cherzem* v. *State*, 2 Carter (Ind.) 149.

22. The 93d section of the act of 1843 (Rev. Stat.), p. 979, which relates to that offence, was in force in April. 1850. *Ib.*

23. In Vermont, the License Law, enacted in 1846, is constitutional. *State* v. *Smith*, 22 Vt. 74.

24. The License Law of July 4, 1838, is held to be constitutional. *State* v. *Moore*, 14 N. Hamp. 451.

25. The Rev. Stats. ch. 47, § 1, which

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subjects to a penalty any person who should presume to be an innholder, common victualler, or seller of wine, and spirituous liquor, to be used in or about his house, &c., &c., without being licensed, is not repealed by statute of 1838, ch. 157. *Com.* v. *Odlin*, 23 Pick. 275; *Com.* v. *Harris*, 23 Pick. 280.

26. The act incorporating the town of Eutaw, does not authorize "bona fide licensed tavern-keepers," resident in that town, to retail spirituous liquors within its limits; unless they first obtain from the County Court a licese to retail. *Page* v. *the State*, 11 Ala. 849.

27. In Tennessee, the act of 1846, ch. 90, does not discharge persons who are found guilty of retailing spirituous liquors under the act of 1837, from the penalties of said act. *State* v. *Fleming*, 7 Humph. 152.

28. In Missouri, the twenty-seventh section of the statute relating to groceries (R. C. 1845), authorizes the sale of spirituous liquors in quantities not less than one quart, at a distance of one mile from a town or village, and not to be drank on the premises. *Bledsoe* v. *State*, 10 Mo. 388.

29. A statute which restrains the sale of intoxicating liquor, is good. *Austin* v. *State*, 10 Mo. 591.

30. Where a person was licensed under the statute of 1832, ch. 166, § 8, as an inn-holder, common victualler, and retailer, which statute provides for the license of the persons as innholders, common victuallers, retailers, or sellers of wine, beer, ale, cider, or any other fermented liquor; held that he was not authorized thereby to sell spirituous liquors. *Com.* v. *Jordan*, 18 Pick. 228.

31. In Massachusetts, the statute of 1850, ch. 222, § 1, amending the Rev. Stats., ch. 47, secs. 1, 2, 3, by striking out the word "spirituous," wherever it occurs, and inserting in place thereof, the word "intoxicating," does not operate as a repeal of those sections of the Revised Statutes. *Com.* v. *Herrick*, 6 Cush. 465.

32. Where, by a declaratory provision, the legislature enacts that a thing may be done, which before that time was unlawful, and adds a proviso, that nothing therein contained shall be so construed as to permit some matter in the general provision to be done, this is an implied prohibition of such act, though before that time it was lawful. *The State* v. *Eskridge*, 1 Swan 413.

33. The act in relation to certain specific taxes (Rev. Stats. 1843), directs the county treasurer in vacation, &c., to determine the sum to be charged for a year, for a license to sell spirituous liquors, to receive the amount, and give a receipt. *Place* v. *the State*, 8 Blackf. 319.

34. The 175th section of that act, has reference only to the application of brokers. *Ib.*

35. The 17th section of the act of 1841 (acts of 1841, p. 42), was revised by the aforementioned act of 1843, on the subject, and was therefore repealed by the general repealing act of 1843, p. 1023. *Ib.*

36. The act of 1793, "to regulate taverns and restrain tippling-houses," imposes a penalty of three pounds for keeping a tippling-house, or for retailing liquors without license, two offences. The act of 1831 adds fifty dollars to the former offence, only, leaving the latter as it stood before. *Morrison* v. *Com.*, 7 Dana's Rep. 218.

37. The sale of spirituous liquors in quantities not less than a quart, if they are made of the production of the seller's farm, or sold by a merchant in his store, is not prohibited, being expressly excepted by the act of 1793, against retailing; and a colored woman keeping a store for the sale of sugar, coffee, teas, and other groceries, is a merchant, within the meaning of the act. *Cole* v. *Com.*, 8 Dana 31.

38. The act of 1793, "to regulate taverns, and restrain tippling-houses," section four, defines two offences: 1st, keeping a tippling-house; 2d, retailing spirits without license, unless, etc. *Hinton* v. *Com.*, 7 Dana 215.

39. In an indictment for a statutory offence, the statute must be strictly pursued; and if the description of the offence embraced in the statute be departed from in any material respect, or if any ingredient in the definition of the offence be omitted, the indict-

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ment will be bad. *Bush* v. *Republic of Texas*, 1 Texas 455.

40. If a statute prohibits an act under a penalty, to be enforced by indictment, and a subsequent statute gives a qui tam action for such penalty, the latter is merely cumulative of, and does not repeal the remedy given by the former statute. *Ib.*

41. In Illinois, a fine against a retailer of spirituous liquors for selling without a license by quantity less than one quart, cannot, under the act of 1827, exceed ten dollars. *Johnson* v. *the People*, Breese 276.

42. In Indiana, the statute authorizing the clerks of courts in partition, to give permits to retail spirituous liquors, &c., has no application to grocery-keepers. *The State* v. *Sumer*, 5 Blackf. 253.

43. In Kentucky, the statute of 1835, giving power to the trustees of Hopkinsville, to license tippling-houses, is with respect to all who obtain such license, a suspension of the general law, and protection. *The Com.* v. *Luck*, 2 B. Monr. 296.

44. In Tennessee, the act of 1827, ch. 15, which authorizes the sale of spirituous liquors on days of muster, at the house of the person where such muster takes place, is repealed by the act of 1837-'8, ch. 120. *Campbell* v. *the State*, 3 Humph. 9.

45. For an account of legislation in Tennessee, upon the subject of retailing liquors, see *Dyer* v. *the State*, 1 Meigs 237.

46. A person making it his business to keep a house of entertainment for travellers, is a tavern-keeper within the meaning of the statute of Ohio, though he keeps no liquor in his house for any purpose. *Curtis* v. *State*, 5 O. 324.

47. In Virginia, the 13th section of the act for the regulation of ordinances, &c., is not to be construed as allowing persons from the produce of whose estates ardent spirits are made or distilled, to retail them to be used at the place where sold. *Clemmons* v. *the Com.* 6 Rand. 681.

48. A defendant cannot be punished by a term of imprisonment for six months, for retailing spirituous liquors, under the 5th section of the Virginia act of 1792, unless the information allege that it is a second offence after having been convicted of a similar offence; nor can he be so punished unless the second offence be committed after the conviction of the first. *Commonwealth* v. *Welsh*, 2 Virg. Cas. 57.

49. In South Carolina, the act of 1831 was intended to prevent the employment of a slave as an agent or clerk to carry on the business of retailing, in the absence of his owner or employer, though for the benefit of such owner or employer; it only reaches those cases where the slave makes the sale and receives the price, as well as delivers the liquor; it does not extend to a case where the slave merely draws it in the presence and by the direction of the master. *State* v. *Glasgow*, Dud. S. C. 40.

50. A defendant may be legally convicted of retailing without a license and of trading with a slave, though both offences arise out of the same act. *Ib.*

51. In North Carolina, the acts of 1800, 1808, and 1809 (See 1 Rev. Stat. c. 99, sec. 9), prohibiting the sale of spirituous liquors and other articles, except by licensed stores and taverns, near a church, meeting-house, or other place where persons are assembled for Divine worship, are constitutional. *State* v. *Muse*, 4 Dev. & Batt. 319.

52. In New York, ale and strong beer are included within the meaning of the terms *strong and spirituous liquors*, as used in the statute (1 R. S. 680, § 15), making it penal to sell such liquors by retail without license—per Walworth, Chancellor. *Nevin* v. *Ladue*, 3 Denio 437.

53. In North Carolina, the 75th and 77th sections of the 34th chapter of the Revised Statutes, which, after prohibiting the selling of spirituous liquors to slaves, and making the offence indictable and punishable with fine or imprisonment, prescribes that "if it shall appear on the trial that the defendant is a licensed retailer of spirituous liquors by small measure, he shall also forfeit his retailer's license, and shall be incapable of taking a new license for the space of two years from and after the date of his conviction," mean

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that the defendant shall be a retailer at the time of the offence committed, and not at the time of the trial; and the fact of his being such retailer is not to be ascertained on affidavits or otherwise by the Court, but must be averred in the indictment, and confessed or found to be true by the verdict of a jury. *State* v. *Plunket*, 1 Iredell 115.

54. In New York, the terms *inn* and *tavern*, and *inn-holder* and *tavern-keeper*, as employed in the statute for the regulation of taverns, &c. (1 R. S. 676 *et seq.* 2d ed.), are synonymous. *Overseers* v. *Warner*, 3 Hill 150.

55. The term premises, in the statute of Alabama, authorizing merchants and shopkeepers to retail spirituous liquors by the quart, so that the same be not drank with, &c., on the premises where they reside or have their stores, means something over which the individual has control—and therefore a conviction is proper when the liquor furnished is drank from glasses of the shopkeeper, on a bench used by him in a mill-yard, some fifteen or twenty steps from the house where the liquor was sold. *Swan* v. *State*, 11 Ala. 594.

56. The statute requiring a license to sell strong and spirituous liquors in small quantities, is not in conflict with the 8th and 10th sections of the Constitution of the United States. *Smith & Bunce* v. *the People*, 1 Parker's Crim. R. 583.

57. A State has the right, in making general regulations in regard to its internal affairs, to prescribe restrictions on the sale of goods, and to grant persons license to pursue a particular business; and the exercise of such power on the part of the State will not be deemed an additional duty upon imports, though such restrictions and license extend to imported goods, as well as to those of domestic origin. *Ib.*

58. In Maine, after the repeal of the statute of 1848, which restricted the sale of spirituous or intoxicating liquors, an action would lie for the sale of spirituous liquors, under the act of 1846. *Parsons* v. *Bridgham*, 34 Maine (4 Red.) 240.

59. The act of New York of 1845, relating to excise (Stat. 1845, p. 322), did not repeal the provisions of the Revised Statutes which made it penal and indictable to sell strong and spirituous liquors without a license, in the towns in which the electors had voted against licenses. *People* v. *Townsey*, 5 Denio 70.

60. An ordinance of the City Council of Charleston, imposing a penalty upon retail grocers for having spirituous liquors on their premises without a license to retail the same, is not in derogation of the "common rights" of the citizen, but a legal restraint imposed on a few for the benefit of the many, and within the powers delegated to the Council by the charter of the city. *City Council* v. *Ahrens*, 4 Strob. 241.

61. Although, if Congress pass a law authorizing the importation of any article of commerce on payment of a duty, or even without, no State can pass a law prohibiting the importation; yet, as soon as the article ceases to be a part of the foreign commerce of the country, and passes into the hands of retailers or consumers, it becomes a part of the property of the citizens of the State; therefore, an ordinance of the City Council of Charleston, forbidding spirituous liquors, in the hands of the retailer or consumer, to be kept in certain places, is not an interference with the power of Congress to regulate trade. *Ib.*

62. In Massachusetts, the statute of 1849, c. 231, § 2, prohibiting the setting up or maintaining, without license, of any public show, amusement or exhibition, has no application to a school for the teaching of dancing, although admittance thereto is paid for on each evening. *Com.* v. *Gee*, 6 Cush. 174.

III. What Constitutes an Offence under the Statutes—And the Offence, how Punished.

63. Where a druggist, on a proper occasion, bona fide and with due caution, retails liquor to be used only as a medicine, he will not be guilty of an offence against the statute. *Donnell* v. *State*, 2 Carter 658.

64. Under the provisions of section 7 of the Comp. Statutes, 506, either

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selling or furnishing intoxicating liquors without a license, formed a separate and distinct offence. *State* v. *Woodward*, 25 Vt. 616.

65. In Massachusetts, the offence of being a common seller of wine, &c., contrary to the Revised Statutes, c. 47, § 1, may be committed, when there are a sufficient number of unlawful sales on the same day. *Com.* v. *Perley*, 2 Cush. 559.

66. Where one is not licensed to sell spirituous liquor, and takes money of B. for some other article which B. receives from him, and B. thereupon takes A.'s spirituous liquor without any words concerning it, this is a sale of liquor, and A. is guilty of a violation of the Revised Statutes, c. 47, where any part of the money is given by B. and received by A. in payment for the liquor. *Com.* v. *Thayer*, 8 Metc. 525.

67. Where a party has no license to sell spirituous liquor, sells it with another article, and receives pay for both together, it is sufficient in a complaint or indictment against him on the Rev. Statutes, c. 47, to charge the sale of the liquor only. *Ib.*

68. A single act of sale constitutes an offence within the meaning of the Revised Statutes, c. 47, § 3, that no person shall presume to be a retailer or seller of spirituous liquors in less quantity than twenty-eight gallons, except when licensed as a retailer of spirits. *Com.* v. *Thurlow*, 24 Pick. 374.

69. In Massachusetts, to constitute a common seller of wine, &c., under the Revised Statutes, c. 47, § 1, it must be shown that the defendant made three or more distinct sales of spirituous liquors; and it is not enough to show merely that he had a place on his premises fitted up in the usual manner, with a bar for the sale of spirituous liquors, to be used on the premises; that the place so fitted up was provided with the liquors, or some of them mentioned in the said section; that this place was provided with a person in the employment of the defendant, to wait upon customers; that the defendant, by himself or his agent, did, in fact, sell liquor, of some of the kinds mentioned, to be used upon his premises, to one person or more; and that the defendant did by himself or his agent, was there, ready and willing to sell to persons who might come there to buy and drink; though these facts are matters proper to be submitted to the jury as proof of three distinct sales, upon which they may find the defendant guilty as a common seller. *Com.* v. *Tubbs*, 1 Cush. 2.

70. Where there is an agreement for the sale of a quart of liquor, the price of a quart being paid, and one pint taken away by the purchaser, the other pint remaining in the cask with other liquor, it is held to be a sale of less than a quart under the statute of Indiana prohibiting such sales. *Murphy* v. *State*, 1 Carter (Ind.) 366.

71. In order to constitute one a dealer in spirituous liquors, so as to subject him to the penalty imposed by the statute of 1846, he need not actually do the business in person, and it is not necessary that it should be done in his presence, or by his express command; if he keeps liquors and employs clerks to deal them out in common with other commodities, he is liable for sales made by such clerks the same as if made by him in person. *State* v. *Dow*, 21 Vt. (6 Washb.) 484.

72. So where the owner of the store of goods, at which spirituous liquors are kept for sale, resides out of the State of Vermont, and the business of the store is managed by one who is his general agent in that respect, and who has the general direction and supervision of the clerks in the store, the same as his employer would have had if he had been present; held that such general agent is liable to the penalty imposed by the statute, although the liquors be in fact sold by the clerks. *Ib.*

73. In Massachusetts the offence of selling spirituous liquors in contravention of the Revised Statutes, c. 47, § 1, may be committed by a sale of such liquor mixed in small quantity with other unknown ingredients, and called for by customers, and sold as beer. *Com.* v. *Bathrick*, 6 Cush. 247.

74. One act of selling spirituous liquors without license, constitutes an offence under the Vermont statute of 1846. *State* v. *Paddock*, 24 Vt. (1 Deane) 312.

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75. Where an indictment was laid for selling spirituous liquors in quantities less than a quart, it appeared that a customer was in the habit of going to the defendant and contracting for a quart of liquor, but that he took only a pint at a time; held that only a pint was sold where only a pint was delivered at a time. *Murphy* v. *State*, 1 Smith 261.

76. Where a person was indicted under the statute of 1843, for keeping a disorderly house, called a tippling-house, where he sold liquor without license, and gathered together noisy, drunken people, who kept quarreling, fighting, &c., to the great annoyance and disturbance of the people, &c.; held, 1st, that the offence was not confined to a case where the sale of liquor was by a less quantity than a quart; 2d, that the defendant might be liable, although the quarreling, fighting, &c., were in the street; 3d, that the State was not bound to show that the defendant knew of the alleged annoyance. *Cable* v. *State*, 8 Blackf. 531.

77. In conformity with the Indiana act of 1846, a vote was taken in Center township, Marion county, relative to the granting of licenses to retail spirituous liquors in that township, and the voters decided by a large majority against the granting of such licenses. The county commissioners were duly notified of such vote. Held that the retailing of spirituous liquors afterwards in said township without a license, was, under the act of 1843, on the subject, indictable. *Ib.*

78. Where a party kept a few goods for sale in his shop, for the purpose of protecting himself against the statute against tippling-shops, and it appeared that his principal business was selling liquor, and that the liquor was drunken on his premises, it was held that he was not within the provision of the statute which excepted merchants selling liquor to be used off from their premises. *Com.* v. *McGeorge*, 9 B. Monr. 3.

79. Where one obtained license to keep a tavern, and the other agreed to pay for the license, and sold liquors in an adjoining room which he rented from a third person, not being at all under the control of the former, it was held that the latter was not protected by the former's license, but was liable for keeping a tippling-house. *Common.* v. *Branamon*, 8 B. Monr. 374.

80. Under the Kentucky act of 1839, respecting the sale of liquors in Louisville without a license, one is not liable for selling liquors unless the same were drank in his house. *Chevalier* v. *Commonwealth*, 8 B. Monr. 379.

81. The penalty for "dealing in the selling of foreign or domestic distilled spirituous liquors" may be incurred by a single act of selling without license. *State* v. *Keyes*, 15 Vt. 425.

82. A tavern-keeper, duly licensed, may have his bar-room in an apartment which is not connected by any doorway with his main building, but separate from it; and may there retail spirituous liquors by himself or partner, without a violation of the law—provided this separate bar-room constitutes, in good faith, a part of the tavern, and the license is not used as a fraudulent shield for a "grocery." *Gray* v. *Com.*, 9 Dana 301.

83. To constitute the statutory offence of keeping a tippling-house, there must be a retailing of liquor, without license, in a house kept by the retailer for that purpose. *Our* v. *Com.*, 9 Dana 30.

84. The master who knowingly permits his slave, while under his control, to retail liquor in a house belonging to the master, is himself guilty of the offence of keeping a tippling-house, and liable to the penalty. *Commonwealth* v. *Major*, 6 Dana 293.

85. It is not necessary to prove that it was done by the actual command of the master, or that he took the profits, to make out the charge against him. *Ib.*

86. A man may keep a tippling-house by his agent; and he who does so, whether a hired person or the wife, or servant of the principal, incurs the penalty. *Ib.*

87. Where one sells port wine by a less quantity than a quart at a time, without license, it is not a violation of the statute which prohibits such sale of spirituous liquor. *The State* v. *Moore*, 5 Blackf. 118.

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88. When a person is indicted under the Rev. Stat. of Massachusetts, ch. 47, §§ 1, 2, for presuming to be a common seller of spirituous liquors, and also for selling spirituous liquor in a single instance, to be used in or about his house or other buildings, without being first licensed as an innholder or common victualler, and is proved to have done the acts alleged in the indictment, it was held that he is liable to the penalties imposed by those sections, although he was not the owner nor lessee of the building where the sales were effected, and was merely a hired agent or bar-tender, without any interest in the profit of the sales, and acted in the presence and under the direction of his employer, unless his employer was duly licensed as an innholder or common victualler. *Commonwealth* v. *Hadley*, 11 Met. 66.

89. The selling of spirituous liquors after nine o'clock, on Sunday, is indictable, whether the party selling has a license to vend spirituous liquors or not. The privilege conferred by the license is subject to the restraints imposed by the general law in force when the license is granted. Such a license confers no right to violate the provisions of the Criminal code. See R. S. 1835, title, "Crimes and Punishments," art. 8, § 31, p. 209; ibid., "inns and taverns," p. 316. *Lambert* v. *State*, 8 Mo. 492.

90. Where one sells liquors by the quart to be drank in the house of the defendant, it does not constitute the offence of keeping a tippling-house, within the statute. *Moore* v. *the State*, 9 Yerg. 353.

91. Where a person was indicted for keeping a disorderly, common tippling-house, and the jury found a special verdict, that the defendant on one occasion kept a house in which there was a collection of twenty or thirty negroes more than belonged to the place, who got drunk, danced, and disturbed the neighborhood with noise and uproar; held that the facts so found by the special verdict did not constitute the offence of keeping a disorderly, common tippling-house. *Dunnaway* v. *the State*, 9 Yerg. 350.

92. In order to constitute a common tippling-house, of a disorderly character, there must be more than a single act of tippling and disorder. *Ib.*

93. Where one retails spirituous liquors to two distinct persons at the same time and place, it constitutes two distinct offences, and not one offence only. *Commonwealth* v. *Dow*, 2 Virg. Cas 26.

94. A husband is liable in a case where his wife, in his presence, retails spirituous liquors without a license. *Gening* v. *State*, 1 McCord 573.

95. An order in which the master of a slave consents that A. B. should sell and deliver to said slave ardent spirits whenever he shall apply for the same during the present year, is void, as being in derogation of the Act of Assembly. *State* v. *Hyman & Austin*, 1 Jones' N. C. 59.

96. The delivery of spirituous liquor to a slave after night-fall, in pursuance of an order from his overseer, for his (the overseer's) own use, is not unlawful. *State* v. *McNair*, 1 Jones' N. C. 180.

97. To render one liable to an indictment for retailing spirituous liquors in quantities not less than a quart, and permitting the same to be drunk on his premises, the liquor must be drunk in some place over which he has the legal right to exercise authority or control. *Downman* v. *the State*, 14 Ala. 242.

98. On an indictment for retailing spirits by the small measure, without a license, where the contract appeared to be to deliver to the purchaser, from time to time, spirits in parts of a quart as he should call for them, with an engagement on his part to take in the whole a quart in quantity, and an engagement on the part of the seller not to exact payment until that quantity should be received; it was held by the Court that this was a violation of the act of Assembly prohibiting the sale of spirits by the small measure without a license. *State* v. *Kirkham*, 1 Iredell 384.

99. Where a sign was posted in front of a house, on which was painted "A. B's. entertainment," and a piece of pasteboard was affixed to the same post, inscribed "Temperance;" held not such an indication that the occu-

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pant of the house kept a *tavern*, as would make him liable for the penalty imposed by 1 R. S. 678, § 10, 2d ed. *Overseers* v. *Warner*, 3 Hill 150.

100. To subject one to the penalty imposed by § 10 of the New York statute for erecting or putting up a *sign*, it must indicate that he keeps a *public house, licensed to sell* liquors, &c. *Ib.*

101. The selling of *spirituous liquors* without license, is an offence punishable as a misdemeanor under the statute upon that subject, although it contains no other prohibition than the imposition of a penalty, and a provision that all offences against the provisions of the act shall be adjudged to be misdemeanors. *People* v. *Brown*, 16 Wend. 561.

102. And it *seems* that the sale of spirituous liquor to a common drunkard, is an offence within the terms of the statute, whether the seller knew him to be a common drunkard or not. *Smith* v. *State*, 19 Conn. 493.

103. In Arkansas, to constitute the offence prohibited by sec. 2, ch. 159, Dig., it is not sufficient that defendant sold ardent spirits in quantities less than one quart, without license, but it is necessary that he should have kept a grocery for that purpose. *Ramsey* v. *State*, 6 Eng. 35.

104. It is not the mere act of keeping a grocery, but the further act of selling spirits in quantities less than one quart without license, that constitutes the offence. *Ib.*

105. It is not sufficient that defendant kept a grocery without license, but he must have kept it for the purpose of selling ardent spirits. *Ib.*

106. To constitute the offence, the party must keep a grocery, &c. Keeping spirits for sale in private houses, is not within the prohibition. *Ib.*

107. The offence of keeping a house of public entertainment for travellers, either in town or country, without first obtaining a license therefor from the county court, is punishable by indictment or presentment, although spirituous liquors be not retailed in the house; but no tax can be demanded on granting a license to keep a house of public entertainment, unless it be in a city, or incorporated town or village. *State* v. *Cloud*, 6 Ala. 628.

108. The retailing of spirituous liquors on Sunday, being a violation of the act of 1846, ch. 90, the grand jury have power, under the 13th section of the act, to cause witnesses to be brought before them to testify in relation to this species of unlawful retailing, and make presentment of such offences, upon information thus acquired. *Doebler* v. *the State*, 1 Swan 473.

109. The retailing of spirituous liquors in less quantity than a quart, or the sale of a quart or greater quantity to be drank upon the premises where sold, if no license has issued to the person so retailing or selling, is a violation of the provisions of the act of 1846, ch. 90; and in either case, by virtue of the 13th section of the act, the grand jurors may make presentment upon the information of witnesses brought before them upon a subpœna issued at their instance. *Glenn* v. *the State*, 1 Swan 19.

110. In Michigan, the penalty given by the Rev. Stat. for retailing spirituous liquors without a license, as a tavern-keeper or common victualler, may be recovered by indictment. *People* v. *Hart*, 1 Mann. (Mich.) 467.

IV. Information and Complaint for Retailing Spirituous Liquors.

111. Where an information sets forth the offence in the words of the act, it is good; and where an information for a violation of the license law alleges that the respondent sold distilled spirituous liquors in a less quantity than twenty gallons, and in quantity of one pint, and more; it was held enough to prove the offence under each count, as specific as stated; and proof that the respondent sold distilled spirituous liquors in quantities of one pint or more, and less than twenty gallons, was all that is required. *State* v. *Paddock*, 24 Vt. 312.

112. Where an information contains one hundred counts, each count having a distinct caption, and was only signed at the close of the last count, and upon

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the last page, but the pages were connected together; the information was held to be good. *Ib.*

113. Where an information, founded on the statute relating to the sale of spirituous liquors, averred that on or about the 24th day of February, 1819, said A. did sell, and did offer to sell, by himself and an agent, wines, spirituous liquors, and other intoxicating beverage, to one B., being addicted to habits of intoxication, said A. knowing him to be so addicted, and said B. being also a common drunkard; it was held: 1. That the information was not defective for duplicity, because it charged A. with selling and offering to sell, as these acts may have been parts of one and the same transaction; 2. That it was not obnoxious to this objection, because it alleged that A. did the acts charged, by himself and by an agent, as those acts may have been joint, and done by both acting together; 3. That for the same reasons it was not defective for uncertainty or repugnancy. *Barnes* v. *State*, 20 Conn. 232.

114. Where an information for a violation of the 2d section of the statute of 1846, regulating the sales of wines and spirituous liquors, charged that at, &c., on &c., the defendant, not being a taverner, kept a certain store or shop, situate, &c., for the purpose of selling wine or spirits, to be drank thereat, it was held that such information was not defective for want of uncertainty, either in the description of the place alleged to have been kept by him, or in the description of the liquors for the purpose of selling which it was kept. *Barth* v. *the State of Connecticut*, 13 Conn. 431.

115. The words store and shop, as employed in this statute, and also in the information which follows the statute, are terms of equivalent meaning; and therefore, the averment as to the place kept, though in the alternative form, is substantially an averment, not that the accused kept one or another of two different places, but that he kept one place, called a store or shop. *Ib.*

116. In this case, the offence consists of keeping a place for a certain purpose; and though the purpose is an indispensable ingredient of the offence, and cannot be omitted, yet if the one charged be within the statute, and alleged in the words of the statute, it is sufficient. *Ib.*

117. Two or more counts for distinct offences may be included in the same information, and the fine provided by statute, imposed on the defendant under each count. *Barnes* v. *State*, 19 Conn. 398.

118. In Connecticut, where the complaint of a grand jury for a violation of the 2d section of the statute of 1846, regulating the sale of wines and spirituous liquors, charged the offence to have been committed "on or about the 24th day of May, 1847," it was held that the complaint was not insufficient for want of the requisite certainty as to the time, nor because it was expressed in figures, and not in words at length. *Rawson* v. *State*, 19 Conn. 292.

119. Where the complaint charged that the defendant kept a certain house, store and shop, for the purpose of selling wines, &c., to be drank thereat, it was held that this was not equivalent to a charge that the defendant kept a house and a store and a shop, as three distinct and separate places for the purpose of selling wines, &c., but the words "house, store and shop," were here employed as designating but one place, and consequently the complaint charged but one offence. *Ib.*

120. Where the words of the statute on which the complaint was founded were, "if any person, or persons except taverners, by agent or otherwise, shall keep any house," &c., and the complaint charged that the defendant, &c., without saying by agent, or in what manner, it was held that the offence set forth in the statute was sufficiently described in the complaint. *Ib.*

121. Where the complaint charged that the defendant sold wine, spirituous liquor, or other intoxicating beverage, to R., he being a common drunkard, it was held that the terms *wine* and *spirituous liquor* were not of the same meaning as *other intoxicating beverage*, consequently the offence was charged in the alternative, and the complaint on that account defective. *Smith* v. *State*, 19 Conn. 493.

122. Where a complaint is founded

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on the Rev. Sts. c. 47, § 3, which alleges that the defendant did presume to be a retailer, &c., and did sell to a person named therein, a specific quantity of spirituous liquor, it is not bad for duplicity; nor is such a complaint defective, in not showing what kind of spirituous liquor the defendant is charged with selling, or to whom it was delivered, or by whom it was carried away. *The Com.* v. *Wilcox*, 1 Cush. 503.

123. In Maine there may be a prosecution for unlawfully selling spirituous liquor, by civil action, or by complaint in a criminal form. *Riker* v. *Petitioner*, 32 Maine (2 Red.) 37.

124. Where there is a conviction for such offence, the appeal may be made after commitment; the justice need not wait forty-eight hours to give opportunity for appeal. *Ib.*

125. To obtain a forfeiture of intoxicating, or spirituous liquors, under the statute of Maine, "for the suppression of drinking-houses and tippling-shops," it must be alleged in the complaint, and shown on the trial, that the liquors were intended for sale in the city or town in which they were kept or deposited. *The State* v. *Gurney*, 33 Maine (3 Red.) 496.

126. Where the complaint mentions no person as the owner, keeper or claimant of the liquors, the swearing of the jury in the form as of a criminal trial, and the finding that the defendant is guilty in such a case, would be only a nullity. *State* v. *Robinson*, 33 Maine 564.

127. To obtain a forfeiture under the Maine act, it must be distinctly alleged in the complaint, and shown on the trial, that the liquors were intended for sale in the city or town in which they were kept or deposited, and by some person not authorized to sell the same in such city or town, under the provisions of the act; but it need not be averred or proved, that they were intended for sale in the shop, or other binding wherein they were kept or deposited. *Ib.*

128. Where a complaint is founded on the Rev. Sts. c. 47, it is a sufficient averment of a sale in violation of the 3d section, that the defendant "then and there sold to the complainant spirituous liquor in a less quantity than 28 gallons." *Com.* v. *Roberts*, 1 Cush. 505.

129. Where a complaint, founded on the Rev. Sts. c. 47, § 3, alleged that the defendant sold to the complainant spirituous liquor in a less quantity than 28 gallons, without being first duly licensed as a retailer of wine and spirits according to law, it was held that the latter words did not well allege that the defendant was not duly licensed to make the sale complained of. *Ib.*

130. A complaint which only charges the crime of having sold a quantity of spirituous liquors, charges no criminal offence. *The State* v. *Lane*, 33 Maine (3 Red.) 536.

131. Where a complaint is made before a justice of the peace, against one for selling spirituous liquors, it will be defective if it omits to charge to whom the liquor was sold, or the quantity, or where it was to be used. *Commonwealth* v. *Dean*, 21 Pick. 334.

132. Where a complaint alleges that A. sold spirituous liquors to be used in his dwelling-house, not being licensed as an innholder and common victualler with authority to sell wine, brandy, rum and other spirituous liquors, it will be sustained by evidence that he sold spirituous liquors as alleged, without being licensed to sell it, though he proves that he was licensed to sell wine and other fermented liquors. *Commonwealth* v. *Thayer*, 8 Metc. 525.

133. Where a complaint is made against a defendant for a violation of the Rev. Sts. c. 47, § 3, it is sufficient to sustain a conviction on it, if it alleges that the defendant not being duly licensed, sold spirituous liquor to A., in a less quantity than twenty-eight gallons, without charging that it was not delivered and carried away all at one time. *Commonwealth* v. *Leonard*, 8 Met. 530.

134. In a complaint for illegally selling spirituous liquor, under the stat. 1846, c. 205, § 5. of Maine, it need not be averred by whose hand the defendant sold; and whether wine is a spirituous liquor, is a question for the jury. *State* v. *Stewart*, 31 Maine (1 Red.) 515.

135. Where a complaint was made

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for selling "one glass of rum," and objected to because it expressed a quantity not known in law, it was held good. *State* v. *Reed*, 35 Maine (5 Red.) 489.

136. Where a complaint was made in this form: "F. on oath complains against P. at M., on the 1st of February in the year 1844, did sell to C. one glass of spirituous liquor," &c., it was held that the word "against," might be rejected as surplusage, and that the complaint without that word was good. *Commonwealth* v. *Penniman*, 8 Met. 519.

137. Where a complaint charges that an offence was committed "on the 1st of February, in the year 1844," it is no good objection thereto that it is dated "the 5th day of February, 1844," without the word year. *Ib.*

138. In Kentucky, a presentment under the second section of the act of 1834, in regard to tavern-keepers, was held defective, because it only charged that the defendant sold liquor to a slave "other than his own," when it should have charged all the qualifications contained in the act. *Commonwealth* v. *Kenner*, 11 B. Mon. 1.

V. Indictment under the Statutes Regulating Inns, License, &c.

139. Where an indictment founded on the Rev. Stats. of Maine, c. 36, § 17, alleges that the accused did presume to be a common retailer of the liquors mentioned in that section of the statute, without license, within the time specified, in less quantities than twenty-eight gallons, and that he did sell such liquors to divers persons without license, within the time specified; held that but one offence is charged. *State* v. *Churchill*, 26 Maine (12 Shep.) 306.

140. Where an indictment was found against A., for keeping a place where spirituous liquors were sold without license, in a disorderly manner, to the disturbance and common nuisance of B. and others, it was held erroneous to quash the indictment for the omission of the preposition "of," before the name of B. *State* v. *Rhodes*, 2 Carter (Ind.) 321.

141. Where an indictment alleges that defendant "did unlawfully sell one half-pint of brandy, of the value of ten cents, to one A., and suffered the same to be drank at the place of sale, without grocer's license, a dramshop-keeper's license, an inn-keeper's license, or any legal authority to sell," &c., it is sufficient, the negation as to license being sufficiently broad. *State* v. *Hornbeak*, 15 Mo. 478.

142. Where an indictment charges the sale of one quart of whiskey, and suffering the same to be drank at the place of sale, without grocer's, dram-shop-keeper's, or inn-keeper's license, it is defective. The negation is not broad enough. A tavern license should be negatived. *The State* v. *Hadden*, 15 Mo. 447.

143. Where an indictment charges the selling to have been done "without having a license for that purpose, continuing in force contrary to form," &c., it is good. *State* v. *Wilson*, 15 Mo. 503.

144. Where an indictment is laid for selling liquor without license, the name of the person to whom sold, and the price, are unnecessary, as the offence does not violate an individual right. *State* v. *Ladd*, 15 Mo. 430.

145. And where the penalty for each offence is the same as in section 7, both offences may be alleged in the same indictment, and should be alleged in the conjunctive. *State* v. *Woodward*, 25 Vt. 616.

146. Where an indictment charges with selling one pint of whiskey without a dram-shop, tavern, grocer's, merchant's, or any other kind of license, it is sufficient. *State* v. *Owen*, 15 Mo. 506.

147. Where the indictment alleged that the defendant "became a dealer in intoxicating liquors, without having a license therefor in force, and did sell and furnish intoxicating liquors in a less quantity than twenty gallons," &c.; it was held that the indictment was sufficient, and that the allegations beyond what is contained in the prescribed form, may, if necessary, be regarded as surplusage. *State* v. *Woodward*, 25 Vt. (2 Deane) 616.

148. The form laid down in sec. 12 of the comp. stat. 507, is not extended

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beyond prosecutions before a justice of the peace. *Ib.*

149. In Maine, the statute of 1846, c. 205, prohibits the sale without license, of domestic spirituous liquors, in any quantity whatever, and of imported liquors in any quantity less than that which the revenue laws of the United States allow to be imported; it is held that an indictment which charges the defendant's selling spirituous liquors without license, in quantities less than the revenue laws allowed to be imported, need not state whether the liquors were imported or not. *State* v. *Crowell*, 30 Maine (17 Shep.) 115.

150. An indictment was held good which charged that the defendant on, &c., at, &c., "he not being then and there first licensed as a retailer of wine and spirits, as provided by the forty-seventh chapter of the Revised Statutes, did presume to be, and was a retailer of wine, brandy, rum, and spirituous liquors," to one D. E., "in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time," &c. *Com.* v. *Kimball*, 7 Met. 304.

151. An indictment under the Rev. Sts. c. 47, § 3, is sufficient, which avers that the defendant on, &c., at, &c., without any legal authority or license, "did presume to be, and was a retailer of spirituous liquors in less quantity than twenty-eight gallons, and that he delivered, and carried away all at one time and did then and there sell two quarts of spirituous liquor to "a person named." *Goodhue* v. *Commonwealth*, 5 Met. 553.

152. In New Jersey, an indictment under the statute, Rev. Laws 744, § 4, prohibiting the sale of spirituous liquors by small measure, without tavern license, should particularize the kind of liquor sold. *State* v. *Fox*, 1 Harris. 152.

153. Where an indictment on the Rev. Stats. c. 47, § 1, charges the defendant with being a common seller of spirituous liquors, to be used in his house or other building, without authority or license, it is not necessary to allege that the defendant is an inn-holder or common victualler. *Commonwealth* v. *Pearson*, 3 Met. 449.

154. An indictment on the Rev. Stats. c. 47, § 2, may well charge that the defendants presumed to be, and were commen sellers, &c., on a certain day, and on divers other days and times between that day and the day when the indictment was found. *Com.* v. *Tower*, 8 Met. 527.

155. And where such indictment averred that the defendants presumed to be, and were common sellers of wine, brandy, &c., to be used in their dwelling-house, by them used and occupied, without being first licensed therefor according to law; held that the averment of want of license applied to the sale of liquor, and not to the occupation of the house, and that it negatived a license to either of the defendants as well as a joint license to them. *Ib.*

156 Where an indictment on the Rev. Stats. c. 47, charged that B., on the 30th of April, 1844, and on divers other days and times between the 1st of January and the 1st Monday of May, 1844, did presume to be and was a retailer and seller of spirituous liquor in a less quantity than twenty-eight gallons, &c., without being first duly licensed as a retailer of wine and spirits, as is provided by law, and did then and there sell and retail spirituous liquor to J. C., in a quantity less than twenty-eight gallons, &c., to wit: in the quantity of half a pint; it was held that the words in italics might be rejected as surplusage, and that the remaining words well alleged a single act of selling spirituous liquor by the defendant without license. *Commonwealth* v. *Bryden*, 9 Met. 137.

157. In an indictment on the Rev. Stats. c. 47, § 2, it need not be alleged that the defendant sold spirituous liquors in his dwelling-house or other building. *Commonwealth* v. *Stowell*, 9 Met. 569.

158. Where an indictment on the Rev. Stats. c. 47, § 2, avers that the defendant "sold to C., spirituous liquor to be used in his dwelling-house," it shall be construed to mean the dwelling-house of the defendant. *Ib.*

159. Where an indictment charged that the defendant on a certain day, "presumed to be a seller of wine, brandy, rum, and other spirituous liq-

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uors, to be used in and about his house, without being first licensed as an inn-holder or common victualler, with authority to sell spirituous liquor, and did then and there sell to one C., one-half gill of spirituous liquor, to be used in and about his dwelling-house, without being first duly licensed as an inn-holder or common victualler, with authority to sell spirituous liquor;" held that this indictment was not double, that there was a good charge against the defendant as a common seller, and therefore that the words which alleged that he presumed to be such seller might be rejected as surplusage, and that the remaining allegation constituted a good indictment for a single sale. *Ib.*

160. By the first section of c. 47, of the Rev. Stats., the Legislature intended to provide for the punishment of common sellers of spirituous liquors without license; still it need not be alleged in an indictment on that section that the defendant was a common seller; an indictment on that section is valid, if it charge that the defendant on a certain day, and during all the time between that day and the day of the finding of the indictment, was, without being licensed, a seller of rum, &c., to be used in his dwelling-house, &c. *Commonwealth* v. *Leonard*, 8 Met. 529.

161. In an indictment for selling intoxicating liquors, to be used in and about the premises of the seller, it need not be alleged that he was not duly licensed under the statute of 1850, c. 232, to sell intoxicating liquors for mechanical and medicinal purposes. *Commonwealth* v. *Shaw*, 5 Cush. 522.

162. Two or more persons may be jointly indicted and charged with the offence of selling spirituous liquors without license. *Commonwealth* v. *Sloan*, 4 Cush. 52; vide *Com.* v. *Tower*, 8 Met. 527.

163. An averment in an indictment against two for selling spirituous liquors without license, in contravention of the Rev. Stats. c. 47, of Mass., that the defendants "did presume to be retailers of wine, brandy, rum and other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, without being first licensed as retailers of wine and spirits, according to law," is a good averment that the defendants were neither jointly nor severally licensed, and will sustain a verdict of guilty against one alone. *Ib.*

164. An indictment for a violation of the license law of 1846, is valid, upon motion in arrest of judgment, although it only negate the respondent's being licensed "to sell distilled spirituous liquors," and charge a single act of sale. *State* v. *Clark*, 23 Vt. (8 Wash.) 293.

165. In a complaint for a violation of the act "to restrict the sale of intoxicating drinks," it need not be alleged by whose hand an illegal sale is made; the offence is committed where the sale is made, either by the defendant or by his clerk, or servant, or agent; and where the complaint alleged that the defendant made a sale, and the proof was, that in the absence of the defendant a person bought liquor at his store, and that a man behind the counter, unknown to the witness, drew the same and received the pay, the jury were instructed that if they found the person who sold the rum was the "agent, servant, or clerk" of the defendant, the defendant would be liable; and they returned a verdict of guilty; held that the evidence was sufficient for them to find that the person selling was the "agent, servant or clerk" of the defendant, and that they need not find which of those positions he held. *State* v. *Brown*, 31 Maine (4 Red.) 520.

166. The exception in the first section of the act to "restrict the sale of intoxicating drinks," is sufficiently negatived by allegations that the same was not wine or spirituous liquors imported into the United States from any foreign port or place. The Christian name of the buyer need not be stated in such complaint; it is no defence that the liquor was sold and used solely for medicinal purposes, when the defendant had no license, although no one else in town had license to sell for medicinal purposes. *Ib.* 522.

167. Where one has license as a "taverner" under the Rev. Statutes, c. 47, § 21, to sell fermented liquor only, he cannot be convicted of selling spirituous liquors on an indictment charging that he sold it "without being duly

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licensed as an inn-holder;" in such case the indictment should charge that the defendant, being licensed as an inn-holder, with authority to sell fermented liquor only, did sell spirituous liquor. *Com.* v. *Thayer*, 5 Metc. 246.

168. An indictment will not be good where it follows merely the words of the statute, that the defendant "presumed to be a retailer or seller of spirituous liquors;" it must also allege, that at a time and place stated, he sold to a person named, or a person unknown, as the case may be. *Com.* v. *Thurlow*, 24 Pick. 374.

169. An indictment under the Rev. Statutes, c. 47, § 3, which alleges the offence of presuming to be a seller of spirituous liquors without a license, must charge that the defendant was not duly licensed. *Ib.*

170. But not so under Revised Statutes, c. 47, § 3, against presuming to be a retailer or seller of spirituous liquors. *Ib.*

171. An indictment under statute 1838, c. 157, providing that no person shall sell spirituous liquors in less quantity than fifteen gallons, &c., must allege that the quantity sold is less than fifteen gallons; thus, an allegation merely that the defendant sold "one pint," is bad. *Com.* v. *Odlin*, 23 Pick. 275.

172. In an indictment under the statute of 1786, c. 68, § 1, it is enough to allege that the defendant presumed to be a common seller of wine, &c., without specifying particular instances of selling *Com.* v. *Pray*, 13 Pick. 359; *Com.* v. *Oldin*, 23 Pick. 275.

173. Where an indictment is framed under Revised Statutes, c. 47, § 1, for presuming to be a common seller, it is material whether the sales were all made to the same person or different persons. *Ib.*

174. An indictment under the statute of 1838, c. 157, which charges the defendant with selling "spirituous liquors" in a less quantity than fifteen gallons, without license, but not specifying the kind of spirituous liquors sold, is sufficiently definite, and such indictment is sustained by proof of the sale of brandy. *Ib.*

175. If such indictment only alleges that the defendant, not being licensed, sold one pint of spirituous liquors, it is defective, as it does not negative the sale of fifteen gallons or more. *Ib.*

176. Where an indictment alleged the sale of spirituous liquors in less than fifteen gallons, and that delivered and carried away all at one time, to wit, "two quarts of spirituous liquors," it was held to be good. *Ib.*

177. In Virginia, an information under the 3d or 17th section of the act of March 3, 1840, must contain an allegation that the person selling had no license or certificate to sell spirituous liquors. *Hampton's case*, 3 Gratt. 631.

178. Two or more persons may be jointly indicted for selling liquors without a license; and when they are convicted, a several fine of thirty dollars each may be imposed. *Com.* v. *Harris*, 7 Gratt. 600.

179. Where an indictment for selling spirituous liquors without license, in charging the kinds of liquors sold, employed the words "or other spirituous liquors;" held that the use of the disjunctive was not defective. *Morgan* v. *Com.*, 7 Gratt. 592.

180. In Maryland, where an indictment is founded upon the act of 1847, c. 193, prohibiting the sale of spirituous liquors on the Sabbath day, it will be bad unless it describe the party accused as a licensed tavern-keeper, or a licensed retailer of spirituous liquors, they being the class of persons upon whom the provisions of the act were designed to operate. *Bode* v. *State*, 7 Gill. 326.

181. A statute containing an exception so incorporated with its enacting clause that the one cannot be read without the other, the rule of pleading is, that the indictment must negative the exception; but where, after general words of prohibition, an exception is created in a subsequent clause or section, it may be pleaded by the accused as a matter of defence. *Ib.*

182. But this rule has no reference to an indictment under the act of 1847; that act, by its true construction, being restricted and limited in its character and prohibitions to a designated class, there are no exceptions to be nega-

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tived or to be interposed by the accused as a matter of defence. *Ib.*

183. The provisions of this act with respect to the forfeiture of the license of one who is convicted a second time for the same offence, clearly requires incorporating into the indictment a description of the person charged. *Ib.*

184. Where, in an indictment upon the statute of March 7, 1834, for retailing ardent spirits without license, the charge was that the spirits were "to be drunk at the place where sold," it was held that this showed the indictment to be founded on the 17th, not the 3d section of that statute, and that such charge could not be rejected as surplusage, but must be proved. *Coe's case*, 9 Leigh 620.

185. Where an indictment is found for selling spirituous liquors to a person to the jurors unknown, it is good. *State* v. *Carter*, 7 Humph. 158.

186. Where an indictment alleged the selling of liquor "to be drunk on the premises," it was held to be the same as alleging, "with the intent to be drunk." *Bilbro* v. *State*, 7 Humph. 534.

187. Where an indictment lies for keeping a dram-shop, it should state the kind, quantity, and price of the liquor sold, and to whom sold. *Neales* v. *State*, 10 Mo. 498.

188. In Virginia, where an indictment is found for selling ardent spirits without a license, it may charge the sale to two persons in the same count. *Peer's case*, 5 Gratt. 674.

189. Two counts, one for selling ardent spirits without a license under the 17th section of the act of March 7, 1834 (Session Acts of Virginia, 1833 and 1834, p. 7), and another under the 3d section of the same act, may be joined in the same indictment. *Ib.*

190. In an indictment for selling ardent spirits without a license, the omission in the counts of the words "and certificate," does not make the counts bad. *Ib.*

191. An indictment under the third section of the act of 1839 and 1840, (Session Acts of Virginia, c. 2, p. 5,) for selling liquors without license, is sufficient, though it does not negative the exceptions and provisos contained in the 4th section. *Com.* v. *Hill*, 5 Gratt. 632.

192. Where an indictment charges that the offender "did take upon himself and presume to be a common retailer of wine," &c., without license, and "did then and there," as aforesaid, sell and cause to be sold to divers persons, to the jurors unknown, divers quantities of strong liquors;" held that it charges but one offence. *State* v. *Stinson*, 5 Shep. 154.

193. Where an indictment is framed under the statute, it is not necessary to state what penalty or forfeiture is incurred, or to what uses it is applied, as these depend upon the law. *Ib.*

194. An indictment framed under these statutes should be in the name of the State. *Ib.*

195. The sale of spirituous liquors in any quantity on Sunday, is an indictable offence under the acts of 1838, c. 159, and 1846, c. 90. *State* v. *Eskridge*, 1 Swan 413.

196. The statement of the day of the month in indictments for offences committed on Sunday (though the doing of the act upon that day is the gist of the offence), is no more important than in other offences, and hence it is immaterial if the indictment charge the offence to have been committed on Sunday, but upon a day of the month which, according to the almanac, was some other day of the week. *Ib.*

197. Where an indictment was founded upon the stats. of 1834, ch. 141, § 1, and 1835, concerning inn-holders, retailers, &c., it was held that the name of the complainant need not be inserted in the indictment, that by W. in the county of K., the town of W. was intended; that the allegation, from the first day of November, 1835, until the finding of the indictment, is a good statement of the time when the offence was committed; that alleging afterwards that the accused had also been guilty, before the time alleged, does not impair the force of the prior allegation; that the averments that the accused did presume to be a common retailer of liquors mentioned in the statute, within the time specified, and that he did sell such liquors to divers persons, sufficiently designate the

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offence ; that to sell more than twenty-eight gallons at one time is unlawful, whether the liquor is carried away at one time, or at several times ; and that the indictment is bad for duplicity, because it alleges that the accused did sell wine, brandy, rum, and other strong liquors, as but one penalty is incurred under this section of the statute ; although each description of liquor may have been sold. *The State* v. *Cottle*, 3 Shep. 473.

198. In an indictment for selling spirituous liquor without license, in Missouri, it need not allege that the defendant sold in the capacity of a dram-shop-keeper. *Austin* v. *State*, 10 Mo. 591.

199. It is not necessary that such indictment should negative that it was sold under circumstances stated in the statute, which made it legal. *State* v. *Buford*, 10 Mo. 703.

200. Where an indictment charged the defendant A. with retailing liquor in Noble County, without license, to be drunk in the house of him, the said A., where the same was so sold aforesaid ; held that the fact that the said house was in Noble County (supposing it ought to appear), was established with sufficient certainty. *The State* v. *Shearer*, 8 Blackf. 262.

201. By statute of 1837, selling liquor is prohibited within two miles of any religious assembly, at a "booth, tent, wagon, huckster-shop, or other place erected, brought, kept, continued, or maintained, within the distance aforesaid," where an indictment under the statute alleged a selling within one-half mile of a religious assembly, but did not allege that the liquor was sold at a booth, &c., kept, &c. ; held that no offence was charged. *Bouser* v. *the State*, 1 Smith 408.

202. Where an indictment is found for a violation of the statute against the presuming to be "a seller of wine, brandy, rum, or other spirituous liquors," &c., without being licensed as an inn-holder (R. S. of Michigan, 1838, p. 203, § 1), which charged the defendant with presuming to be a seller of whiskey, alleging it to be spirituous liquor, without such license, it was held good ; and that the presuming to be a seller of whiskey was forbidden by the statute, although that kind of spirituous liquor was not therein specifically stated. *People* v. *Webster*, 2 Doug. 92.

203. In Arkansas, under the act prohibiting the keeping of a grocery for the retailing of ardent spirits without a license, an indictment alleging that the defendant kept a grocery, and did retail ardent spirits without a license, is not sufficient. *Hensley* v. *the State*, 1 Eng. 252.

204. In Virginia, where the record of the finding of an indictment for retailing ardent spirits without a license, recited that the grand jury presented an indictment against A. for "retailing liquors," a true bill, it was held sufficient. *Tuffi's case*, 8 Leigh 721.

205. The offence is well charged in the indictment by averring that the defendant sold by retail, without license, "whiskey, brandy, and other liquors, to the jury unknown," to be drank at the place where sold. *Ib.*

206. In an indictment on the Rev. Stats. c. 47, § 2, for selling spirituous liquors, to be drank in or about the seller's house or other buildings, without being licensed as an inn-holder or common victualler, it need not be alleged that the quantity sold was less than twenty-eight gallons. *Commonwealth* v. *Brown*, 12 Met. 522.

207. In an indictment for selling spirituous liquors by the small measure, without license, the omission of the auxiliary verb "did," which should have been joined with the words "sell and dispose of," is not fatal upon a motion in arrest. *State* v. *Whitney*, 15 Vt. 298.

208. The County Court have original jurisdiction in such case, though the fine is limited to ten dollars. *Ib.*

209. In an indictment against a person for selling spirituous liquors by the small measure, without a license, it is not necessary that it should be averred to whom they were sold, or the number of the persons. *State* v. *Munger*, 15 Vt. 290.

210. An averment that the respondent sold rum, brandy, and gin, is sufficient, without an averment that they were spirituous liquors. *Ib.*

211. The negation of license must be

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broad enough to cover all the sources from which it might have been obtained. *Ib.*

212. If the negation of license to sell is, as to quantity, coextensive with the quantity charged to be sold, it is sufficient. *Ib.*

213. The general negation—"not having a license to sell said liquors, as aforesaid," relates to the time of sale, and not to the time of finding of the bill, and is sufficient. *Ib.*

214. It is not necessary that the offence of selling spirituous liquors without license, should be charged to have been committed with force and arms. *Ib.*

215. Where a distinct sale of spirituous liquors is alleged to have been made on a day certain, the count is not vitiated by adding an averment of sales at divers times between that and the finding of the bill; but the averment may be regarded as surplusage. *Ib.*

216. An indictment that charges only that the defendant kept a tippling-house, by retailing in a certain town, will not justify the fine of sixty dollars. *Our* v. *Com.*, 9 Dana 30.

217. An indictment charging the defendant with "keeping a tippling-house in the town of P., by then and there retailing," etc., charges only a retailing in that town; not that it was in a house kept by him for that purpose. *Ib.*

218. A general charge of keeping a tippling-house, without a license, makes a good indictment. But if, beside the general charge, the indictment specifies the facts, and they do not amount to the offence, the indictment is bad. *Morrison* v. *Com.*, 7 Dana 218.

219. An indictment charging that the accused kept a tippling-house, "not under pretence of keeping a tavern," is good after verdict, as those terms manifestly imply that he had no license. But the terms, kept, etc., "without having obtained a license to keep tavern," are more appropriate. *Webster* v. *Com.*, 7 Dana 215.

220. An indictment should allege the facts necessary to constitute the offence charged, by averments direct, positive, and certain, and not by way of argument and inference. *Bush* v. *Republic*, &c., 1 Texas 455.

221. An indictment alleging that defendant did then and there, in said house, keep a tippling-house, without having first obtained a license then and there to keep a tavern, is sufficient, unless restricted by other words in the indictment. *The Com.* v. *Turner*, 4 B. Monr. 4.

222. The facts constituting the offence should be averred in the indictment with all convenient reasonable certainty. *Burch* v. *Republic*, 1 Texas 698.

223. It will generally be sufficient if the indictment follows the exact words of the statute in describing the offence, and it is never safe to depart from them. But where the statute uses a general term, it is not enough to employ that term only, but the pleader must also state the species, according to the truth of the case; or where general expressions are used in the statute, it is not enough to employ those general words only, but the facts intended to be included and forbidden by them should be specified. *Ib.*

224. A presentment for retailing spirits, without stating that it was done in any other place than in the county, is not sufficient. *Grimme* v. *the Com.*, 5 B. Monr. 263.

225. A presentment for selling spirits, &c., in the city of Louisville, alleging a selling in quantities less than a quart, &c., is sufficient under the acts of 1838–1839. *Redding* v. *the Com.*, 3 B. Monr. 339; *Haskell* v. *the Com.*, 3 B. Monr. 342.

226. To allege that A. B., &c., &c., did then and there presume to keep a tippling-house, by then and there selling ardent spirits by retail, without a license to keep a tavern, &c., is not a good allegation to support the averment. *Woods* v. *Com.*, 1 B. Monr. 74.

227. But an indictment which alleges the selling, &c., and permitting it to be drank on the premises, is good. *Overshiner* v. *the Com.*, 2 B. Monr. 344.

228. In Mississippi, the provision in the statute of 1829, regulating spirituous liquors, against selling and retailing any wines or spirituous liquors, in

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less quantities than one gallon, or suffering the same or any part thereof to be drank on the premises, recites two distinct offences; one count, therefore, charging in the words of the statute, charges two offences, and is bad for duplicity. *Miller* v. *the State*, 5 How. Miss. 250.

229. In an indictment for selling spirituous liquors without license, it need not be stated that the defendant had not a permit from the clerk of the board of county commissioners to sell, &c. *The State* v. *Watson*, 5 Blackf. 155.

230. In an indictment for retailing spirituous liquors without license, it is not necessary to state the kind of liquor sold. *The State* v. *Mullinix*, 6 Blackf. 544.

231. An indictment for selling spirituous liquors contrary to the 56th section of the act relative to crime and punishment, should allege that the liquor was sold to be drank in the house, &c., of the seller. *The State* v. *Freeman*, 6 Blackf. 248.

232. An indictment for retailing spirituous liquors within the borough of Vincennes, without license, by the president and trustees, &c., need not allege the existence of the corporation, nor of an ordinance regulating the sale, &c., nor state the kind of liquor sold. *The State* v. *Graeter*, 6 Blackf. 105.

233. An indictment against a party for selling spirituous liquors to an Indian, cannot be objected to merely on the ground that the name of the Indian is not inserted, if the indictment alleges that the name is unknown to the jurors. *The State* v. *Jackson*, 4 Blackf. 49.

234. An indictment charging the defendant with selling spirituous liquors, to wit, rum, brandy, whiskey, and gin, in less quantities than one quart, without having first obtained a license, is good. *State* v. *Whitted*, 3 Ala. 102.

235. In an indictment under the statutes, for retailing liquors by a measure less than a quart, the expression, less than a quart, must be annexed to the description of the offence. *The State* v. *Shaw*, 2 Dev. 198.

236. An indictment for playing at cards in a storehouse, where spirituous liquors are retailed, must allege such to have been the character of the storehouse when the playing took place; and it is not enough to aver that spirituous liquors were retailed there when the indictment was found—the playing being proved on a previous day. *The State* v. *Coleman*, 3 Ala. 14.

237. Where the defendant pleads not guilty to an indictment, containing three counts, and the entire cause is submitted to a jury, who find a verdict as to one count, without responding to the others, the cause is at an end. *Ib.*

238. A single act of retailing is a violation of the law prohibiting the selling of spirituous liquors without a license. *The State* v. *Cassety*, 1 Rich. 90.

239. A conviction for retailing to one person is no bar to an indictment for retailing to another, anterior to the finding of the bill on which the conviction was had. *McBride's case*, 4 Me. 332, on this point overruled. *Ib.*

240. Two bills for retailing were found against the defendants at the same time. The first charged a retailing to A. B., and to divers other persons; the second a retailing to C. D., and to divers other persons. A conviction was had on the first indictment, and it was pleaded in bar of the second; held that the words, "and to divers other persons," in both indictments, must be rejected as surplusage, and the plea in bar was overruled. *Ib.*

241. In North Carolina, in an indictment for retailing spirituous liquors by the small measure without a license, under the statute of 1825 (1 Rev. Stat. ch. 34, § 81), it is necessary that the retailing was to some particular person or persons, or to some person or persons to the jurors unknown. *The State* v. *Faucett*, 4 Dev. & Batt. R. 107.

242. Where, on the trial of an indictment for retailing, &c., the special verdict does not find that the selling was without license, judgment must be rendered for the defendant, for such an averment is necessary in an indictment under the statute, and a special verdict must be found by a jury. *The State* v. *Kirkham*, 1 Iredell 384.

243. An indictment for retailing with-

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out license, which alleged that the defendant "did sell and retail one quart of rum to a certain W. A., the said defendant then and there not having a license to sell and retail spirituous liquors," &c., held to be sufficiently descriptive of the offence. *The State* v. *Moody*, 3 Hill's S. C. R. 187.

244. An indictment against a retailer of spirituous liquors, for permitting gaming in his house, should charge that the defendant was a licensed retailer of spirituous liquors. *The State* v. *Kennedy*, 1 Ala. 31.

245. In an indictment for selling liquor by small measure, the name of the person to whom it was sold must be specified, if known. *The State* v. *Walker*, 3 Harring. 547.

246. An indictment lay under the act of 1845, concerning excise (Stat. p. 322), for selling, by retail, any intoxicating or spirituous liquors, or wines, while that act remained in force. *The People* v. *Safford*, 5 Denio 112.

247. An indictment also lay, at the same time, for the same offence, under the Revised Statutes, except as to certain liquors excepted from their operation. *Ib.*

248. Where an indictment is laid for selling liquor without license, found while the act of 1845 was in force, containing the allegations essential to an indictment under the Revised Statutes, it is good, though it also allege that the electors of the town had voted against licenses, the last-mentioned allegation being surplusage. *The People* v. *Townsey*, 5 Denio 70.

249. Held, also, that the repeal of the act of 1845, pending the prosecution of such an indictment, did not interfere with the proceeding. *Ib.*

250. An indictment will lie against commissioners of excise for wilfully and corruptly granting a license to a person to sell spirituous liquors, as an inn-keeper, knowing that he is not possessed of good moral character, that he is not a person of sufficient ability to keep a tavern, that he has not the necessary accommodation to entertain travellers, and that a tavern is not absolutely necessary at the place where he proposes to keep a tavern. *The People* v. *Norton*, 7 Barb. 477.

251. Where justices grant or refuse license, under the excise law, they do not act solely as judicial officers. They have indeed a discretion to exercise, which the Supreme Court will not control by mandamus; but their duties are so plainly defined that, if they wilfully disregard them, they are liable to an indictment. *Ib.*

252. The act of 1817, ch. 227, applies both to licensed retailers and persons accustomed to make and sell distilled spirits, or other liquors, without license, and an indictment under this act, describing an offender as a licensed retailer, is sufficient. *Rawlings* v. *the State*, 2 Mar'd 201.

253. The offence is defined and punished in the first and second sections, and an exception is contained in a proviso to the seventh section, that the law shall not apply to travellers putting up or stopping whilst travelling through said counties; held that this exception need not be negatived in an indictment under this act. *Ib.*

254. The first section contains a proviso that the law shall not apply to slaves having a written order from their owners. This license must be negatived in the indictment. *Ib.*

255. It is not always necessary to negative exceptions contained in the act creating the offence; but where exceptions are in the enacting part of the law they must be negatived. *Ib.*

256. If a party undertakes to recite a statute, and mistakes a material point, it is inexcusable; but if he recites truly so much as will serve to maintain his action, and mistakes the rest, this will not vitiate the declaration. *Ib.*

257. Every fact and circumstance laid in an indictment, which is not a necessary ingredient in the offence, may be rejected as surplusage, and if there be any defect in the manner of stating such matter, it will not vitiate the indictment. *Ib.*

258. It not being necessary to negative the exception contained in the proviso to the seventh section of this act, a mistake in reciting this proviso does not vitiate the indictment. *Ib.*

259. In North Carolina, an individual who acts as an ordinary-keeper, with-

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out taking out license and giving bond, but who has a license to retail spiritu ous liquors, may be indicted on the act of 1798, ch. 501, for exacting more than the rates established by the Court of this county; and he is estopped from denying the fact of his being a tavern-keeper. *The State* v. *Wynne*, 1 Hawk. 451.

260. Disorderly houses; liability of persons for disorderly conduct in and about their store. *State* v. *Burchinal*, 4 Harr. 572.

261. An inn-keeper is not liable to indictment for the offence, when committed in his absence, and without his knowledge, by his bar-keeper, of selling spirituous liquors to an intoxicated person. *Hipp* v. *the State*, 5 Blackf. 149.

262. Two persons may be jointly liable, and may be jointly found guilty of the offence of retailing spirits. *The State* v. *Caswell*, 2 Humph. 399.

263. Where spirituous liquors are sold by an agent, in violation of the statute, both principal and agent are guilty, and liable to indictment. *Thompson* v. *the State*, 5 Humph. 138.

264. Where a slave obtains a verbal gift of freedom by his master, it does not make him a freeman, and, as such, subject him to the penalties of the law for retailing spirituous liquors without license. *James* v. *the State*, 9 Humph. 308.

265. Where a person licensed to retail spirituous liquors, causes and procures, for lucre, evil-disposed persons to congregate in and about the house in which the liquors are sold, and permits them to remain there, drinking, cursing, blackguarding, fighting, &c., the house is a public nuisance, and the keeper of it is liable to indictment therefor. *The State* v. *Mulliken*, 8 Blackf. 260.

266. A shopkeeper is liable to a criminal prosecution for an unlawful sale of spirituous liquor in his shop, made with his assent by a servant or agent employed in his business; but an unlawful sale by the servant or agent is only prima facie evidence of the assent thereto by the shopkeeper, and of his liability therefor. *Com.* v. *Nichols*, 10 Met. 259.

267. Where one sells spirituous liquors as the servant of another, held that neither he nor his principal having any license under the statutes of this State, is liable personally to an indictment, though he acted without compensation in making the sale. *State* v. *Bugbee*, 22 Vt. (7 Washb.) 32.

268. Where one commits a single act of selling spirituous liquors without license, he is guilty of the offence under the Vermont statute of 1846. *Ib.*

269. Ale is fermented liquor, and an intoxicating drink under the act of Missouri, 1851, amendatory of the act of March 25, 1845, and the person selling it without license, whether it be manufactured within or without the State, is liable to an indictment. *State* v. *Lemp*, 16 Mo. (1 Bennett) 389.

270. Where liquors are sold by an agent or clerk, his employer not being licensed, an indictment will lie against either. *Schmidt* v. *State*, 14 Mo. 137.

VI. Matters of Defence.

271. On a presentment for retailing spirits without a license, the burden is on the defendant to show a license. *Haskill* v. *the Com.*, 3 B, Monr. 342.

272. It does not justify the sale of spirituous liquor without license, that at the time of such sale, there was no druggist or other person licensed to sell spirituous liquors within the county, that the sale was made upon the order or prescription of a physician, and that the spirit thus received was necessary for the buyer's use, either as a medicine, or for the preservation of his health. *Com.* v. *Sloan*, 4 Cush. 52.

273. Where the defendant in an indictment for selling liquor without license, has a license, it rests upon him to produce it. *Schmidt* v. *State*, 14 Mo. 137.

274. On an indictment for selling liquor without license, it is no defence that the defendant sold it as an agent of another person. *Hays* v. *State*, 13 Mo. 246; *State* v. *Bryant*, 14 Mo. 340.

275. Where it is the duty of the County Commissioners, under Rev. Sts.

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c. 47, to license one or more persons in each town, to retail spirituous liquors, held that their refusal to license any person whatever does not annul the statute, and authorize every person to retail spirits without a license. *The Com.* v. *Blackington*, 24 Pick. 352.

276. Where one has a license as innholder and common victualler, it does not authorize him to sell intoxicating liquors to guests. *The State* v. *Woodward*, 34 Maine (4 Red.) 293.

277. On a criminal trial for unlawfully selling intoxicating liquors, where the defendant relies upon a license, the burden of establishing such license is upon him. *Ib.*

278. Where an indictment was laid in Wayne county, for retailing spirituous liquors, it was held that the fact that the sale was made in the city of Richmond, in Wayne county, was no defence. *Sloan* v. *the State*, 8 Blackf. 361.

279. The fact that the liquor is bought for medicine, does not exempt from the penalty. *State* v. *Keys*, 15 Vt. 405.

280. Where one who sells spirituous liquors in a room of an inn, which is under the control of the inn-keeper, and by his permission, he is protected by the license of the inn. *Duncan* v. *the Com.*, 2 B. Monr. 281.

281. The defendant in an indictment under the act of 1816, must prove the existence of a license. *The State* v. *Morrison*, 3 Dev. 299.

282. Where a license has been granted to one man to keep a tavern in a particular house, and he having removed from it, another man, who is indicted for retailing liquors in the same house, may show in defence, that he did it as the agent or partner, and under the license of him to whom it was granted. *Barnes* v. *the Com.*, 2 Dana 388.

283. It is for one who is indicted for selling spirituous liquors without a license, to show that he had a license. *Gening* v. *State*, 1 McCord 573.

284. To legalize the retailing of spirituous liquors, it is necessary that a license should first be obtained for that purpose from the County Court; a license to keep a tavern does not confer that right. *Page* v. *State*, 11 Ala. 849.

285. It is no defence to a charge of selling liquor by retail without license, that it was sold to the purchaser *under the direction and prescription of a licensed* physician, it must also be shown that it was prescribed for *medical purposes*. *People* v. *Safford*, 5 Denio 112.

286. The keeping and selling by a retailer of some of the articles used by apothecaries, does not constitute him an apothecary; but there must be combined therewith skill in the preparation of medicine. *State* v. *Keys*, 15 Vt. 425.

287. The Supreme Court can take no notice of a variance between the proof and an indictment, unless exceptions were taken on trial for that cause. *Ib.*

VII. Evidence to Sustain the Indictments—Evidence Admissible on Information and Complaint for Retailing, &c.

288. On the trial of an indictment under the R. S. of Maine, for presuming, &c., the prosecuting officer need not introduce proof in support of the negative allegation that such selling was without license; if the accused would defend himself on the ground that he was licensed, he must prove it. *State* v. *Crowell*, 25 Maine (12 Shep.) 171.

289. An allegation in an indictment on the Rev. Sts. c. 47, § 2, that the defendant sold spirituous liquor to A, is sustained by evidence that he sold to A. brandy or gin, mixed with sugar and water. *Com.* v. *White*, 10 Met. 14.

290. On the trial of an indictment, charging that the defendant presumed to be and was a common seller of wine, brandy, &c., on a special day, and on divers subsequent days, no proof of his presuming to be such seller on any day prior to that which is specified, is admissible. *Com.* v. *Briggs*, 11 Met. 573.

291. Where there is an allegation in an indictment that the respondent sold one pint of liquor without license, it is supported by proof that he so sold half a pint. *State* v. *Cooper*, 16 Mo. (1 Bennett) 551.

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292. On the trial of an indictment for selling liquor without license, which charges the sale to have been made to persons to the jurors unknown, evidence that the persons were known to the jury, constitutes no variance. *State* v. *Ladd*, 15 Mo. 430.

293. Where an indictment charged that the respondent, without a license, sold five quarts of spirituous liquors to one J., it was held that the State was not bound to show that the respondent had not a license. *State* v. *Foster*, 3 Foster (N. H.) 348.

294. Where an indictment contains several counts for violations of the license law, by the sale of spirituous liquors, it is not erroneous in the County Court to allow the prosecutor, after having given evidence tending to prove as many distinct breaches of the law by the respondent, within the time covered by the indictment, as there are counts in the indictment, to proceed and show other sales within the same period of time. *State* v. *Smith*, 22 Vt. (7 Washb.) 74.

295. To sustain an indictment for selling one pint of rum, it is sufficient if it be proved that the respondent sold one quart of rum. *State* v. *Moore*, 14 N. H. 451.

296. Upon the trial of an indictment of several counts, for violation of the license law, by the sale of spirituous liquors, it is not erroneous in the County Court to permit the prosecutor, after having offered testimony tending to prove as many distinct breaches of the law by the respondent, within the time covered by the indictment, as there are counts in the indictment, to proceed and show other sales within the same period of time, as held in *State* v. *Smith*, 22 Vt. 74; *State* v. *Crotean*, 23 Vt. (8 Washb.) 14.

297. Where an indictment is found for selling liquors to persons to the jury unknown, it will be supported by the testimony of a witness that the liquor was sold to him, unless it appears that the grand jury knew when they found the indictment that the witness was the unknown person referred to in the indictment. *Hay* v. *State*, 13 Mo. 246.

298. Where A. was indicted for retailing vinous and spirituous liquors in less quantities than a gallon, in the city of Vicksburg, without a license, and was found guilty, upon proof, that he made such sale at a place four miles out of and from the city; held that under the statute of 1842, which appropriates all money accruing from the granting of licenses to retail, and from fines for a violation of the statute committed within the city of Vicksburg, to that city, the particular place where the offence was charged to have been committed, became a fact and circumstance constituting an offence, and that it was incumbent on the State to prove it as alleged in the indictment. *Legori* v. *State*, 8 Smed. & Marsh. 697.

299. In Massachusetts, the words of the Rev. Stats. c. 47, § 3, that no person shall presume to be a retailer or seller of spirits in a less quantity than twenty-eight gallons, unless he is first licensed as a retailer, being general, it is not allowable for a party indicted for selling contrary to the statute, to show that the spirit was bought of him to be used as a medicine, unless he claims to be a druggist. *Com.* v. *Kimball*, 24 Pick. 366.

300. On the trial of such an indictment, it is not proper for the government to give in evidence the declaration of defendant, that he considered the law unconstitutional, and intended to sell regardless of it; although the alleged sale was after the defendant had been convicted on an indictment for a similar offence, on the trial of which the same declaration had been offered in evidence. *Ib.*

301. The testimony of inhabitants of the town wherein the offence is alleged to have been committed, is admissible to sustain the prosecution, on the trial of an indictment against an inhabitant of the same town for being a common seller of wine, brandy, rum, and other strong liquors, without license, contrary to the provisions of the Rev. Stats. c. 36, § 17; although the town would be entitled to the penalty incurred. *The State* v. *Stewart*, 10 Shep. 111.

302. In Maine, under the act "for the suppression of drinking-houses, or

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tippling-shops," legal proof that the liquors were kept for sale by the owner or keeper of them, is a necessary prerequisite to a decree of forfeiture, where a claimant appears, and to the imposition of a fine; and neither the affidavit contained in the complaint, nor the recitals in the warrant, nor the officer's return, can be received as evidence upon that point. *The State* v. *Robinson*, 33 Maine (3 Red.) 564.

303. An officer's return which fails to state how long the liquors had been advertised, or that the notice posted contained the number or any description of the packages, is so defective as not to authorize a decree of forfeiture based upon it. *Ib.*

304. On the trial of an indictment for selling liquor without a license, the prosecutor, after having proven that the defendant kept a public-house, may show that the defendant kept a bar with bottles in it. *The People* v. *Hulbut*, 4 Denio 133.

305. It is error to receive evidence of a greater number of offences than there are counts in the indictment. *Hodgman* v. *the People*, 4 Denio 235.

306. In Massachusetts, upon the trial of an indictment under the Rev. Stats. c. 47, § 3, for presuming to be a retailer or seller of spirituous liquors in less quantity than twenty-eight gallons, and that delivered and carried away all at one time; and which charges the defendant with selling to a person named, one gallon, one quart, or any other specific quantity of such liquor, in order to convict the defendant, it need not be proved that he sold the specific quantity mentioned in the indictment; it is sufficient if it be shown that the defendant made the sale mentioned in the indictment, and that the quantity so sold was less than twenty-eight gallons. *Com.* v. *Buck*, 12 Met. 522.

307. The respondent being one of the firm, and having made out a bill of the sale of goods at sundry times, in his own hand-writing, upon which was entered the sale of spirituous liquors by the small measure, at different times, and which had been receipted by him; such bill of sale is competent evidence to go to the jury to prove a sale; and the person to whom the sale was made need not be produced. *State* v. *Munger*, 15 Vt. 290.

308. It is no valid objection that the sale purports, by the bill, to have been made on a different day from the one charged in the indictment. *Ib.*

309. It is not error for the court to charge the jury that, upon such evidence, they could find the respondent guilty. *Ib.*

310. The Commonwealth may show any offence against the act, by the accused, within the prescribed time. *Loftus' case*, 3 Gratt. 631.

311. To sustain a prosecution for selling liquor to a common drunkard, it is not necessary to prove that the defendant knew that the person to whom the liquor was sold was a common drunkard. *Barnes* v. *State*, 19 Conn. 398.

312. And where it appeared in such prosecution, that the sale complained of was made by the clerks of the defendant; and he offered evidence to prove that he had given such clerks specific directions to sell no liquors to common drunkards; it was held that such evidence was admissible. [Two judges dissenting.] *Ib.*

313. A single act of selling liquor, to be drank in the house, without a tavern license, would not be sufficient evidence of the offence of keeping a tippling-house. *Morrison* v. *Com.*, 7 Dana 218.

314. Proof of selling liquor by the half-pint, to be drank in the vender's house, conduces to prove that he kept a tippling-house; but evidence of a single sale of a quart, and that it was drank in his house, is not conclusive proof that he kept a tippling-house. *Hinton* v. *Com.*, 7 Dana 215.

315. Upon the trial of an indictment for retailing ardent spirits, without license, to persons to the jurors unknown, the defendant offered to prove that the persons to whom he sold the same were known to the grand jury; held that there was not a material variance between the evidence and charge in the indictment. *Halstead's case*, 5 Leigh 724.

316. Upon an indictment for retailing ardent spirits, alleging the precise quantity and the kind, to be drunk

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where sold, without license; evidence of retailing any quantity of any kind of ardent spirits to be drunk where sold, is sufficient. *Burk's case*, 6 Leigh 634.

317. In Indiana, where an indictment is found for selling spirituous liquors without a license, the prosecutor need not show that the defendant had no license. *Shearer* v. *State*, 7 Blackf. 99.

318. Where, on the trial of an indictment for retailing spirituous liquors, the evidence was that the retailing was at the accused's store, but did not show whether the store was in the district laid in the indictment; held that the jury might infer that defendant's store was within the venue, from any facts within their own knowledge. *State* v. *Williams*, 3 Hill's S. C. 91.

319. From a single act of retailing by a clerk, it cannot be inferred with certainty that it was done by the authority of his employer; to authorize a conviction, it ought to have been shown that it was the usual course of business to retail at defendant's store. *Ib.*

320. Indictment for selling spirituous liquor, sustained by proof of the sale of common cordial. *State* v. *Bennet*, 3 Harring. 565.

321. An admission by a party prosecuted under the statute, that he had sold "all strong beer or fermented beer," does not prove him guilty of an offence. *Nevin* v. *Ladue*, 3 Denio 437.

322. On the trial of an indictment for a breach of the excise law, evidence of a sale of spirituous liquors by the accused, in less quantities than five gallons, establishes prima facie the offence. It is, in such case, for the accused to prove that he has the license required by law. *Smith & Blood* v. *Joyce*, 12 Barb. 21.

323. In a case of civil action, the question of license arises collaterally. In an indictment, it is the main issue on the part of the accused. *Ib.*

324. Where the prosecutor, in an information for retailing spirituous liquors, for the purpose of proving that B. was a common drunkard at the time of the sale, offered evidence to show that his habits of intoxication, of which proof had been given, continued for several weeks *after the sale*, it was held that such evidence was admissible. *Barnes* v. *State*, 20 Conn. 232.

325. Where, on the trial of a complaint for selling spirituous liquors to X., Y. and Z., persons addicted to habits of intoxication, knowing them to be so addicted, contrary to the statute, the prosecutor, after having shown the alleged habits of X., Y. and Z., and the sale to them, proposed to offer evidence that the defendant had, for a long time before the sale complained of, been in the habit of selling to those persons spirituous liquors, to be drunk by them to excess; it was held that such evidence was admissible, for the purpose of proving the defendant's knowledge of the habits of X., Y. and Z. *Wickwire* v. *State*, 19 Conn. 477.

326. Where the State, on the trial of a complaint against B. for selling wine and spirituous liquors, contrary to the statute, having introduced evidence to prove the facts averred in the complaint; B., to rebut such evidence, introduced evidence to prove that at other times he had refused to sell; and thereupon the State, to show that such refusals of B. were not real, but a mere pretence, and thus to rebut B's. evidence, put in evidence a record of the Court, showing the pendency, at the time of those refusals, of a prosecution against B. for selling wine and spirituous liquors in violation of the statute; it was held: 1. That such record was admissible to show the existence of such prosecution at the time referred to, and thus to counteract the effect of B.'s evidence; 2. That if B.'s evidence was irrelevant, and for that reason inadmissible, B. could not successfully claim a reversal of the judgment against him, on the ground that the evidence introduced to rebut his irrelevant evidence, was also irrelevant. *Barnes* v. *State*, 20 Conn. 254.

327. Where the prosecutor, on trial of a complaint for selling wine and spirituous liquor to R., alleged to be a common drunkard, offered evidence to show that R., during the preceding year, had bought liquor at other places than the one stated in the complaint, and had become drunk thereon; it was held that such evidence, though not connected with proof of the defendant's

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knowledge of such facts, was admissible. *Smith* v. *State*, 19 Conn. 493.

328. Where it appears by the appropriate record, that the town authorities have licensed the highest number of persons which the law permits for selling intoxicating drinks, and it does not appear that any additional number has been licensed, it is not competent for a defendant in a prosecution for selling such liquor, to prove by an unrecorded license that he had authority to sell. *State* v. *Shaw*, 32 Maine (2 Red.) 570.

329. A license to sell such liquor is not valid, if granted before the delivery to the town treasurer of the bond prescribed by law. *Ib.*

VIII. Fine and Penalty for Violations.

330. Whoever takes it upon himself to be a common seller of spirituous liquors, without being licensed therefor, in less quantities than twenty-eight gallons at a time, is liable to the penalty provided by the statute, whether he takes it upon himself to be a common victualler or not. *The State* v. *Davis*, 10 Shep. 403.

331. Where an agent who is appointed, under the act of 1851, to suppress tippling-houses, to sell liquors for certain purposes, becomes a common seller of liquors; held that he is liable to the penalty prescribed by the eighth section of that act, in the same manner as persons not agents who violate the act, although he is liable also to have his agency revoked, and to a suit upon his bond. *The State* v. *Keen*, 34 Maine (4 Red.) 500.

332. The penalty (by existing laws) for merely retailing liquors without license, is $20. *Robinson* v. *Com.*, 6 Dana 288.

333. For keeping a tippling-house, *i. e.*, retailing in a house kept for that purpose, without license, the penalty amounts to $60. *Ib.*

334. Two individuals convicted of keeping a tippling-house together, cannot complain that they are fined $60 jointly—the sum for which each of them is liable. *Gray* v. *Com.*, 9 Dana 301.

335. One may sell a quart of spirituous liquor, or even less, in his own house, on a single occasion, without keeping a tippling-house; and for that offence, the fine is three pounds only; the cumulative penalty of $50, imposed by the act of 1831, is incurred only by keeping a tippling-house. *Hinton* v. *Com.*, 7 Dana 215.

336. The penalty for a second offence goes to the State, but it constitutes no ground of complaint on the part of the offender, that the justice awarded one half of the penalty to the prosecutor. *Ricker* v. *Petitioner*, 32 Maine 37.

337. On conviction, costs may be awarded, in addition to the penalty. *Ib.*

338. In a mittimus, the complaint need not be copied, nor need the mittimus state the proofs before the justice. *Ib.*

339. In Kentucky, by the former laws, the prosecuting attorney was entitled to one-half of the fine recovered against one convicted of keeping a tippling-house, and where one was convicted and fined sixty dollars, the governor remitted one-half of the fine, it was held that the prosecuting attorney was entitled to the whole of the residue. *Frazier* v. *Commonwealth*, 12 B. Mon. 369.

340. Where a person is convicted of a violation of the Rev. Sts., c. 47, regulating licensed houses, he may be sentenced to pay a fine and costs, and to stand committed "till the sentence be performed." *Harris* v. *Commonwealth*, 23 Pick. 280.

IX. Warrant.

341. A warrant for the search of "spirituous or intoxicating liquors," will not be deemed unauthorized, on the ground that those words do not constitute a sufficient description of the thing to be searched for. *State* v. *Robinson*, 33 Maine 564.

342. In Maine, proceedings to revoke the license of an inn-holder under the Rev. Stats. (c. 36, § 15), must be founded on a complaint made to the licensing board; and it is not enough to justify the board; in issuing a warrant, that matter of complaint has come to

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their knowledge. *State* v. *Lamos*, 26 Maine (13 Shep.) 258.

343. And although such complaint need not be in writing, to authorize the warrant to be issued, yet, before notice to the party accused can be given, the complaint should be put in writing, and the matter complained of specifically averred, that he may know what he is to answer. *Ib.*

344. In a warrant for the penalty incurred by a violation of the North Carolina acts of 1800, 1808 and 1809, it is not necessary to name the person or persons to whom the articles were sold, because each act of selling is not a distinct offence, but only one offence is committed, and only one penalty incurred by the same individual, by any number of sales to one or more persons in the same day. *State* v. *Muse*, 4 Dev. & Batt. 319.

345. A warrant for a penalty under these acts should conclude against the form of the statutes, the rule being that, when an act cannot be made out to be criminal, or a penalty to be incurred without reading more than one statute, it is then necessary that the indictment or declaration should conclude "against the form of the statutes," in the plural. *Ib.*

346. A conclusion in a warrant for a penalty against the form of the statute, when it should be against the form of the statutes, is a substantial defect, which is not cured by the verdict. But the Supreme Court under the 1st and 10th Sections of the Revised Statutes may amend the defect, as it does not change the issue between the parties, and is according to the right and justice of the matter found by the jury. *Ib.*

X. Jurisdiction of the Offence.

347. In Maine, the Common Pleas have jurisdiction of the offence of being a common retailer without license, and of all other offences which are prosecuted by indictment, committed against the provisions of the statutes of 1834 and 1835, for the regulation of innholders. *State* v. *Stinson*, 5 Shep. 154.

348. A justice of the peace has jurisdiction of the offence of selling spirituous liquor to a common drunkard, though such offence is punishable by a greater fine than seven dollars. *Barnes* v. *State*, 19 Conn. 398.

349. A justice of the peace has no jurisdiction of a charge for keeping a tippling-house, as the fine exceeds $50. *Robinson* v. *Com.*, 6 Dana 288. An appeal in such case should be dismissed for want of of jurisdiction in the justice of the peace. *Ib.*

XI. Miscellaneous.

350. Where the Court, upon an information containing one hundred counts, "directed the jury to return a verdict of guilty for each act of selling," it was held that though the jury are the ultimate judges of both the law and fact, there was nothing improper in the charge, since it must be considered an expression simply of the opinion of the Court, of the law in the case. *State* v. *Paddock*, 24 Vt. 312.

351. On a criminal trial, for a violation of the license law, the question whether the liquor sold is, as a matter of fact, wholly or in part spirituous or intoxicating, is for the jury, and not for the Court, to pass upon. *The State* v. *Wall*, 34 Maine (4 Red.) 165.

352. Where a defendant is charged with distinct offences in different counts, and the jury return a general verdict of guilty, and no evidence appears to have been given upon the trial tending to prove one of the offences alleged, the Supreme Court will not arrest the sentence by granting a new trial, but will render judgment upon those counts only upon which the conviction was properly had. *State* v. *Bugbee*, 22 Vt. 32.

353. Where one was indicted for unlawfully selling intoxicating liquors, it was held that the Court were not called upon to construe the term intoxicating liquors, since that was done in the statute. *State* v. *Wittmar*, 12 Mo. 407.

354. The compelling the prosecutor to elect for what offence he will proceed, in cases of this kind, is matter of practice, and should rest in the sound dis-

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cretion of the County Court; and the most which the defendant can claim is, that the election should be made before he is called upon to put in his defence. *State* v. *Smith*, 22 Vt. 74.

355. Where there is a conviction on an indictment for a breach of the license law, it will be, prima facie, a bar to a second indictment for a similar offence by the defendant previously committed. (Bennett, J.) *Ib.*

356. Where the Court, in a prosecution for a violation of the statute regulating the sale of wines, &c., after a verdict of guilty against the accused, rendered the judgment that he "pay a fine of thirty dollars, which is to be paid to the Treasury of New Haven county," it was held, that although the fine was payable into the town, and not into the county Treasury, yet as the town was entitled to it by virtue of the statute, and not by the judgment of the courts, and as the Court had properly no control over the disposition of it, and the judgment was complete without any direction on the subject, the direction given was not a sufficient ground of reversing the judgment. *Booth* v. *State*, 13 Conn. 431.

JURY.

I. Summoning, selecting, and drawing Petit and Grand Jurors.
II. Qualification of Petit Jurors; how impanelled; sworn and kept during the trial.
III. Qualification of Grand Jurors; how impanelled and sworn; duties of foreman.
IV. Challenge for principal cause, and challenge to the favor.
V. Peremptory challenge, and challenge to the array.
VI. Challenging Petit Jurors.
VII. Challenging Grand Jurors; proceedings before the Grand Jury; how conducted.
VIII. Grand Jury; their duty, number requisite to constitute a Grand Jury.
IX. Petit Jury; their duty; number required to constitute a panel.
X. Instructing and charging the jury in cases of murder and other cases.
XI. Discharging the Jury in cases of murder, manslaughter, felonies, &c.
XII. Miscellaneous.

I. Summoning, Selecting, and Drawing Petit and Grand Jurors.

1. A struck jury may be demanded in a criminal as well as in a civil case. *Sutton and others* v. *State*, 9 Ohio R. 133.

2. But where a jury is struck at the instance of the defendant, in term time, shorter notice than is provided by law may be accepted by the plaintiff, and if the parties proceed and strike a jury, the defendant cannot object the want of longer notice, upon a writ of error. *Ib.*

3. Where the jury are not drawn by the sheriff and county commissioners, so that the accused can be tried at the first court, they will be entitled to be discharged unless they are tried at the next session. *Com.* v. *Prophet*, 1 Browne 135.

4. A venire for a petit jury should not include a panel for a grand jury; they are separate bodies, and should be separately summoned. *Forsythe* v. *State*, 6 Ham. 19.

5. In Georgia, the act of 1805, changes the act of 1799, so far only as relates to the mode of selecting grand jurors; under both of those acts, those remaining on the list, as made out from the tax-books by the clerk, constitute the petit jury, for the trial of both civil and criminal cases, so that, in fact, the act of 1799 is superseded, as well to grand as to petit jurors, by the act of 1805. *Malone* v. *the State*, 8 Geo. 408.

6. In Illinois, since the act, March 3, 1845, for the selection of juries, a jury selected at the discretion of the marshal, to serve in the Circuit Court of the United States for that district, is not legally selected under the act of Congress, September 24, 1789, § 29; and the jurors should be selected from the State at large, before each term of the Court. *U. States* v. *Woodruff*, 4 McLean 105.

7. Where, at the Oyer and Terminer, the initiatory proceeding of a trial for murder had been commenced, by calling the jurors according to law, and only nineteen of the jurors answered to their names, thereupon three hundred addi-

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tional jurors were summoned by the sheriff by direction of the Court; and the Court refused to delay the trial for two or three days, as requested by the prisoner's counsel, to enable them to examine such list of additional jurors; it was held that the question to be decided on such application was a matter of discretion, and that no exception could lie to such refusal. *Colt* v. *the People*, 1 Parker's Crim. R. 611.

8. Held, also, that the summoning of so large a number of additional jurors was a matter of sound discretion, to be exercised by the Court with a view to get an adequate number who were qualified and competent, from which a full jury could be drawn; and that such discretion should be exercised upon the knowledge which the Court possessed, of the probable effects which a report of the facts, in the public papers and otherwise, might have had, in biasing the minds of jurors, so as to disqualify them from serving on the trial.

9. It need not appear upon the return of the precept directed to the sheriff, commanding him to summon a jury, that the jury have been drawn according to law; but it will be presumed that the sheriff has returned his writ executed according to law, until the contrary is shown. *Com.* v. *Green*, 1 Ashmead 289.

10. Under the act of 21st February, 1814, pleading the general issue and going to trial, is held to be a waiver of any error or defect in drawing, summoning, or returning juries: but *quere*, whether it is a waiver, if the defendant refuse to plead at all, and the Court orders the plea of "not guilty" to be entered for him, under the provisions of the 3d section of the act of 23d September, 1791. *Com.* v. *Chauncey*, 2 Ashm. 90.

11. Where the sheriff neglects to sign his return to the jury process directed to him, such neglect does not render it incurably vicious, and is not a sufficient reason to induce the Court to quash the array of jurors, but the Court will quash the return to the process, and in writ will order the sheriff to complete his return by endorsing on his writ the execution thereof, and signing the same. *Ib.*

12. In Indiana, the record of the board of county commissioners must indicate that grand juries who found a certain indictment were selected according to the provisions of the statute, or the indictment will be quashed. *The State* v. *Conner*, 3 Blackf. 325.

13. There is no act of Congress that confers on the United States Courts the right to summon grand juries or describe their powers, the laws of Congress have invested the Courts of the United States with criminal jurisdiction, and since this jurisdiction can only be exercised through the instrumentality of grand juries, the power to direct them is the result of necessary implication; therefore, the powers of grand juries are co-extensive with, and are limited by the criminal jurisdiction of the Courts of which they are an appendage; so, too, a presentment of a grand jury in the Circuit Court of the United States, of an offence of which that Court has no jurisdiction, is coram non judice, and is no legal foundation for any prosecution which can only be instituted on the presentment or indictment of a grand jury to be carried on in another Court, unless that Court has no power to direct grand juries. *United States* v. *Hill*, 1 Brock. 156.

14. In Virginia, the act of February 24, 1846, changing the mode of summoning and making up juries in trials for felony, has application to all cases tried after the act, though the offence was committed, or even the examining Court had passed upon the case before the passage of the act. *Perry's case*, 3 Gratt. 632.

15. There being several capital cases on the docket on the first day of the term, the Court commanded the sheriff to summon a large number of citizens to be in attendance as talesmen to fill up the panel; held that this act was warranted by law, and was intended to secure an impartial jury, and was no ground for a new trial. *Bird* v. *State*, 14 Geo. 43.

16. The grand jury that found the indictment, and the petit jury at the trial, were summoned by the sheriff and returned without a venire. The Court held that this was not such an irregularity as will vitiate the verdict and

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arrest the judgment, the trial in other respects being according to law. *Ib.*

17. In New York, where such a deficiency of jurors occurs in a criminal prosecution as is contemplated by 2 R. S. 733, § 3; the number of additional persons to be summoned rests in the sound discretion of the Court before which the indictment is pending. *People* v. *Colt*, 3 Hill 432.

18. In South Carolina, talesmen are to be drawn as well in criminal as in civil cases; under the jury laws of this State, the Court has no power to issue a venire facias for talesmen. 2 Hill, S. C. 381.

19. In case a defendant on his arraignment suggests that he is an alien and claims the privilege of a trial by a jury demedietate linguæ, the Court of Oyer and Terminer may direct such a jury to be summoned instanter. *People* v. *McLean*, 2 Johns. 381.

20. Where a venire facias directed the officer to cause a juror to be drawn, not more than twenty nor less than six days before the sitting of the Court, and he made a return that the juror was drawn as above directed, but without date, the return was held good. *Fellows' case*, 5 Greenleaf 333.

21. If a jury cannot be formed from the original panel, nor from the bystanders, in consequence of the prisoner's challenges, the Court may award a venire facias, commanding the sheriff to summon a specified number to attend the Court then in session, and upon the return of the process the prisoner may be compelled to elect a jury saving the right of challenge. *Gibson* v. *Com.*, Vir. Cas. 111.

22. In Indiana, if there be a default of jurors, on the return of the venire, a new one must issue; but if any number, however small, appear, and they be set aside on challenge, talesmen may be sworn to try the issue. *Fuller* v. *State*, 1 Blackf. 63.

23. A paper purporting to be a venire, but without the seal of the Court, is a nullity. *People* v. *McKay*, 18 Johns. 212.

24. A writ of venire facias, by which a grand jury is summoned, is not void for want of the seal of office of the clerk who issues it. *Maher* v. *State*, 1 Porter's R. 265.

25. Where the venire facias directs the sheriff to summon good and lawful men to serve as jurors, it need not specify the particular qualifications necessary to constitute them good and lawful jurors. *State* v. *Alderson*, 10 Yerg. 523.

26. In Tennessee, if a juror be discharged on account of sickness on the trial of a criminal cause, no juror who had been once challenged can again be summoned as juror in that cause. *Garner* v. *State*, 5 Yerg. 160.

27. It is enough that the record shows the jurors to have been summoned by the deputy-sheriff, which in the eye of the law is the act of the sheriff himself. *Kelly & Little* v. *State*, 3 S. & Marsh. 518.

28. The sheriff summoned as talesmen, persons who were not bystanders in the court-house; held, that the calling them into Court was a sufficient summoning, when they came in they were bystanders, and bound to serve; whether the Court could have fined them for non-attendance,—*Quere.* *State* v. *Lamon*, 3 Hawks. 175.

29. In North Carolina, an order to the sheriff to summon talesmen need not be made returnable on the same day on which it was issued. *Ib.* The law is silent as to the number of talesmen which a sheriff must summon; it therefore belongs to the Court, in its discretion, to determine the number, and should it not do so, the sheriff is left to summon such number as he may deem necessary. *Ib.*

30. The writ of venire facias is merely a precept to the sheriff to summon a jury according to a list of names or panel annexed; 10th sec. of the act of 1839, copied from the act of 1731, R. L. 124. *State* v. *McElmurry*, 3 Strobh. 33.

31. The fact of the writ of venire facias not having been issued within twenty days after adjournment of the Court, nor returned within fifteen days before its sitting, does not afford sufficient ground for arrest of judgment. The important object of obtaining an impartial jury is secured by the manner of drawing them, which is not in the least affected by the mode of summoning them. *Ib.*

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32. A seal to the venire is necessary, in compliance with the law which requires all judicial process to be issued under the seal of the Court, but it is not necessary that the impression of the device should be manifest on the seal. *Ib.*

33. It is not necessary that the names of the jurors should be embodied in the writ of venire facias, it is sufficient if they be arranged in lists below the signature of the clerk. *Ib.*

34. On a trial for murder, where one of the panel summoned by the sheriff is excused on his own application, it is not error in the Court to refuse to order the sheriff to summon another in his place before exhausting the panel. *Martin* v. *State*, 16 Ohio 364.

35. A juror was put on the panel upon his swearing that he had been summoned, the constable having omitted his name in the return of the warrant. *Case of Patterson*, 1 Mass. 486.

36. It is not necessary that a venire facias should issue to the sheriff to summon a jury before he can proceed to do so, nor need one be awarded on the roll. *Samuels* v. *State*, 3 Mo. 50. Objections to the officer returning a jury should be taken before the trial commences, and cannot be taken advantage of in arrest of judgment. *Ib.*

37. In Mississippi, in capital cases, the prisoner is entitled to a trial by a jury selected from the persons summoned under the special venire facias, and of whose names a list had been furnished to him, provided a sufficient number of competent jurors according to the rules regulating the impaneling of jurors, be obtained therefrom. *Boles* v. *State*, 24 Miss. 445.

38. It is not competent for a circuit judge to discharge a person summoned under the special venire in a capital case, without sufficient cause. *Ib.*

39. If after the State and prisoner had failed to obtain a sufficient number of competent jurors from those of the special venire in attendance upon the Court, an application for an attachment to compel the attendance of the absentees had been refused, the accused, as a general rule, would have a right to demand the process of the Court to compel their attendance. *Ib.*

40. The fact that disqualified persons were summoned, if it constituted a defect in the special venire, could not therefore be objected to by a challenge to the array, and was no ground to quash unless upon proof of partiality, or corruption in the sheriff. *Ib.*

41. In Georgia it is not a valid objection to a juror drawn and summoned for the trial of a slave, that the summons was left at his residence, and not served on him personally. *Judge* v. *State*, 8 Geo. 173.

42. It is no objection to a juror, because there was a mistake as to his middle name. *Ib.*

43. In Mississippi, the authority to award a special venire, except in a peculiar class of cases, in which parties are capitally charged, is confined to cases in which there are none of the regular venire in attendance upon the Court. *Baker* v. *the State*, 23 Miss. 243.

44. Any irregularity in the issuance or direction of the venire to summon the petit jury must be excepted to before the jurors are sworn, not after verdict returned. *Brown* v. *State*, 7 Eng. 623.

45. The panel of the grand jury returned by the sheriff, or the caption thereto, should show the purpose for which, the authority by which, and the Court to which the persons named in the panel were summoned. *State* v. *Rickey*, 4 Halst. 293.

46. Although the panel returned by the sheriff by which the grand jury are called and sworn, is defective, yet it may, by order of the Court, be amended, or a new one substituted at any time during the day on which it is returned previous to the presentment of any bills of indictment. *Ib.*

47. In South Carolina, the presiding judge for Edgefield, at Fall term, 1845, ordered an extra Court for that district, to be holden on the 4th Monday in February, 1846. The legislature, in December, 1845, extended the judicial term for Edgefield to two weeks instead of one, but omitted to provide for juries for the second week of the next Spring term. In January, 1846, the judge who had ordered the extra Court, made an order at Chambers, postponing

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it to the second Monday in March, which was the second week of the extended regular term. The jurors for the extra Court had been summoned, and the sheriff, after the order was made, notified them to attend on the second Monday in March. An indictment was found by the grand jury at Spring term, 1846, against the defendant for murder of a slave, and on the second week he was tried and found guilty. Held that whether the judge had authority or not to postpone the extra Court the jurors summoned for the Court could not be regarded as jurors of the regular term, and consequently that the trial was illegal, and the conviction void. *State* v. *Harden*, 2 Rich. 533.

48. Plea in abatement, that six of the grand jurors who found the indictment, had not been drawn and summoned according to law, and were not, therefore, competent grand jurors, and issue was taken on the plea on the trial; the prosecuting attorney read to the jury the caption of the record, which, after reciting the term of the Court, proceeded: "A grand jury of inquest for the body of this county, was drawn and impanelled from the regular venire, namely, J. N. C., &c., naming the grand jurors, and rested the case; the defendant then offered to read the original *venire facias*, upon which the names of the six grand jurors did not appear, which being objected to, was ruled out by the Court; the defendant then offered to prove by a deputy sheriff, who was the officer of the Court, that when he called the list of jurors regularly summoned, a sufficient number answered to their names, and were present in court, to constitute a grand jury, and that the six persons mentioned in the plea were, by the order of the judge, substituted for six of the regular panel who were then in attendance, and who had brought in their substitutes, and tendered them, and the Court received the substitutes, and discharged the original jurymen; and that the witness was instructed to insert the names of the substitutes on the panel; the regular jurors who employed substitutes, were also offered to prove the fact of substitution, all of which evidence being objected to, was ruled out by the Court; held that the venire facias ought to have been admitted, and being the better evidence, it would have proved the caption of the record to be true; that the parol evidence would have explained and shown how the discrepancy in the record occurred; held that it was pertinent to the issue. *Rawls* v. *State*, 8 Smedes & Marsh. 599.

49. It is no objection to the venire facias, that it reads, "I command you to summon," instead of "you are hereby commanded to summon;" this objection savors too much of refinement even for criminal proceedings. *State* v. *Cole*, 9 Humph. 626.

50. The defendant pleaded not guilty to the bill of indictment, and went to trial, and was convicted; after this he shall not be permitted to object to the venire, or to the jurors summoned under it; if he have legal objection to the one or the other, he must avail himself of it either by motion or plea before he puts himself upon his country for his deliverance, by his plea of not guilty; it is afterward too late. *Ib.*

51. The writs of venire by which the grand and petit juries were summoned, are parts of the record of conviction; and if they are void, the judgment will be arrested. *State* v. *Williams*, 1 Richard's Rep. 188.

52. The objection that the grand jurors have not been selected and summoned as required by law, may well be taken by plea in abatement to the indictment. *State* v. *Williams*, 5 Porter 130.

53. A writ of venire facias to summon a grand jury, directed "to any sheriff of the State of Alabama," if received, executed, and returned by the proper sheriff, will be good. *State* v. *Phillips*, 2 Ala. 297.

54. Where a verdict has been rendered in a criminal case, an objection, then first taken, that no precept was issued by the district attorney to the sheriff, requiring him to summon a grand jury in pursuance of the New York Revised Statutes, comes too late, it appearing that the grand jury was regularly drawn and summoned according to the requirements of the statute.

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People v. *Robinson*, 2 Parker's Crim. R. 235.

55. The tenth chapter of the penal code of Alabama provides the manner by which grand juries shall be constituted, and one constituted in any other mode has no legal warrant; when, however, the board of officers intrusted with the selection of the jury has made the necessary certificate, there is no mode by which its action can be collaterally called in question or re-examined. *State* v. *Brooks*, 9 Ala. 9.

56. The code of Alabama provides that a grand jury may be summoned by the Court when none is in attendance under the venire; and when a jury is thus constituted, the accused is not invested with the right to inquire if the form prescribed by the statute has been pursued or otherwise. *Ib.*

57. In pleas of abatement in the constitution of the grand jury, the greatest accuracy and precision are necessary, as two modes are provided by which a jury may be constituted, and therefore the plea must negative that either mode was pursued. *Ib.*

58. The sheriff's return of a grand jury ought to evince the authority by which he summoned them, whatever his authority may be, whether by writ or by statute. *Chase* v. *State*, 1 Spen. 218.

59. The certificate of the officers selecting grand juries under the act of 1836, is a record which cannot be impeached by evidence showing that he was not present when the duties were performed. *State* v. *Clarkson*, 3 Ala. 378.

60. If such certificate shows that the grand jurors were drawn by lot, this is proper evidence to support an issue that the grand jurors were drawn by lot instead of being selected as provided for by the act of 1836. *Ib.*

61. If a jury cannot be formed from the original panel of the venire, nor from the bystanders, in consequence of the exercise of the right of challenge by the prisoner, the Court may award a venire facias, commanding the sheriff to summon a specified number to attend the Court then in session, out of whom a jury may be formed for the trial of the prisoner; and upon the return of that process, and the attendance of the persons so summoned, the prisoner may be compelled to elect a jury, saving his right of challenge. *Gibson* v. *Com.*, 2 Virg. Cas. 111.

62. When the examining Court has sent up to the Superior Court several prisoners jointly proceeded against for a felony, a separate venire facias should be issued for a venire for the separate trial of each of the prisoners. *Mc Whirt's case*, 3 Gratt. 594.

63. And where, in such case, but one venire facias has been issued, and the defendants demand a separate trial, the Court will quash the panel so summoned by the single venire facias, and order a separate venire facias for a venire for the separate trial of each of the defendants, at the same term of the Court. *Ib.*

64. In South Carolina, the act of 1799, directing jury-lists to be made from the tax returns once in every three years, is purely directory to public officers in the discharge of their duty; and if they fail to discharge it, and the jury is drawn from the old list, it does not vitiate the array, nor is it cause of challenge to the polls. *State* v. *Massey*, 2 Hill (S. C.) 379.

65. When the panel of the venire is exhausted and the jury not formed, resort must be had to successive drawings from the tales-box; each tales juror as drawn, must be called, and if he appears he is to be presented for challenge or acceptance; if he does not appear when called, another is to be drawn and presented in like manner, and so on until the jury is filled. *State* v. *Williams*, 2 Hill (S. C.) 381.

66. But an objection to the mode in which the talesmen are drawn and summoned, must be made to each juror as he is presented; it is too late after he is sworn. *Ib.*

67. It is not a good cause of challenge to a tales-juror, that since his name was put in the tales-box he has removed, and was then living more than five miles from the court-house. *Ib.*

68. On the trial of a capital case, the names of the jurors of the original panel should be first put into the box and drawn, before those of the tales-jurors are put in and drawn, and the

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jurors summoned under a special venire facias, as provided by the act of 1830, c. 27, are in this respect to be regarded as talesmen. *State* v. *Benton*, 2 Dev. & Batt. 196.

69. In North Carolina, in an indictment for a capital offence, the Court having previously ordered one hundred tales-jurors to be summoned on the trial, the original panel was first passed and exhausted; and the Court then directed thirty-six of the tales-jurors to be drawn, and these being exhausted by challenges, directed the remaining tales-jurors to be drawn, the prisoner at the time making no objection; held that there was no error in this, nor ground for a new trial. *State* v. *Nash*, 8 Iredell 35.

70. In Mississippi, the law requires that when the list of jurors is returned, the names shall be set down on separate slips of paper and put into the box, but the drawing does not take place until the sitting of the Court. *S. & Pillet* v. *Richer*, 1 How. 522.

71. In Mississippi, by the statute, the panel of jurors is to be drawn in term-time, or in vacation, and a venire is directed to issue, returnable to the next term. The grand jury is to be drawn from the number appearing, and the balance are to be sworn as petit jurors for the term, according to the form of the oath prescribed. *Shaffer* v. *State*, 1 How. 232.

II. Qualification of Petit Jurors—How Impaneled, Sworn, and Kept during the Trial.

72. In a case of murder, a juror should be set aside who has formed or expressed any opinion as to the guilt of the accused, or who is conscientiously scrupulous of returning a verdict of guilty, in any case where the death-penalty might be inflicted, or who declares that he cannot return a verdict of guilty in any case where the punishment might be death. *The State* v. *Jewell*, 33 Maine 583.

73. Where a juror has expressed an opinion, it is a competent objection to such juror. *State* v. *Godfrey*, Brayt. 170.

74. In Connecticut, it is no part of the qualification of a juryman, that his estate be actually rated, or put into the list. *State* v. *Doan*, 2 Root 451.

75. A person who was called as a juror, declared on his voire dire, "that he had expressed an opinion on the circumstances as he had heard them narrated in the country, but had not heard any of the evidence given on the examination of the prisoner, or conversed with any of the witnesses or parties, and that he did not think his opinion, so formed, would have any influence on his mind in trying the case," the juror was then challenged for cause; held that he was impartial, and that the challenge should not be allowed. *Brown's case*, 2 Leigh 769.

76. In Indiana, the statute of 1824 excuses persons above 60 years of age from serving on juries, if they choose to avail themselves of the privilege; but the party indicted has no right to object to them on that ground. *State* v. *Miller*, 2 Blackf. 35.

77. A juror who had heard the testimony of a witness in the cause, and then formed an opinion upon it, and was doubtful whether he had expressed the opinion or not, though he thought it most probable that he had expressed it, but who stated that at that time he had no prejudice against the accused or his cause, and could, as he believed, give the accused as fair a trial as if he had not heard anything on the subject, was held an impartial juror, and the challenge against him for the cause was not sustained. *Pollard* v. *Com.* 5 Rand. 659.

78. Where a juror, upon being challenged, swears that he has formed and expressed an opinion, but only upon rumor, but that he could do impartial justice upon hearing the evidence in the case; prima facie the juror is competent, though in some cases the Court or the triers may find otherwise. *State* v. *Dorr*, 10 Iredell 469.

79. Where a juror was challenged for bias, and declared under oath that he had formed an opinion, either from rumor or from reading the newspapers, but was not prejudiced, and could try the case on the evidence, and the Court accepted him; it was held that no error

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was committed, as the Court had taken the juror on his qualifying himself under the statute. *Baldwin* v. *the State*, 12 Mo. 223.

80. Where a party in possession of land under a contract of purchase, who has refused to accept a conveyance tendered to him, and instituted a chancery suit in which the question as to the sufficiency of the title is yet undetermined; held, in Virginia, that he was not a freeholder qualified to serve as a grand juror. *Kirby's case*, 7 Leigh 747.

81. In South Carolina, a juror cannot be examined on his voir dire with regard to any opinions he may have formed, or any expressions he may have used, relative to the accused's guilt or innocence. *The State* v. *Baldwin*, 3 Brevard 309.

82. As to who shall be considered impartial jurors on the trial of a homicide. *McCune's case*, 2 Robinson 771; *Cottrell's case*, 2 Robinson 771; *Paine's case*, 2 Robinson 771.

83. Where, on a trial for murder, a juror stated, on his voir dire, that he had made up no decided opinion, that he had heard a part of the evidence of one witness, and formed an impression, and if the balance of the testimony should be of the same tenor that impression would be confirmed; that as far as the evidence went he had a decided opinion, if the rest should not run against it, but that he had no prejudice, had not expressed any opinion, and was prepared to decide the case by the evidence which might be given in, uninfluenced by the portion of evidence he had heard; the juror was held competent. *Moran's case*, 9 Leigh 651; see, also, *Maile's case*, 9 Leigh 661.

84. In Virginia, on the trial for a capital felony, it need not be expressly stated in the record that the petty jurors were freeholders. *Stephen's case*, 4 Leigh 679.

85. Where one called to serve as a juror in a criminal case, being examined on his voir dire, first said that he was not a freeholder, but before the panel was completed, returned into court, and said he had made a mistake, and that he was a freeholder; held that he was a good and lawful juror. *Kendrick's case*, 5 Leigh 707.

86. In a capital case, two jurors stated, upon oath, that they had formed and expressed opinions unfavorable to the accused, and were challenged by the Commonwealth for the cause; held that, inasmuch as the accused made no objection, but acquiesced in the challenge, there was no necessity for appointing triers. *The Com.* v. *Gross*, 1 Ashmead 281.

87. Where a juror, in answer to a question touching his competency, replies that he has formed no opinion nor come to any conclusions on the case, the accused's counsel is not thereby precluded from questioning him still further with respect to whether he has not conversed much about the case. *Heath's case*, 1 Robinson 735.

88. Persons who are called to serve as jurors in a criminal case, when examined on their voir dire, declared that they had heard part of the evidence on a former investigation, and formed some opinion thereon, yet the opinion so formed would in nowise affect their minds as jurors, but that they should act upon the case impartially; it was held that such persons were good and impartial jurors. *Kendrick's case*, 5 Leigh 707.

89. Where, on a trial for murder, a juror who was examined on his voir dire, stated that he was not present at the preliminary examination of the accused, and had heard no statement of the evidence from any witness or any person who was present; that he had heard the case spoken of in the town, and rumors in regard to its circumstances, upon which he had expressed no opinion, though he believed these rumors to be true, and if they should turn out upon the trial to be true, he had a decided opinion in regard to the case, but he felt no prejudice, and was satisfied he should be able to decide the case upon the evidence which might be given to the jury, uninfluenced by the rumors he had heard; that the opinion he had formed was, that if the accused had stabbed the deceased under the circumstances he had heard, he ought to be punished; the juror was held competent. *Moran's case*, 9

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Leigh 651; vide *Maile's case*, 9 Leigh 661.

90. As to the opinions formed and expressed by a juror which will render him not indifferent. *Armisted's case*, 11 Leigh 657; *The State* v. *Johnson*, Walker 392.

91. An opinion as to the guilt or innocence of a prisoner, formed from rumor, is sufficient ground to exclude a juror. *Waw-kow-chaw-neck-kaw* v. *U. States*, 1 Morris 332.

92. Where one had formed though not expressed some opinion relative to the matter to be tried, who had made up his mind as to the subject of treason, provided the facts were proved, but not as to the guilt of the prisoner, he was recommended by the Court to be withdrawn, the trial being one for treason, the definition of which, and in application, though not abstractly, had not yet been perfectly determined by judicial decision, and the Court considering that his answer showed that he might have made up his mind on the law of treason, and made it up differently from what the Court would decide. *Smith's case*, 2 Wallace, Jr. 150.

93. Where one had certainly expressed an unfavorable opinion towards the course of these gentlemen, that is, persons with whom the prisoner agreed in opinion, the person summoned being sensible of no such bias as would affect his action as a juror, having neither formed nor expressed an opinion as to the guilt or innocence of the prisoner, or of the other persons charged to be concerned with him in the commission of the offence, not presuming to be a judge whether the offence was treason, knowing none of these gentlemen individually, and meaning to express nothing more than an opinion against the transaction, and that the persons engaged in it ought to be punished; held that he is competent. *Lyon's case*, 2 Wallace, Jr. 149.

94. Where one was summoned as a juror in a case where treason was charged to have been committed, and stated, on being challenged, that he read the newspaper accounts of the facts at the time, and came to his own conclusions, and had made up his mind that the offence was treason, though he had not expressed that opinion, nor apparently formed nor expressed an opinion that the defendant was or was not engaged in the offence; held that he is incompetent to sit as a juror. *Walsh's case*, 2 Wallace, Jr. 143.

95. Where one has formed a conditional but not an absolute opinion on the law of treason, *e. g.*, who says he cannot understand how treason can be committed against the United States, if such and such facts do not constitute it; held that he is competent to sit as as juror, if he says, on being instructed by the Court, that the opinion is erroneous, that such opinion will cease to influence him as a juror. *Reynolds' case*, 2 Wallace, Jr. 145.

96. The prosecution have no right to ask a juror whether he has so made up his mind (on facts) as that it could not be changed in the course of a trial, there being no obligation on the prisoner to take upon him the burden of altering the juror's mind, to the extent that even if this question were answered negatively, he might have to do it to procure a discharge. *Whitman's case*, 2 Wallace, Jr. 147.

97. Where one, without forming or expressing any opinion as to the matter to be tried, had formed an opinion that the laws had been outraged; held that he is competent. *Bunton's case*, 2 Wallace, Jr. 149.

98. The affidavits of the jurors are admissible to prove that they did not read or hear any papers read before their verdict. *State* v. *Hascall*, 6 N. Hamp. 352.

99. After verdict in criminal cases, it is presumable that the names of the jurors specified in the venire facias have been drawn according to law, particularly when the writ expresses that they were "good and lawful jurors, duly appointed as the statute requires." *State* v. *Williams*, 3 Stew. 454.

100. Although a juror may suppose, after an opinion formed and expressed, that he will be regulated by the testimony, yet the law suspects him. *Sprouce* v. *Com.*, 2 Virg. Cas. 375.

101. A juror who had heard a relation of what the principal witness for the prosecution had sworn to, and had said that if these things were true he

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believed the prisoner guilty, but who declared on his voir dire that he felt no prejudice, was open to conviction, and if the facts did not turn out as they had been represented, he was ready to change his opinion, is a good juror, and the prisoner's challenge for cause was properly overruled. *Ib.*

102. In Arkansas, a resident of the county and citizen of the State, and who contemplates so remaining, is qualified to serve as a juror, though his residence was not such as to confer upon him political privileges. *Anderson* v. *State*, 5 Ark. 445.

103. As a general rule, after putting a juror upon his voir dire, a want of impartiality is not to be proved by witnesses; but where a distinct cause of challenge exists, which could not be known to the juror, it forms an exception to this rule. *Com.* v. *Wade*, 17 Pick. 395.

104. In Tennessee, a citizen of one county, who owns freehold lands in another county, or who is the owner of an occupant-right to lands situated in another county, may serve as a juror of the county in which he resides. *State* v. *Bryant*, 10 Yerger 527.

105. The improper rejection of a juror in a criminal case is not an error for which the Court will necessarily reverse the judgment, if the defendant obtains an impartial jury of his own selection. *Henry* v. *State*, 4 Humph. 270.

106. That certain qualifications are to be possessed by the individual to constitute him a juror, necessarily disqualifies the person who does not possess such qualifications. *Guykowski* v. *the People*, 1 Scam. 476.

107. In South Carolina, a commissioned officer in the United States' Navy is not exempt from jury service; all previously-existing exemptions are virtually repealed by the jury law of 1799. *The State* v. *Ingraham*, Chev. 78.

108. Where the juror said that he formed and expressed an opinion from rumor only, but that his mind was free to act upon the testimony, he was held competent. *King* v. *the State*, 5 Howard 730.

109. A juror states that he has heard the circumstances of the case, and believing the statements he has heard to be true, has made up his mind as to the guilt or innocence of defendant; he is incompetent. *Payne* v. *the State*, 3 Humph. 375.

110. Jurors stated that, from rumor and reports in their neighborhood, they had heard that a man had been killed, that defendant was accused of the murder, and had attempted to make his escape, and that upon these facts and circumstances they had formed and expressed an opinion; held that they were competent. *Ib.*

111. It is a settled rule that neither party has a right to interrogate a juror before he is challenged. *Mississippi* v. *Flower*, Walker's R. 318.

112. In North Carolina a Commissioner of Navigation is not exempt from serving as a tales-juror. *The State* v. *Hogg*, 2 Murph. 319.

113. If a juror has made up a decided opinion, respecting the merits of the controversy, either from a personal knowledge of the facts, from the statements of the witnesses, from the relations of the parties, or from rumor, he is disqualified from trying the case, if challenged for cause. *Neely* v. *the People*, 13 Ill. 687.

114. On a trial for murder, one of the jurors, upon being sworn and examined, stated that from rumor he had formed an opinion touching the accusation against the prisoner, upon which he was called to pass; the Court then asked him if his information was from any of the witnesses, or persons who knew the facts; he said he did not know, or even know the witnesses in the cause; he was further asked if he could do justice to the prisoner, or if his mind was anywise biased; the answer was, if the proof turned out differently from rumor, he could do justice to the prisoner, whereupon the Court pronounced him a competent juror, and he was put to the prisoner. *Moses* v. *the State*, 10 Humph. 456.

115. The entertaining a decided opinion of the prisoner's guilt, formed from reading the newspapers, is not a valid objection to a juror, if he thinks he can discard his opinion. *Smith* v. *Commonwealth*, 7 Gratt. 593.

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116. A juror, summoned on the first trial, was stricken from the panel by the prisoner; this is not a valid objection to him as a juror on the second trial. *Ib.*

117. Jurors must be challenged, if at all, before they are interrogated by the Court as to their bias and opinions. *Commonwealth* v. *Webster*, 5 Cush. 295.

118. An opinion formed by a juror, not strong enough to lead him to prejudge the case, does not disqualify him. *Ib.*

119. One who is opposed to capital punishment, is, notwithstanding, competent to be sworn as a juror, if he believes he can give a verdict according to the evidence. *Ib.*

120. On a trial for murder, a juror stated that the sons of his wife, by a former marriage, were the second cousins of the deceased, and that his wife was still living; held that the juror was competent. *Moses* v. *the State*, 11 Humph. 232.

121. If a juror has made up his mind as to the guilt or innocence of the accused, either from personal knowledge of the facts, or from the statements of others professing to know the circumstances of the case, he is incompetent; but an opinion formed from rumor merely does not disqualify him. *Ib.*

122. In Georgia, by the act of 1843, two questions, and two only, are allowed to be propounded to the juror, upon his voir dire, by counsel, to test his competency, and, notwithstanding his answer, the State or the prisoner, either, has the right to put such juror upon his trial, in the manner pointed out by the Common Law, and to prove such juror incompetent; but this must be done by aliunde testimony. *Bishop* v. *the State*, 9 Ga. 121.

123. A juror cannot be examined on his voir dire as to any opinions he may have formed, or any expressions he may have used relative to the prisoner's guilt or innocence. *The State* v. *Baldwin*, 1 Const. R. 289.

124. When the matter of a plea in abatement is the disqualification of a juror, laying out of view the direction to summon freeholders and householders, as to which no opinion is given, it must present the constitutional disqualification of conviction for bribery, &c., &c. Matters which exempt individuals from jury service are not disqualifications which will abate an indictment. *The State* v. *Brooks*, 9 Ala. 1.

125. In Alabama, notwithstanding the enumerated causes of challenge in the penal code, the Court may, in its discretion, reject such as are unfit or improper persons to sit upon the jury, and may excuse those from serving who, for reasons personal to themselves, ought to be exempt from serving on the jury. So, also, the Court may reject any juror who admits himself open to any of the enumerated challenges for cause, without putting him upon the prisoner. *The State* v. *Marshall*, 8 Ala. 302.

126. In forming a jury, on the trial of an indictment for murder, the prisoner challenged a person tendered as a juror because he was not indifferent for him. To sustain the challenge before the Court, the prisoner offered that person as a witness, and, being sworn, he stated that he had formed and expressed an opinion adverse to the prisoner upon rumors which he had heard, but that he had not heard a full statement of the case, and that his mind was not so made up as to prevent the doing of impartial justice to the prisoner; held that upon this evidence the Court might find that the juror was indifferent, and having so found, as a matter of fact, the Supreme Court cannot revise their decision. *The State* v. *Ellington*, 7 Iredell 61.

127. While the jury were being impanelled, for the trial of an indictment for murder, A. was called as a talesman, and being asked whether he had formed any opinion as to the defendant's guilt, said that soon after the defendant's arrest he read certain newspaper accounts of what purported to be his confessions, and upon reading them he was of opinion that if those accounts were true, a horrid murder had been committed; but he had formed no opinion as to the truth or falsity of them, and remarked to his family, while reading the accounts, that the case on the trial would probably turn out to be a very different affair; he added that he had not any settled opinion upon the subject,

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and felt that he could render an impartial verdict; held that A. was not disqualified by bias to sit as a juror in the cause. *The State* v. *Potter*, 18 Conn. R. 166.

128. Where a juror, after he is sworn in chief, and has taken his seat, is discovered to be disqualified from serving, he may, in the exercise of a sound discretion, be set aside by the Court at any time before evidence is given, and this may be done even in a capital case, and as well for cause existing before as after the juror was sworn. *The People* v. *Damon*, 13 Wend. 351.

129. A person whose opinions are such as to preclude him from finding a prisoner guilty of an offence punishable with death, is incompetent to serve as a juror on the trial of an indictment for an offence subjecting to that punishment; it is not the opinions on the subject of the religious denomination to which he belongs which exclude him, but his own opinions; and, therefore, if he entertains them, though he does not belong to a religious denomination, he is incompetent to serve as a juror. *Ib.*

130. It is an essential qualification of jurors that they should be freeholders; and if it be discovered after verdict that one of the jury was not a freeholder, it is a sufficient ground of arrest of judgment; but judgment will not be arrested merely because the jury after the cause was submitted to them separated before they had agreed on a verdict. *State* v. *Babcock*, 1 Conn. 401.

131. The oath taken by a master-mason, or a royal-arch mason, on his admission, does not render him incompetent to serve as a juror, in an action between a mason and a person not a mason. *The People* v. *Horton*, 13 Wend. 1.

132. In Virginia, in a case of felony, a juror may be objected to on the ground that he is not a freeholder. *Dowdy* v. *Commonwealth*, 9 Gratt. 727.

133. Where it is ascertained that a juror has formed a fixed opinion for or against the prisoner, and entertains it at the time, he is incompetent. *Willis* v. *the State*, 12 Ga. 444.

134. Where a juror, on the trial of an indictment, had formed and expressed a decided opinion as to the guilt of the defendant, previous to the trial, which fact was unknown to the defendant until after the rendition of the verdict; held that such juror was disqualified from serving. *Wade* v. *the State*, 12 Ga. 25.

135. If, in a capital case, a juror when called, states that he has conscientious scruples about the propriety of capital punishment, and is opposed to it, and being asked whether if the testimony in the cause proved the prisoner to be guilty of murder in the first degree he would convict him of it, replies, I do not know, is incompetent. *Clore's case*, 8 Gratt. 606.

136. A juror being called and sworn, stated that he had not heard any of the evidence, nor any report of it, but from what he had heard spoken of the case, in the neighborhood, he had formed an opinion to a certain extent; thereupon, the Court asked him if there was partiality or prejudice on his mind for or against the prisoner, he replied that he could not say there was any, but if any, it was in favor of the prisoner; held that he was competent. *Ib.*

137. When a juror has been put upon triers at the instance of the prisoner, and they have retired to their room, it is not competent for the defendant's counsel to move the Court to send written instructions to the triers, to propound to the juror a particular interrogatory for the purpose of establishing his ineligibility. *Whaley* v. *State*, 11 Ga. 123.

138. In the progress of impanelling the jury, a talesman was called, and on his examination he stated "that he read the evidence as published in the newspapers, and had formed and expressed the opinion, though it was not a decided one, that the prisoner was guilty. But he was satisfied that he could give the prisoner a fair and impartial trial, notwithstanding his impressions, and without being influenced by them, on hearing the evidence adduced on the trial." The prisoner thereupon objected to him as a juryman, but the Court overruled the objection. *Smith* v. *Com.*, 6 Gratt. 696.

139. Another talesman was called,

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and stated "that he had formed and expressed a decided opinion, founded on a report of the evidence before the mayor, published in the papers, but not such an opinion as would influence his mind if accepted as a juryman; that the opinion so formed would naturally be recalled to his memory, but that he would be governed solely by the evidence which might be given in Court." The prisoner objected to him as a juror, but the Court overruled the objection. *Ib.*

140. One of the jurors called, stated "that he had formed and expressed an opinion from the rumor or report he had heard in his neighborhood soon after the murder was committed; that he had no acquaintance with the defendant, no ill-will or prejudice against him; that he had no personal knowledge of the circumstances of the case; that he had never heard any of the testimony or conversed with any of the witnesses; that his opinion was conditional; that if what he had heard was true he had formed an opinion, if what he had heard was not true he had formed none." Six other jurors being examined, made the same statement; held that the jurors were not competent. *Trimble* v. *State*, 2 Greene 404.

141. Where any provision of a statute is in force, its true construction and the constitional power of the Legislature to make it, are pure, abstract questions of law, upon which it is the privilege and the duty of the jury to be governed definitively by the instructions of the judge before whom the indictment is tried. If they coincide with his own opinions, of course he is not disqualified, and if they differ from his, it his duty to yield his own and follow those of the judge; and having taken upon himself the duty of a juror, and taken an oath faithfully to perform it, the law presumes that he will do it. Whether, if the juror should express a determination not to follow the instructions of the Court in matters of law, if they should differ from his own opinion, this would show him partial and disqualified, like a declaration made beforehand, that he would not be governed by evidence in matters of fact if it should tend to result contrary to his own pre-conceived views,—*Quere*. *Commonwealth* v. *Abbot*, 13 Met. 120.

142. On the trial of an indictment for secreting records, a juror belonging to the town, whose book of records was alleged to have been secreted by the accused, was excluded from the panel; held that this was right. *State* v. *Williams*, 30 Maine Rep. 484.

143. The great principle is, that every man who is accused has a right to demand a trial by an impartial jury of his country; a jury whose minds are free from prejudice and from bias; cases may arise in which it is next to impossible to procure a jury of this description, but even in such cases the nearer we can approach to the principle the better. It seems to be generally conceded that an opinion formed and expressed on common rumor will not disqualify a juror. *Nelms* v. *State*, 13 Smed. & Marsh. 500.

144. The whole matter relative to the examination of jurors beyond the provisions of the statute, is one that must be left to the sound judgment and judicial discretion of the presiding judge. This applies not only to the propounding of further questions to the jurors, but also to the manner of putting them. The counsel of a party has no right personally to interrogate the jurors with a view of showing their bias or prejudice by facts drawn out by a cross-examination or something very like it. *Commonwealth* v. *Gee*, 6 Cush. 174.

145. Where it does not appear that the persons returned by the sheriff were persons having the proper qualifications of jurors, this objection is not open to the defendants upon their bill of exceptions. If this point had been intended to be raised, it should have been distinctly stated, and the objection taken before the jurors were placed upon the panel. *Ib.*

146. The belief of the juror, that he can do justice, can have but little influence in determining his competency. The presumption of law is against his competency when a decided opinion as to the guilt or innocence of the prisoner has been formed. *Sam* v. *State*, 13 Smed. & Marsh. 189.

147. If a juror were offered who had

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already heard all the testimony, and made up his mind from it, beyond all doubt he would be incompetent. On the other hand, if one were offered who had formed only an hypothetical opinion from rumor, and who at the same time declared that he could render an impartial verdict, it would be equally clear that he was competent. *Ib.*

148. In Alabama, a juror whose sole property in slaves consists in an undistributed share in an estate composed of slaves, is not a slaveholder within the contemplation of the statute, and is incompetent to sit as such on the trial of a slave for a capital offence. *Spence* v. *State*, 17 Ala. 192.

149. It is not error to excuse a struck juror from serving for good cause shown; and that he is postmaster is good cause. *Stewart* v. *State*, 1 O. Rep. 66.

150. It is not in general enough to justify triers in setting aside a juror in a criminal case as not being indifferent, that he has formed an unfavorable opinion of the character of the defendant; whether it would be a valid objection that he had read a report of the facts in the public papers, and had thereby imbibed an impression against the defendant, depends upon the strength of the impression. *People* v. *Lohman*, 2 Barb. 216.

151. A juror in order to be competent, must not only be indifferent as to the issue he is to pass upon, but impartial between the parties; and where triers of a challenge for favor to a juror were sworn to find whether the juror was indifferent "upon the issue joined," that qualification being objected to, the oath was held to be erroneous. *Freeman* v. *People*, 4 Denio 9.

152. A juror having formed an opinion of the guilt of the defendant, is not competent to serve; although he declares that if the circumstances on which his opinion is founded are not supported by proof, his opinion of the guilt of the accused will be removed. *People* v. *Mather*, 4 Wend. 229.

153. There is no distinction as to the grounds of the opinion formed by the juror of the guilt of the defendant: whether it be founded on being an eyewitness or on hearing the testimony of persons present at the transaction, or whether it be based on rumors, reports, and newspaper publications; in either case it is good cause of challenge. *Ib.*

154. It is not necessary that a juror should own a freehold; it is sufficient if, in lieu thereof, he has paid a tax the preceding year, of three shillings. *State* v. *Massey*, 2 Hill's S. C. 379.

155. If there is a mistake in the copy of the panel of the jury delivered to the prisoner, and one of the juror's names omitted, the juror cannot be sworn. *State* v. *Powell*, 2 Halst. 244.

156. A juror cannot before he is sworn on his voir dire be asked whether he has formed and expressed an opinion as to the guilt of the prisoner. *Quere*, whether such question can be asked at all in the State. *State* v. *Zellers*, 2 Halst. 220.

157. To disqualify a juror, he should show something more than a vague and indefinite impression, not founded upon facts, which are established in his own mind to be true; and yet it is not necessary that he should have so far prejudged the case, that his mind is not still open to conviction. *Baxter* v. *People*, 3 Gilman 368.

158. It is the *nature* of the opinion which the juror has imbibed, which must decide his competency, regardless of the source in which it originated. *Boon* v. *State*, 1 Kelly 631.

159. A juror who states upon oath, in answer to the statutory questions, that he has formed and expressed an opinion with regard to the guilt or innocence of the prisoner from hearsay, is not an *impartial juror*. *Reynolds* v. *State*, 1 Kelly 222.

160. A juror who entertains such conscientious scruples upon the lawfulness of capital punishment, that he could not in any case, whatever might be the evidence, render a verdict which might subject the prisoner to loss of life, is manifestly an unfit person to try an indictment where the law would require him, upon evidence of wilful, deliberate, malicious homicide, to return a verdict of murder in the first degree. *Pierce* v. *State*, 1 N. H. (2d series) 536.

161. It is immaterial in what manner a juror becomes biased—the ques-

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tion is, is he impartial or is he not? He will be unfitted to do justice to the parties, whether he derive his impressions from reading the newspapers, from common report, or from hearing witnesses testify in a court of justice. *State* v. *Webster*, 1 N. H. Reports (2d series) 491.

162. The prosecuting attorney may inquire of a person presented as a juror in a case for counterfeiting, whether he has taken an oath to acquit all persons of counterfeiting; the person may, however, refuse to answer. *Fletcher* v. *State*, 6 Humph. 249.

163. A juror after having stated that he had formed and expressed no opinion in the case, was tendered to the prisoner as a juror, when he voluntarily stated to the Court that he had conscientious scruples about finding any man guilty of murder, and could not conscientiously take the oath; the Court, thereupon, discharged him without challenge, either upon the part of the State or the accused. *Lewis* v. *State*, 9 Smedes & Marsh. 115.

164. In Georgia, the scruples of a juror, whether real or not (for into their genuineness no human tribunal can easily inquire), amounting to a pre-determination to condemn or acquit a prisoner, disregarding the evidence or disregarding the law; if declared by the juror, or otherwise made known, form a legal ground of principal challenge; and if either side thinks fit to challenge for that reason, the cause is sufficient. *Williams* v. *State*, 3 Kelly 453.

165. Under sec. 155, chap. 52, Digest, a member of a grand jury by which an indictment is found, &c., cannot serve as a juror on the trial thereof; and under section 163 of the same chapter, if the disqualification of the juror is discovered after he is sworn, but before any of the evidence is introduced, the Court may, in its discretion, discharge him, notwithstanding the contrary provision of section 20 of chapter 94 of the Digest; because the former section having been passed after the latter, controls it, under the rule of construction as given in the 6th section of the 156th chapter of the Digest. *Cornelius* v. *State*, 7 Eng. 782.

166. In Ohio, when the regular jury has been discharged, and there are cases yet undisposed of, the Court of Common Pleas is authorized to impanel a jury of bystanders to try such causes. *Reed* v. *State*, 15 O. 217.

167. Whether the jury shall be permitted to separate during the progress of the trial in a criminal case, and the exercise of this discretion cannot be questioned on error. *Davis* v. *State*, 15 Ohio 72.

168. When the jury retire, in the charge of a sheriff or of a *qualified* constable, such officer need not be specially sworn. *Ib.*

169. In criminal cases, in Arkansas, the jury are the judges of the law and evidence, and should be sworn to give their verdict according to both. *Patterson* v. *State*, 2 Eng. 59.

170. The form of oath, by analogy to the form used in England, is, "You shall well and truly try, and a true deliverance make between the State of Arkansas and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the law and evidence. So help you God." *Ib.*

171. The defendant was convicted of murder on an issue of not guilty; he brought error, and the judgment was reversed, because the record states that the "jury were sworn to say the truth in the premises," which form of oath was held wholly insufficient. *Ib.*

172. In Alabama, when the office of sheriff is full, and a temporary inability of the sheriff to act, from sickness, the Court has no power to direct the coroner to impanel a jury in a criminal case. *State* v. *Monk*, 3 Ala. 415.

173. Whether, in the event of the refusal or permanent inability of the sheriff to act, the Court does not inherently possess the power of appointing a ministerial officer to execute its mandates,—*Quere*. *Ib.*

174. The act authorizing the coroner temporarily to fill the office of sheriff, when a vacancy occurs, until the Executive appoints, is not in conflict with the constitutional provision giving, the appointment in case of vacancy to the Governor. *Ib.*

175. The act authorizing the coroner to act where the sheriff is a party in

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interest to any suit, and perform all the duties of sheriff whenever, from any cause, he may be incompetent to act as such, Aik. Dig. 96, is in affirmance of the Common Law, and merely authorizes the coroner to act when the sheriff is temporarily incompetent to act, from relationship, interest, &c., &c., but does not apply when the sheriff is unable to act. *Ib.*

176. In organizing a jury for the trial of an accused, the jurors of the first and second juries are to be called, in succession, beginning with the foreman; it is not before both the regular juries are exhausted, that supernumeraries in the panel which are annexed to the venire, are to be drawn. *State* v. *Sims*, 2 Bailey 29; *State* v. *Crank*, Ib. 66.

177. In New York, a court of *Special Sessions* have the power and it is their duty to issue a *second* venire for a jury to try the accused, if the first jury are discharged on the ground that they cannot agree upon a verdict. *Vanderwerker* v. *People*, 5 Wend. 530.

178. Where a case is not submitted to a jury impanelled to try it, it is proper to impanel a new jury at a subsequent term. *Harriman* v. *State*, 2 Green 270.

179. Where a party objects to a sheriff on account of prejudice, and asks the Court to appoint an eliser to impanel a jury; held that he sufficiently manifests his objection to the coroner also, and the Court may appoint an eliser. *Malone* v. *State*, 8 Ga. 408.

180. But if the sheriff afterwards impanel a jury, and it is not objected to until after the verdict, the objection is held to be waived. *Ib.*

181. In impanelling a jury for trial of an indictment of felony, it is not necessary that the jurymen who have been elected and sworn should be kept together, and separate from other persons under charge of the sheriff, until the whole number shall be elected and sworn. *Toole's case*, 11 Leigh 714.

182. The Court in the early stage of impanelling jurors, where the numbers unchallenged are yet great, in particular trials, or in particular circumstances, as where public opinion has been abused by the party press, or where there is reason to suppose that the opinion of the neighborhood from which the jurors came may be biased, will permit more searching and particular questions to be put to the persons summoned as jurors than it would subsequently; where it appears that a jury such as would be entirely desirable, cannot be had, or where the case has not excited public interest, it will endeavor in the first instance, and as far as practicable, to have a jury not only free from legal bias, but even from any even slight impressions about the case at all. *U. States* v. *Hanway*, 2 Wallace, Jr. 139.

183. In a capital case, the accused is entitled to a trial by a jury selected from the special venire facias if a sufficient number can be obtained therefrom, and the Circuit judge cannot without good cause discharge one of the jurors thus specialy summoned. *Boles* v. *the State*, 24 Miss. 445.

184. It is no abridgment of the right of the accused in a capital case to select a jury from the whole of the special venire, if some of them fail to appear, provided a jury is taken from those who do appear. *Ib.*

185. Held that the impanelling of the jury upon the plea of the general issue previous to disposing of the plea in bar, was an irregularity which could be obviated only by discharging the jury. *State* v. *Nelson*, 7 Ala. 610.

186. That such discharge under the circumstances of the case was not equivalent to an acquittal, nor entitled the defendant to his discharge. *Ib.*

187. In organizing a jury for the trial of a criminal case, the practice is to present to the prisoner for challenge the juries number one and two impaneled and sworn, beginning with the foreman of jury number one, and after these are exhausted by challenge, then to present successively the supernumeraries as drawn on the first day of the term. *State* v. *Brown*, 3 Strobh. 508.

188. Where the manner of swearing a jury is stated, the Court will not presume that the jury was otherwise sworn; and if the swearing be not in accordance with the statute, the verdict will be set aside. *Bivens* v. *State*, 6 Eng. 455.

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189. Where there are two or more counts in a declaration to which there are pleas and issue, it is error to impanel and swear the jury to try the issue to one count only. *Adams* v. *State*, 6 Eng. 466.

190. A general oath may be administered to jurors at the opening of a Court, for the trial of issues; there is no necessity that they should be sworn in each cause in which they are called. *People* v. *Albany C. P.*, 6 Wend. 550.

191. The words then and there, need not appear in the caption; for if it is by word shown that the jurors were sworn, it will be sufficiently intended that they were then and there sworn. *Woodsides* v. *State*, 2 Howard 655.

192. In Georgia, under the act of February, 1850, transferring the trial of capital offences committed by slaves and free colored persons to the Superior courts, jurors are to be impanelled and sworn in the same manner as for trial of crimes committed by free white persons. *Stephen* v. *the State*, 11 Ga. 225.

193. In a criminal case it is not sufficient to swear the jury well and truly to try the issue joined, and a true verdict to render according to the evidence; the jury being the judges as well of the law as the facts, should be sworn to try the case according to both. *Sandford* v. *State*, 6 Eng. 328.

194. The proper form of the oath to be administered to the jury in a criminal case is, that they shall render a true verdict according to the evidence. *State* v. *Jones*, 5 Ala. 666.

195. It is sufficient objection to an oath to jurors, that the statute has prescribed an exact form of oath to be administered in criminal trials to jurors, and that it was not so administered. *State* v. *Rollins*, 2 Foster 528.

196. On a trial for murder, the jury were sworn the truth to speak upon the issue joined between the parties; held that the oath was insufficient. *Harriman* v. *State*, 2 Greene 270.

197. In Iowa, it is not sufficient in a criminal case to swear the jury "the truth to speak on the issue joined." *Warren* v. *State*, 1 Greene 106.

198. That the fact of separation having been established by the prisoner, the possibility that the jury has been tampered with and has received other impressions than those derived from the testimony in court, exists, and prima facia the verdict is vicious; but 2d, this separation may be explained by the prosecution showing that the juror had no communication with other persons, or that such communication was upon subjects foreign to the trial, and that in fact no impressions other than those drawn from the testimony were made upon his mind; but 3d, in the absence of such explanation, the mere fact of separation is sufficient ground for a new trial. *Hines* v. *State*, 8 Humph. 597.

199. If the record shows the Court had on an adjournment from one day till the next, placed the jury in the charge of a bailiff, it will be presumed that the jury was committed to his care in a legal manner. *Dias* v. *State*, 7 Blackf. 20.

200. Lodging the jurors apart, distributed in five different rooms, in the third story of a hotel opening upon a common passage which communicated with the street below by flights of stairs, the doors of their chambers being unlocked during the night, and there being no doors or other fastenings at either end of the passage, or at both ends, does not constitute nor is equivalent to a separation in contemplation of law. *Thompson* v. *Com.*, 8 Gratt. 637.

201. There is no Virginia authority that lays down a different rule and countenances the proposition that the fact of ardent spirits entering into and forming part of the refreshments, if used with moderation and temperance, constituted misconduct in a jury, and if misconduct for which the jury might be fined, such an irregularity as to vitiate the verdict. *Ib.*

202. Where a jury was sworn and impanelled to try a defendant on several indictments, and after giving a verdict of not guilty on the first indictment, they separated and went to a tavern, and then returned into court, when the accused was tried by the same jury on the other indictments, and found guilty, this Court held the proceedings on the other indictment ir-

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regular; but whether the prisoner is to be discharged or a new trial granted,—*Quere*. *People* v. *Meany*, 4 John. 294.

203. Misconduct in a juror in a capital case, as a separation from his fellows, or eating or drinking without the permission of the Court before delivering the verdict; held by Ruffin, C. J., and Daniel, J., to be a reason for applying to the discretion of the judge in the Court below for a new trial, and not to render the verdict a nullity, and a venire de novo proper. *State* v. *Miller*, 1 Dev. & Batt. 500.

204. But, per Gaston, J.—Any unauthorized and unexplained separation of a juror from his fellows, in a capital case, in law vitiates the verdict, and a venire de novo should be awarded. Minor irregularities are grounds for a new trial, addressed to the discretion of the judge who presided at the trial. *Ib.*

205. The effect of a separation of the jury before they return their verdict, and the difference between a new trial and a venire de novo, discussed and stated at length by Ruffin, C. J., and Gaston, J. *Ib.*

206. In the trial of a case not capital, if two of the jury retire without permission and without an officer, it shall not vitiate the verdict if it appear from the affidavit of the jurors that they spoke with no one while they were out. *State* v. *Carstaphen*, Martin & 2 Hayw. 422.

207. It is within the sound discretion of the presiding judge to allow a juror to leave the jury-box for a brief time, even during the trial of a capital case. *State* v. *Anderson*, 2 Bailey 565.

208. In capital cases, and indeed in all cases of felony, the jury, after they are sworn, should not be permitted to separate until they have rendered their verdict; and if permitted to separate, the judgment will be reversed. *McLean* v. *State*, 8 Mo. 153.

209. In Virginia the sheriff is, ex officio, bound to keep the jury when adjourned, in a criminal case; and it is not a matter of absolute necessity that he should be sworn; if, however, it were necessary to swear him, the presumption would be that he was sworn in a case where the record does not show the contrary. *Bennett's case*, 8 Leigh 745.

210. It is discretionary with the presiding judge to permit a jury to separate during the adjournments of a cause from day to day during the trial, even when it is a capital case. *State* v. *Anderson*, 2 Bailey 565.

211. Where the record of a capital case showed that after the petit jury were sworn, the court adjourned from one day to the next, but it did not show that the jury were legally disposed of during the adjournment; it was held that a judgment and verdict against the defendant must, under these circumstances, be considered error. *Jones* v. *State*, 2 Blackf. 475.

212. The separation of a jury in a criminal case, in consequence of the adjournment of the court at the end of the term, does not have the effect to discharge the accused from further prosecution. *Com.* v. *Thompson*, 1 Virg. Cas. 319.

213. In South Carolina the jury are not bound to remain together, even after they have been charged in a capital crime. *State* v. *McKee*, 1 Bailey 651.

214. Where, in the course of a criminal trial, a juror separated from his fellows, unaccompanied by an officer, the verdict was set aside for that reason. *State* v. *Shipping*, Brayt. 169.

215. Where, through inadvertence, the jury separate and mingle with the crowd, when the Court takes the burden of fairly inquiring into the circumstances, in part by an examination of the jurors upon oath, and is satisfied that nothing has occurred which may be prejudicial to the prisoner, the verdict should not be disturbed. *Roberts* v. *State*, 14 Geo. 8.

216. Where both parties consent to the separation of the jury before verdict, it is not erroneous for the Court to permit it; if a defendant can plead guilty, he can consent to the separation of the jury; though in some cases, as where minors or slaves are indicted, it might be prudent for the Court not to act upon the consent, yet it is discretionary with the Court. *State* v. *Mix*, 15 Mo. 153.

217. The evidence relied upon to es-

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tablish separation, was that the jury were kept up stairs in a tavern—that they occupied five lodging rooms—that these rooms were separated by a passage, into which the only doors to said rooms opened—that the said doors were continually open, except that at one time, for a few minutes, one of them was closed—that at each end of this passage there were doors which were continually kept fastened and secured, and that one or more of the deputy-sheriffs were continually attending on said jury, and did not know or believe that any person could have had access to them; held, that keeping the jury in rooms thus situated and attended, was a strict compliance with the law. *Kennedy* v. *Com.*, 26 Virg. Cas. 510.

218. In a criminal case where, on the trial of an indictment, the jurors had been impanelled and sworn, and the case partly submitted to them, when the Court adjourned. During the adjournment one of the jurors separated himself from his fellows, and when the court met, this juror was dismissed and another person substituted; held that this was erroneous. *Grable* v. *State*, 2 Greene 559.

219. Ordinarily, it is the duty of the Court to keep the jury together, in a criminal case, from the time it is submitted to them until they are finally discharged from its consideration. *Berry* v. *State*, 10 Geo. 511.

III. Qualifications of Grand Jurors—How Impanelled and Sworn—Duties of the Foreman.

220. Where a person deeded all his land in trust to a creditor as security for the payment of a debt, and the day of payment was past, but the trustee had not sold the land, and the debtor was still in possession; held that he was competent to serve as a grand juror in Virginia. *Com.* v. *Carter*, 2 Virg. Cas. 319.

221. To an indictment in Petersburgh Circuit Court, the defendant put in several pleas: 1st. That one of the grand jury which found the indictment was, at the time he was summoned and sworn, the owner of a water-grist mill, situated in Chesterfield. 2d. That one of the grand jury was, at the time of finding the indictment, the owner of a water-grist mill (without stating where the mill was situated); held under the construction to be given to the Virginia statute (1 Rev. Code, c. 75 § 1, p. 264), and the act of March 28, 1836, that the pleas were insufficient. *Moran's case*, 9 Leigh 651.

222. In Virginia, to an indictment found in S. county, in September, 1838, the accused put in a plea in abatement that A., one of the grand jurors, was not a freeholder; on the trial of the issue joined on this plea, it appeared that the only land to which A. at the time the indictment was found had title, was a parcel in S. containing six hundred and ninety-one acres, formerly part of a large tract lying mostly in S., but partly in W. county. The whole tract was offered for sale in 1815, in the latter county, for arrears of taxes, but was not sold, and these taxes remained unpaid on the 1st July, 1838. In 1834, the owner conveyed the whole tract to a trustee, upon trust that the trustee should sell the lands and pay the debts, but no sale was ever made under this deed. In 1837, the grantor in the trust-deed sold and conveyed to A. the six hundred and ninety-one acres of which A. immediately received possession, and remained in possession at the time he was sworn as a grand juror; held that the issue on these facts was found in favor of the government. *Morris' case*, 9 Leigh 638.

223. In Indiana, where a person is selected as a talesman to serve on a grand jury, he must either be a freeholder or a householder. *The State* v. *Herndon*, 5 Blackf. 75.

224. Where the grand jury has not all the qualifications required by statute, it is a good ground of challenge, or the defendant, before issue joined, may plead the objection in avoidance. *Ib.*

225. In Virginia, when on the first day of the term of the Circuit Superior Court, a grand jury was impanelled and sworn, and proceeded in the discharge of its duties, and on the next

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day it was discovered that one of the grand jurors was disqualified, whereupon the Court discharged him and ordered another to be sworn; held that this was regular, and the grand jury were lawfully constituted. *Baxter's case*, 4 Leigh 645.

226. A residence of six months in the territory of Iowa gives a person a right to sit as grand juror, and it is not objectionable that a portion of such residence was in the Indian country. *Harkee* v. *U. S.*, 1 Morris 169.

227. Where an indictment is found by the grand jury, one of whom is an alien, the bill or presentment may be avoided by plea. *Commonwealth* v. *Cherry*, 2 Virg. Cas. 20.

228. In Tennessee it is sufficient that the caption of an indictment state that the grand jurors were good and lawful men; if they be such, they must be freeholders and householders. *Cornell* v. *Tennessee*, 1 M. & Yerg. 147.

229. It is not even necessary that the qualifications of jurors should appear in proceedings in the Superior Courts. *Ib.*

230. It will be presumed that the grand jurors selected are good and lawful men. The party may destroy this presumption by challenge and proof before the trial, but the question cannot be afterwards raised. *Cody* v. *State*, 3 Howard 27.

231. The list of grand jurors returned by the sheriff is not evidence that such grand jurors are qualified according to law. *State* v. *Ligon*, 7 Porter 167.

232. In Indiana; according to the statute, grand jurors can only serve for one year from the time they are selected. *Barger, et al.* v. *State*, 6 Blackf. 188.

233. Where a grand jury was impanelled, of which twelve persons were taken from the regular venire, and it having then become exhausted, two persons were taken from bystanders summoned by the sheriff; held regular objections to the personal qualifications of grand jurors, or to the legality of the returns, cannot affect any indictments found by them after they have been received and filed by the Court; but such objections, if any exist, must be made before the indictments are found, and may be received from any person who is under a presentment for any crime whatsoever, or from any person present who may make the suggestion as amicus curiæ. *Dowling* v. *State*, 5 S. & Marsh. 664.

234. The defendant when first arraigned, though it were at a subsequent term to that at which the indictment was found, may plead in abatement that the grand jurors who found the indictment had not been selected conformably to the statute. *Vattier* v. *State*, 4 Blackf. 73.

235. It is not sufficient exception to an indictment for an offence to which the law annexes a fine for the use of the town where the offence was committed, that the foreman of the grand jury who found the indictment is a taxable inhabitant of such town. *Commonwealth* v. *Ryan*, 5 Mass. 90.

236. The Court will not set aside a grand juror because he has been the prosecutor of a person accused of a capital crime, whose case may probably be brought before the grand jury. *Case of John Tucker*, 8 Mass. 286.

237. After an indictment has been found against a prisoner, and the same has been filed and accepted in Court, he cannot except to the personal qualifications of the persons selected, summoned and sworn on the grand jury, or plead in bar of that indictment, that one of the jurors who preferred it is an alien. *Boyington* v. *State*, 2 Porter 100.

238. On the second day of the term after the grand jury had been organized and charged, one of their number who had been regularly drawn, impanelled, and sworn as such, upon his application was discharged and a substitute ordered to be summoned by the Court from the bystanders; held that this substitution vitiated the whole body. *Portis* v. *State*, 23 Miss. 578.

239. But it does not follow that by this unauthorized act of the Court, the grand jury were rendered invalid. If the action of the Court had ceased here, no such result would have followed; for after the discharge of the juror in question, a sufficient number

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to constitute a legal grand jury remained; the body would have preserved its organization, and possessing all the requisites of a legally-constituted grand jury, its acts to all intents would have been valid *Ib.*

240. But the Court having acted without authority, manifestly could not by such illegal and void act acquire a right to cause the substitute to be sworn in the place of the discharged grand juror. The admission, therefore, of this person upon the panel of the grand jury, and his participation in their deliberations, vitiated the whole body. *Ib.*

241. It is good ground for exception to a *grand juror* that he has formed and expressed an opinion as to the guilt of one whose case probably will be presented to the consideration of the grand inquest; so, also, a grand juror's having shown feelings of hostility towards such party, is good ground for exceptions. But these exceptions must be taken before the indictment is found, and will not afterwards be heard. *People* v. *Jewett*, 3 Wend. 314.

242. Objections to the personal qualification of grand jurors, or to the legality of the returns, cannot affect any indictment found by them after they have been received and filed by the Court; but such objections, if any exist, must be made before the indictments are found, and may be received from any person who is under a presentment for any crime whatsoever, or from any person present, who may make the suggestion as amicus curiæ. *Barney* v. *State*, 17 Smedes & Marsh. 68.

243. In Arkansas, the 20th sec., chap. 94, Digest, which declares that "no exception against any juror on account of his citizenship, non-residence, age, or other legal disability, shall be allowed after the jury are sworn," does not apply to grand jurors. *State* v. *Brown*, 5 Eng. 78.

244. It is good cause of abatement that the foreman of a grand jury, by whom an indictment was found, was not a citizen of the State, or that a member of the grand jury was not a householder or freeholder. *Ib.*

245. Therefore, where the defendant pleaded in abatement to an indictment, that one of the grand jurors by whom the indictment was found, was not a householder or freeholder of the county, a replication to such plea, alleging that besides the person so disqualified (and one other), the indictment was found by the concurrence of fourteen good and lawful jurors of the panel, is bad on demurrer. *State* v. *Hawkins*, 5 Eng. 71.

246. The grand jury cannot be called and required to expurgate themselves of any supposed interest or bias at the instance of one in jail, and expecting an indictment to be preferred against him. Objections to the grand jury must be taken by plea in abatement, at the term at which the indictment was found. *State* v. *Clarissa*, 11 Ala. 57.

247. Where one of the grand jurors is detained, and thereby prevented from being present when the rest of the grand jurors are sworn and impanelled, and comes into Court after the rest have retired; held that the juror could be sworn and charged to aid the other grand jurors in their deliberations. *Wadlin's case*, 11 Mass. 142.

248. Quakers are not incapacitated or prevented by any of the requisites of the statutes, from serving on grand juries. *Commonwealth* v. *Smith*, 9 Mass. 107.

249. It would seem that, after the bill found, no irregularity in impanelling the grand jury can be heard as a plea to an indictment. *Com.* v. *Chauncey*, 2 Ashmead 90.

250. Where a list of grand jurors chosen, was not filed with the clerk of the Court within the time prescribed by law; held that such jurors were not chosen according to law. *U. States* v. *Cupper*, 1 Morris 190.

251. In Indiana, jurors must be drawn from the box to be summoned as grand jurors. The jury, however, when convened, may consist of any smaller number not less than twelve. *Hudson* v. *State*, 1 Blackf. 317.

252. Where one of the persons summoned to serve on the grand jury was the complainant against a person accused of the crime of murder, whose case

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was likely to be presented before the grand jury; held that this was no reason why the Court should exclude the said juror from serving on the grand jury. *Tucker's case*, 8 Mass. 286.

253. A case in which defendant attempts to impeach the knowledge of the members of the grand jury, who gave the information upon which the presentment was based, by connecting it with information obtained by him, or them, from one J., falls directly within the principles of the case of the *State* v. *Darnal*, 1 Humph. R. 290, in which the Court say such a course will not be permitted. *The State* v. *McManus*, 4 Humph. 258.

254. It is not permissible for a party who expects an indictment will be preferred against him, to inquire before they are sworn, of each of the members of the grand jury who are to consider the same, whether any of them "have formed and expressed an opinion as to the guilt or innocence of the accused;" if the law were otherwise, the panel might be so exhausted by the challenges of different persons, as to render it impossible to proceed with the criminal business of the term. *State* v. *Hughes*, 1 Ala. 655.

255. The question as to whether a grand jury has been drawn, summoned, and impanelled, according to law, can only be considered under a plea in abatement. *State* v. *Greenwood*, 5 Porter 474.

256. An objection to a grand juror comes too late after a plea to the felony. *State* v. *Martin*, 2 Iredell 101.

257. The form of the oath administered to grand juries is of ancient origin, and should be substantially observed. *Brown* v. *State*, 5 Eng. 607.

258. The usual practice in this country is to administer the entire oath to the foreman, in the presence of his fellows, and then to swear them by four at a time, to keep and observe the same oath; yet this is matter of practice, and if the panel is not complete when the foreman is sworn, it is sufficient if it appear that the full oath was administered to such as were selected afterwards. *Ib.*

259. Where the record states that the grand jurors were duly sworn, &c., the presumption is that the legal oath was administered to them. *Ib.*

260. Where by law the grand jurors of a county have cognizance of offences which were committed in an unorganized county, it is unnecessary that they should be sworn, to inquire of them; for the purposes of individual proceedings, it bears the name of the organized county. *Waw-kow-chaw-neck-kaw* v. *U. States*, 1 Morris 332.

261. In Mississippi, when a grand jury is not impanelled in the way prescribed by statute, they have no power to find a valid indictment. *Stokes* v. *the State*, 24 Miss. 621.

262. The question as to whether a grand jury has been drawn, summoned, and impanelled, according to law, can only be considered under a plea in abatement. *State* v. *Greenwood*, 5 Porter 474.

263. An irregularity in impanelling a grand jury can only be taken advantage of by plea in abatement upon the arraignment, and the objection is made too late after a verdict. *The State* v. *Leaben*, 4 Dev. 305. *The State* v. *Freeman*, 6 Blackf. 248.

264. In Tennessee a grand jury may be impanelled from a venire issued by the County Court for twenty-four jurors, to the Circuit Court. *Barnes* v. *State*, 5 Yerg. 186.

265. One against whom an indictment is preferred may well object by plea to the competency of a grand juror who found the bill. *State* v. *Middleton*, 5 Port. 484.

266. It is in Alabama essential to the competency of a grand juror that he should be a freeholder, or householder, when his name is returned to the clerk by the sheriff. *Ib.*

267. Thus, it is a good plea to an indictment that one of the grand jurors who found it was not a freeholder or householder at the time the list of jurors was returned. *Ib.*

268. Though it would seem that the competency of persons to act as grand jurors should not be tested by the fact of their continuing freeholders or householders up to the time of being drawn to serve as such. *Ib.*

269. If persons possess this qualification when their names are returned

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by the sheriff, though afterwards they are divested of it, they would be competent jurors. *Ib.*

270. In Vermont, if the foreman of a grand jury endorse over his signature on the back of a bill found by them, "true bill," it is sufficient. *State* v. *Davidson*, 12 Vt. 300.

271. If the indictment be not signed by the foreman of the grand jury, no further proceedings can be had on it. *Commonwealth* v. *Sargent, &c.*, Thacher's Crim. Cas. 116.

272. In Illinois, the statute provides that the foreman of a grand jury shall endorse each indictment, a true bill, and sign his name as foreman, &c., but the statute does not require the name to be copied into the record. *Gardner* v. *the People*, 3 Scam. 83.

273. In Kentucky, the statute of 1814, (Stat. Law, 1st, 541,) according to its grammatical construction, requires indictments as well as presentments to be signed by the foreman; it does not direct where the signature is to be placed, though it may be implied that it was intended to be placed at the foot of the presentment or indictment, as the object of the signature was to show to the Court that it had been passed upon, and found by the grand jury; this is as well shown by an endorsement of his signature by placing it at the foot of the indictment, and either form will suffice. *Overshiner* v. *Com.*, 2 Monr. 344.

274. In a bill of indictment endorsed "a true bill," and to the subscription of A. B., the foreman, the letters, F. G. J. added, will be sufficient to indicate that he acted as foreman, where it appears from the record that A. B. was in fact the foreman of the grand jury when the bill was found. And if no letters had been added after his name, his subscription to the endorsement could only be referred to his official act as foreman, and would therefore be sufficient. *State* v. *Chandler*, 2 Hawk. 439.

IV. Challenge for Principal Cause, and Challenge to the Favor.

275. A juror may be challenged to the favor, after the same juror has been challenged for principal cause, and such challenge has been tried and overruled. *Carnal* v. *the People*, 1 Parker's Crim. R. 272.

276. Where, after a challenge for principal cause had been tried and overruled, a challenge to the same juror was made "to the favor," it was held that the form of the challenge was good, without mentioning specifically the grounds of challenge. *Ib.*

277. Where a juror was challenged for cause by the prosecution, and the challenge allowed and the jury completed before the peremptory challenges were exhausted, it is held that the sufficiency of the cause of the challenge will not be examined into. *The State* v. *Arthur*, 2 Dev. 217.

278. After a juryman has been elected and sworn, the Court has it in its discretion to allow the prisoner to challenge him for cause, and strike him from the panel. *Toole's case*, 11 Leigh 714.

279. A challenge for principal cause, constitutes a part of the record; and to review this, a certiorari will lie in a criminal cause, and a writ of error in a civil cause, otherwise of a challenge to the favor. *Ex parte Vermilyea*, 6 Cow. 555.

280. Where a juror has expressed an opinion against the party, though from his knowledge of the cause, and not from any favor or ill will; yet this is a principal cause of challenge. *Ib.*

281. So it seems, if his opinion be founded on the information of those who are acquainted with the facts; otherwise, where his opinion is based on mere rumor. *Ib.*

282. Where one forms and expresses an opinion upon the guilt or innocence of a party on trial for a felony, it is a principal cause of challenge; the mere forming of an opinion is enough. *People* v. *Rathbun*, 21 Wend. 509.

283. Where, on a trial for felony, the accused by his counsel consents to substitute the Court for triers, upon challenges to jurors, such consent cannot subsequently be revoked, and a demand made that a challenge to jurors shall be passed upon by triers, especially after the challenge has been passed upon by the Court. *Ib.*

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284. A bill of exceptions will lie for refusing triers, or upon any question arising upon a challenge to jurors, in a case where triers may be demanded. *Ib.*

285. Where a juror was challenged for cause, and it appeared that his wife was cousin to the prisoner's former wife, who was now dead, leaving no children; held that this was no cause of challenge, the affinity having ceased with her death. *State* v. *Shaw*, 3 Iredell 532.

286. The improper allowing or disallowing of a challenge, is a ground for a venire de novo, not as a matter of discretion in the Court, but of right to the party, and is therefore a good foundation for a writ of error. *Ib.*

287. The withdrawal of a juror from the panel by the Court, without sufficient cause, is in law, however excusable the error, an arbitrary withdrawal, for which the Court has no authority. *Ib.*

288. The jurors of the original venire constitute a distinct panel; when that panel is perused—or gone through with—without forming a jury, any individual member thereof, who, upon the challenge of the State, has been set aside to see whether a jury might not be formed from the panel without him, must be brought forward and challenged or taken, before the special venire, or tales-jurors, can be resorted to. *Ib.*

289. The forming and expressing a decided or substantial opinion, is a principal cause of challenge to a juror. *Sprouce* v. *Com.*, 2 Virg. Cas. 375.

290. If the objection to a juror appears in the form of a principal challenge, the prisoner must prove his allegations by testimony; if it is a challenge to the favor, the prisoner appeals to the conscience of the juror, on his voir dire. *Ib.*

291. It is good cause of challenge to a juror, that he has formed and expressed an opinion of the innocence or guilt of the prisoner, from conversations held with jurors who had been previously charged with the trial of the prisoner. *Ned* v. *State*, 7 Porter 187.

292. Where the prisoner, on a trial for gaming, challenged a juror for cause, and his objection was overruled by the Court, and the juror in fact was incompetent and the prisoner afterwards challenged him peremptorily; it was held that unless the record showed that the prisoner had exhausted his peremptory challenges, it was not a fatal error. *McGowan* v. *State*, 9 Yerg. 184.

293. Upon challenging a juror for principal cause, the party challenging has the right to select whether the competency of the juror shall be tried by the Court, or by triers; if by the Court, then the trial must be upon the testimony of the juror only, on his voir dire; if by triers, then by other evidence, to the exclusion of the oath of the juror challenged. *Stewart* v. *State*, 8 Eng. 720.

294. Where it appears that a juror has formed or expressed an opinion as to any material fact in issue involving the guilt or innocence of the prisoner, the law presumes the juror to be incompetent, and that presumption can be removed only by affirmative evidence that his opinion was not formed on the knowledge of any fact derived from the witness, but from rumor. *Ib.*

295. Upon such trial, the party may object to the admission of evidence before the triers, or to the instructions of the Court, and make them a part of the record by bill of exceptions. *Ib.*

296. An opinion formed by a juror upon facts not personally known but well authenticated by witnesses or others in whom he placed confidence, would not be included in the term rumor, as used in the statute. *Quesenberry* v. *State*, 3 Stew. & Porter 308.

297. So it is good ground for the challenge of a juror for cause in a criminal case, that he had formed and expressed an opinion upon information derived from a person in whom he had confidence, the latter having received his information from a witness. *Ib.*

298. The State's challenge to a juror for cause, need not be decided on immediately, but it is in the discretion of the Court to let it stand until the panel be gone through. *State* v. *Overton*, 6 Iredell 165.

299. Where a juror states that he is on principle opposed to capital punishment, and that his opinion will influence his decision against the law and the evidence, he may be challenged by the

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State for cause. *Martin* v. *State*, 16 Ohio 364.

300. Upon the trial of a challenge to a juror for principal cause for having formed and expressed an opinion upon the guilt or innocence of the accused, the challenging party cannot ask the juror when examined as a witness, whether he has an impression as to the accused's guilt or innocence. *People* v. *Honeyman*, 3 Denio 121.

301. Aliter, where the challenge is for favor, on the ground of bias. *Ib.*

302. A juror stated on oath, that he had no conscientious scruples against finding a man guilty of an offence punishable with death, where the proof was positive, but no degree of circumstantial evidence should induce him to render such a verdict; that before he would find a verdict of guilty he should require the positive testimony of a witness who saw the crime committed; another juror stated on oath that he should be very reluctant to render a verdict of an offence punishable with death, even if his judgment was convinced of the prisoner's guilt; that he would probably be the last juror to agree to such a verdict, but he did not know but that he might be starved to render it; he thought he should hang the jury, and thus defeat a verdict of guilty; the prosecution challenged these jurors for cause, and the challenge was allowed by the Court. *Gates* v. *People*, 14 Ill. 433.

303. The officer prosecuting for the State, may, on a capital trial, direct the jurors to stand aside until the panel be gone through with, which is a challenge for a cause to be shown at the end of the panel, and if a cause be then shown and disallowed, the prosecuting officer may still challenge the juror, peremptorily or not at his discretion; but this practice of permitting the prosecuting officer to defer showing his cause of challenge until the panel be gone through, must be exercised under the supervision of the Court, who will restrain it if applied to an unreasonable number. *State* v. *Benton*, 2 Dev. & Batt. 196.

304. A juror may be examined as to opinions honestly formed, and honestly expressed, manifesting a bias of judgment, not referable to personal partiality or malevolence; but if the opinion has been made up and expressed under circumstances which involved dishonor and guilt, and where such expression may be visited with punishment, he ought not to be required to testify so as to criminate himself. *Ib.*

305. An opinion fully made up and expressed against either of the parties on the subject-matter of the issue to be tried, is good cause of principal challenge; but an opinion imperfectly formed, or one merely hypothetical, that is, founded on the supposition that the facts are as they have been represented or assumed to be, does not constitute a cause of principal challenge, but may be urged by way of challenge to the favor which is to be allowed, or disallowed, as the triers may find the *fact* of favor or indifference. *Ib.*

306. A challenge of a juror because of his having formed and expressed an opinion upon the question to be tried, can be made only by the party against whom it was so formed and expressed. *Ib.*

307. The forbearing of the Court to discharge a juror, to whom no exception has been taken, though there be ascertained cause of challenge against him, cannot be assigned for error, because the right of challenge in the parties remains, and neither of them can be injured by such forbearance to act on the part of the Court. *Ib.*

308. The nature and legal consequences of the practice of putting what is called a preliminary question to jurors, upon capital trials, explained, and such practice, except under particular circumstances, disapproved of, and the legal and regular mode of trying exceptions to jurors on trials for capital offences pointed out and recommended. *Ib.*

309. It is no ground of principal challenge to a juror, that he has expressed an opinion on the matter to be tried, if it was not done through ill-will or malice. *State* v. *Spencer*, 1 Zabris. 196.

310. A juror cannot be asked whether he has expressed an opinion on the issue. *Ib.*

311. A hypothetical opinion formed

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by a juror, from facts which he has heard, is no cause of challenge. *Ib.*

312. A person on trial entitled to peremptory challenge of jurors, may challenge for cause, and reserve his peremptory challenge. *Hooker* v. *State*, 4 O. 348.

313. On the trial of an indictment in which the accused was charged in some counts with the embezzlement of a check, in other counts with embezzlement and larceny of notes and dollars, a juror was challenged for cause, and on his voir dire declared that he had formed and frequently expressed a decided opinion of the prisoner's guilt, but that he did not know that this opinion applied particularly to the charge laid in the indictment; held such juror ought to be excluded. *Littlejohn* v. *Commonwealth*, 2 Virg. Cases 297.

314. If a decided opinion be formed and expressed, it is good cause of challenge to a juror, although the opinion may not have been formed from hearing the evidence given in court. *Ib.*

315. It is a good ground for principal challenge that the juror has formed and expressed an opinion that the prisoner is guilty. *Freeman* v. *People*, 4 Denio 9.

316. An impression that the prisoner is guilty, or a hypothetical opinion adverse to him, though not a cause of principal challenge, may be given in evidence, to show bias on a challenge for favor; and the same evidence having been submitted to triers, they were charged that the latter challenge was in the nature of an *appeal* from the judgment of the Court, upon the facts; it was held that the charge was erroneous. *Ib.*

317. Where a juror is set aside by a peremptory challenge, the party on whose behalf it was made cannot on error insist that the Court erred in its ruling upon the previous trial of a challenge of the same juror for cause. *Ib.*

318. A challenge to a juror for cause, must distinctly state the ground of challenge or it may be overlooked. *Ib.*

319. A challenge to a juror for *principal cause* was held to be good, where the juror had said that he believed the accused was guilty, although he testified that he had no fixed opinion upon the subject of the accused's guilt; that he only entertained impressions derived from history and common reports, meaning thereby printed statements in papers and reports in conversation; that he had never heard witnesses to the transaction testify, nor say anything on the subject in question; if the evidence supported the circumstances he had heard, he had a fixed belief respecting the guilt of the accused; if those circumstances should be done away by evidence, he should not consider him guilty; if those circumstances should not be proved, his present belief would be removed. *People* v. *Mather*, 4 Wend. 229.

320. A challenge of a juror for principal cause becomes part of the record, and may be the subject of review on error. *People* v. *Vermilyea*, 7 Cow. 108.

321. A challenge made on the ground that the juror has expressed an opinion, is a challenge for principal cause, and need not be accompanied with personal ill-will to render it valid. *Ib.*

322. Where such a challenge is made and passed upon by the Court, who pronounce it insufficient, that is equivalent to a decision on demurrer and joinder, and should be so entered by the clerk on the record. *Ib.*

323. If it be not so entered, yet on certiorari if the particular facts appear upon the return, the Court will regard it as a decision on a regular issue in law, and set it aside as erroneous. *Ib.*

324. The juror himself may be questioned on oath with respect to his opinion. *Ib.*

325. A juror was held properly excluded on a *challenge* to the favor, who testified that he had formed, though he had not expressed an opinion, that the accused was guilty; his opinion was formed upon reports and what he had read; on the trial of a former challenge, he had heard a witness testify respecting the subject in question; his opinion was made up previous to hearing that testimony, but what the witness had stated had tended to strengthen his opinion; he had read reports of trials and affidavits, or statements under oath, relating to the same subject; his opinion was made up

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from reading them and other matters; and the charge of the judge to the triers in this case was approved, in which he charged them, that if they believe that the juror had a fixed opinion which it would require testimony to remove, he was disqualified, whether that opinion was founded on rumor alone, or on rumor and printed statements. *People* v. *Mather*, 4 Wend. 229.

326. Where a juror, being challenged to the favor, testified before the triers that he had formed no opinion, and had no impressions as to the guilt of the accused, but that it had been and was still his impression, that the general character of the accused was not good; the question was then put to the juror, whether he would disregard what he had heard and read, and render his verdict according to evidence? objected to, and exception taken; held that the question, although inartificially put, substantially called for the consciousness of the juror as to his ability to try the case impartially, and therefore that it was properly allowed. *Lohman* v. *People*, 1 Cow. 379.

327. Upon challenges for favor on account of bias, although evidence that the juror has given credit to written or oral statements as to the accused's guilt is competent for the consideration of the triers, the juror should not be set aside, unless it is found that he has such a settled opinion that he could not render a verdict upon the evidence alone; the case of the *People* v. *Bodine*, (1 Denio 281,) commented on and explained. *People* v. *Honeyman*, 3 Denio 121.

328. Where, on a capital trial, the prisoner challenges a juror for favor, and the solicitor for the State admits the cause assigned to be true, the prisoner is bound by his challenge, and cannot afterwards be allowed to have the matter tried either by triers or the Court. *State* v. *Creasman*, 10 Iredell 395.

329. Upon a challenge to a juror for favor, any fact or circumstance from which bias or prejudice may justly be inferred, although weak in degree, may be received in evidence before the triers. *People* v. *Bodine*, 1 Denio 281.

330. Upon the trial of such a challenge, it is erroneous to reject all evidence, except such as goes to show a fixed and absolute opinion respecting the guilt or innocence of the prisoner. *Ib.*

331. A fixed opinion of the guilt or innocence of the accused, though it may be essential to sustain a challenge for principal cause, need not be shown where the challenge is for favor; a less decided opinion may be shown and exhibited to the triers, who must determine upon its effect. *Ib.*

332. A juror challenged for favor, who is examined before the triers, may be interrogated as to whether he ever thought the accused guilty; or what impressions statements which he had heard or read respecting the evidence had made upon his mind. *Ib.*

333. So, it appears, an opinion imperfectly formed, or one founded upon the supposition that facts are as they have been represented, may be proved before the triers upon such a challenge. Per Beardsley, J. *Ib.*

334. Where the matter charged against one who is drawn as a juror is, in judgment of law, a disqualification, the challenge is for principal cause, and is entered on the record; where the objection is not *per se* a disqualification, the challenge is for favor, and is made on terms. In the former case, where the facts are ascertained, it is to be determined by the Court; in the latter, the question is one of fact for the decision of the triers. Per Beardsley, J. *Ib.*

335. The grounds of challenge for favor are very various, and not subject to precise definition. The question is to be submitted as a question of fact upon all the evidence to the conscience and discretion of the triers, whether the juror is competent or not. *Ib.*

336. Where, upon a challenge for favor, the Court err in receiving or rejecting evidence, or instructing the triers upon matters of law, a bill of exception lies. *Ib.*

337. The remedy would be the same, if the Court should overrule such a challenge when properly made, or refuse to appoint triers. Per Beardsley, J. *Ib.*

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338. The fact that a defendant did not avail himself, as he might, of a peremptory challenge to exclude a juror who was found qualified and competent upon a challenge for cause, does not prevent him from taking advantage of an error committed on the trial of the challenge for cause, though it appears that his peremptory challenges were not exhausted when the impanelling of the jury was completed; he is entitled to have his challenges for cause determined according to law, and to make or withhold his peremptory challenges according to his pleasure. *Ib.*

339. Where, on a criminal prosecution, a person is drawn as a juror, and challenged to the favor, and called as a witness in support of the challenge to show a bias growing out of what he had heard or read on the subject, it is competent, on his cross-examination, to ask him his opinion as to the character and extent of the supposed bias, and whether he thinks it would influence him after hearing the evidence. *The People* v. *Knickerbocker*, 1 Parker's Crim. R. 302.

340. Where, on the trial of a challenge to the favor, incompetent evidence is received, and the triers find the juror indifferent, and he is then challenged peremptorily, and it appears the accused had not exhausted all his peremptory challenges when the panel was completed, the accused cannot afterwards avail himself of exceptions taken to the admission of such incompetent evidence before the triers. *Ib.*

341. In challenges to the favor, the juror is not obliged to answer any question tending to fix infamy or disgrace on him, and it has been said, in England, that he is not compelled to answer whether or not he has formed and delivered an opinion, because the disclosure tends to his disgrace, and, query, is or is not that still the law in Virginia? *Sprouce* v. *Commonwealth*, 2 Virg. Cas. 375.

342. But if the venire man may refuse to answer that question, it is his privilege, and not the Commonwealth's; and if he does not claim it, but answers it on his voir dire, then the rights of the prisoner are exactly the same as if he had proved the same fact on a principal challenge. *Ib.*

V. Peremptory Challenge, and Challenge to the Array.

343. It is not a sufficient cause of arrest of judgment, where two prisoners have been indicted and tried jointly by the same jury, that they had peremptorily challenged but 20 jurors between them; for, if they had wished the liberty of challenging 20 each, they should have availed themselves of it at the bar. *The State* v. *Monaqua*, Charlt. 16.

344. Where two or more defendants, jointly indicted for murder, are tried together, only twenty peremptory challenges can be allowed to all the accused. *The People* v. *Thayers*, 1 Parker's Crim. R. 595.

345. Where persons are tried jointly on an indictment, each one is entitled tohis peremptory challenge. *Bixby* v. *the State*, 6 Ham. 86.

346. In Pennsylvania, the Commonwealth may challenge peremptorily in cases of felonies and misdemeanor. *Commonwealth* v. *Addis*, 1 Browne 285.

347. Where one is indicted for horse-stealing, under the act of Tennessee of 1807, he is entitled to a peremptory challenge of 35 jurors, although such privilege belongs to those on trial for life; and the statute provides corporal punishment for the first offence, and death for the second. *The State* v. *Humphreys*, 1 Overt. 306.

348. A juror may be asked by the prisoner whether he has formed an opinion, in order to a decision as to a peremptory challenge. *The State* v. *Godfrey*, Brayt. 170.

349. In case of an indictment for stabbing, without malice, in Kentucky, the accused has a right to challenge twenty jurors peremptorily. *Hayden* v. *the Commonwealth*, 10 B. Monr. 125.

350. The prisoner has the absolute right to challenge any juror peremptorily at any time before swearing the juror. *Kendrick's case*, 5 Leigh. 707.

351. In Virginia, upon an inquiry in pursuance of the statute, (1 Rev. Code,

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ch. 171, § 16,) whether a convict received into the penitentiary be the same person described in the record of a former conviction, the accused has no right to challenge peremptorily any person called as juror. *Burk's case*, 2 Robinson 845.

352. In North Carolina, an accused may challenge thirty-five jurors, and no more, without showing cause. *The State* v. *Gayner*, C. & N. 305.

353. Where incompetent jurors were put to the accused, by the decision of the Court, and were peremptorily challenged by him, it was held that this was no ground of reversal; the accused having procured a jury without having exhausted his number of peremptory challenges. *Carroll* v. *the State*, 3 Humph. 315.

354. In Ohio, the statute relating to juries (29 Ohio Laws, 98), giving to the prosecuting attorney on the trial of an indictment, a right to two peremptory challenges, gives only two in the same indictment, however many defendants may be included in the indictment. *Mahan* v. *the State*, 10 Ohio 233.

355. A defendant upon a trial for a clergyable felony, is entitled to challenge peremptorily thirty-five jurors. *The State* v. *Cadwell*, 1 Jones' N. C. 289.

356. In a case of murder, before the jury were sworn, but after the panel was complete and accepted, the defendant moved for leave to challenge a juror peremptorily, he not having challenged the number allowed, but leave was refused; held that this was an error. *The State* v. *Cameron*, 2 Chandl. (Wis.) 172.

357. No peremptory challenges are allowable to the prosecution in criminal cases. The statute of 1847, entitled "an act to provide for additional challenges to jurors," has not altered the law in respect to challenges by the People in criminal cases. *The People* v. *Henries*, 1 Parker's Crim. R. 579.

358. In a capital case it is not ground of peremptory challenge of a juror that he has formed, upon common report, and expressed an opinion of the guilt of the prisoner, if the juror believes that such opinion would have no influence in the formation of his verdict, should the evidence on the trial be different from the report of the facts. *The State* v. *Williams*, 3 Stewart 454.

359. The prisoner, on being put upon his trial, challenged a juror peremptorily, and he was set aside; the jury, after hearing the evidence, not being able to agree, were discharged by consent; the prisoner was again put upon his trial at the same term, and one of the jurors whom he had challenged peremptorily at the former trial, being again presented to him, was challenged by him for cause, and the cause assigned was, that he had set him aside peremptorily on the former trial, and thereby created a prejudice on his mind; held that it was not a good challenge for cause. *The State* v. *Henley*, R. M. Charlton 505.

360. In South Carolina, the State has no right to challenge peremptorily, but may challenge for cause, and the cause need not be shown until after the prisoner has gone through with his challenges. *The State* v. *Stalmaker*, 2 Brevard's R. 1.

361. In Massachusetts, a peremptory challenge of jurors in capital cases, must be exercised, if at all, before the jurors are interrogated concerning their bias and opinion. *Com.* v. *Rogers*, 7 Metc. 500.

362. In Tennessee, upon an indictment for perjury, the accused is entitled to challenge peremptorily the same number of jurors as in other cases of a similar grade. *Hooper* v. *State*, 5 Yerger 422.

363. In Indiana and Missouri, the State, in criminal trials, may challenge three jurors peremptorily. *Wiley* v. *the State*, 4 Blackf. 458; *Beauchamp* v. *the State*, 6 Blackf. 300; *Mallison* v. *the State*, 6 Mo. 399.

364. If a party challenge a juror peremptorily when he is not obliged to do so, he waives his exception, and cannot avail himself on error of the exception thus abandoned, and this although he may exhaust his right of peremptory challenges. *Stewart* v. *State*, 8 Eng. 720.

365. In Ohio, the defendant is entitled to only twenty-three peremptory challenges. *Martin* v. *State*, 16 Ohio 364.

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366. B. having been called as a talesman in the same cause, and examined as to his bias, and no reason to except to him on that account appearing, the counsel for the accused were informed by the Court that they could then challenge B. peremptorily if they desired to do so. They declined to exercise the right at that time, as the panel was not then full, and B. was directed to take his seat as one of the jurors. After the panel was full, and but six peremptory challenges had been made, the accused's counsel claimed the privilege to challenge B. peremptorily; held that in the absence of any reason for a peremptory challenge then, which did not exist before, when the exercise of the right was declined, it was too late to challenge B. peremptorily. *State* v. *Potter*, 18 Conn. 166.

367. If the Court erroneously overrule a prisoner's challenge to a juror for favor, and then the prisoner peremptorily challenges the juror, the error of the Court is not cured by the subsequent exclusion of the juror, although the prisoner had not exhausted his peremptory challenges even to the last. *Dowdy* v. *Com.*, 9 Gratt. 727.

368. In Kentucky, on an indictment against a tavern-keeper for permitting unlawful gaming in his house, the Commonwealth has no right of peremptory challenge. *Com.* v. *Bailey*, 7 J. J. Marsh. 246.

369. In Kentucky, the right of peremptory challenge of twenty jurors does *not* exist in penal cases, but is allowed in all other criminal cases. *Montee* v. *Com.*, 3 J. J. Marsh. 132.

370. In Indiana, the right to challenge eight jurors peremptorily depended on the statutory provision, which required the jury to be summoned at the term the trial was to take place; and when that provision was repealed, the right to such challenge ceased. *Cable* v. *State*, 8 Blackf. 531.

371. In Indiana, according to the general law on the subject, each of the parties may, under certain circumstances, challenge six jurors peremptorily. *Ib.*

372. In New York, the right of peremptory challenges exists where the accused *may* be punished by imprisonment in a State prison ten years, though the case is one wherein the Court may impose a shorter period of imprisonment. *Dull* v. *People*, 4 Denio 91.

373. Accordingly, a person indicted for burglary in the second degree, which is punishable "by imprisonment in a State prison for a term not more than ten years, nor less than five years," has a right to peremptory challenges. *Ib.*

374. In the case of an indictment, the right of the accused to challenge a juror peremptorily remains open until the juror is sworn. *Morris* v. *State*, 7 Blackf. 607.

375. A peremptory challenge made by the accused to the polls, is no waiver of his right to object to the want of a venire, for this is not a ground of challenge to the array. *People* v. *McKay*, 18 John. 212.

376. Where two or more persons, jointly indicted for murder, are tried together, only twenty peremptory challenges can be allowed to all the prisoners. *The People* v. *Thayers*, 1 Parker's Crim. Rep. 595.

377. Forgery being a misdemeanor only, the defendant is not entitled to thirty-five peremptory challenges, under the act of 1777 (Rev. S. 115, § 85), unless the offence is charged to be a second one. *State* v. *Morgan*, 2 Dev. & Batt. 348.

378. A person indicted for forging an "order for the payment of money," has no right to a peremptory challenge, it being an offence under the statute, punishable only with imprisonment for a term of years. In all cases in which a right of peremptory challenge does not exist, two or more persons may be indicted and tried jointly or separately, in the discretion of the Court. *People* v. *Howell*, 4 John. 296.

379. Whether two persons who are indicted for a capital offence, and entitled to a peremptory challenge, can be tried together, against their consent, —*Quere*. *Ib.*

380. A challenge to the array will not be permitted on the ground that in the selection of grand jurors, all persons belonging to a particular fraternity or association were excluded,

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if those returned are unexceptionable, and possess the requisite qualifications under the statute. *People* v. *Jewett*, 3 Wend. 314.

381. Under the code of Alabama, a challenge to the array, or a plea in abatement to the panel, invokes the inquiry only whether the jury has been selected in the mode directed; and on such issue, the certificate of the board is conclusive. *State* v. *Brooks*, 9 Ala. 1.

382. This certificate may be made by the attending officers, or the clerk of the County Court, when one of them. *Ib.*

383. In an indictment, under the statute, for negro-stealing, it is no cause of challenge to the array that the sheriff who assisted in summoning the original venire, was one of the owners of the slave alleged to have been stolen, and that he assisted in drawing the jury. *Prime* v. *State*, 3 Stew. 253.

384. In Mississippi, no challenge to the array will be allowed, nor any venire facias quashed, except for corruption in the officer who may summon the jury. *Thomas* v. *State*, 5 Howard 20.

385. Objections to the mode of summoning a grand or petit jury, should be taken by a challenge of the array, or by motion to quash the indictment. *Stone* v. *People*, 2 Scam. 326.

386. It is good cause of challenge to jurors, in a capital case, that they are not electors or householders; but it is no error that they are not described as such in the record. *Shoemaker* v. *State*, 12 Ohio 43.

387. It is no sufficient ground for challenge to the array of petit jurors, that the sheriff who summoned them is a son of the prosecuting attorney, there being no proof that he was not indifferent or impartial. *State* v. *Cameron*, 2 Chandler 172.

388. The disqualification of a juror, is no cause of challenge to the panel. *Woodsides* v. *the State*, 2 How (Miss.) 655.

389. Where objections are made to the array because the selection of the jurors varied in unimportant particulars from the laws, they will not be heard. *Forsythe* v. *State*, 6 Hammond 19; nor will they be heard after challenge for cause. *Com.* v. *Clerk*, 2 Brown 223.

390. Where there is a challenge to the array, it must be in writing. *The People* v. *Doe*, 1 Mann (Mich.) 451.

VI. Challenging Petit Jurors.

391. On the trial of an indictment against a slave for a capital offence, it is good cause of challenge on the part of the State to one called as a juror, that he is nearly related to the owner of the slave; as it would be on the part of the prisoner, that a juror was a near relative of the prosecutor. *State* v. *Anthony*, 7 Iredell 234.

392. Where an accused excepts to a juror, for cause, before he is sworn, it is a matter of right to be determined by the Court; where he excepts after trial, for cause, before the juror was elected and sworn, it is matter within the discretion of the Court, and, in the exercise of such discretion, they will consider the whole case, to see whether justice has been done. *Jones' case*, 1 Leigh 598.

393. Where there are separate trials on a joint indictment, it is no ground of challenge that a juror was sworn on the first trial and found a verdict of guilty, though it is sufficient ground to submit his indifference to triers. *U. States* v. *Wilson*, 1 Bald. 78.

394. Challenges to petit jurors are first made by the accused, and subsequently by the prosecuting attorney. *Jones* v. *State*, 2 Blackf. 475.

395. Where one of the petit jurors summoned to try an indictment was on the grand jury that found the bill; held that the defendant might challenge him, but he could not on that ground move for a new trial, after a verdict of guilty, where he knew of the objection and omitted to make it when the jury was impanelled. *Barton* v. *the State*, 2 Blackf. 114.

396. It is a sufficient ground of challenge, that the juror has conscientious scruples about finding a verdict which may result in capital punishment. *U. States* v. *Wilson*, 1 Bald. 78.

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397. It is a good ground for challenge where the juror does not stand indifferent, having made up his mind, or expressed an opinion, with regard to the accused's guilt or innocence. *U. States* v. *Wilson*, 1 Bald. 78; but see *Noble* v. *the People*, Breese 29.

398. Where a juror who was called in a capital felony, has answered negatively all the questions propounded him by the Georgia statute of 1843, and been found competent by triers who were not especially sworn as triers, but who had been sworn in chief, and who was accepted by the accused, and sworn in chief; and the Court discovering the irregularity, to cure it, causes the juror again to be put upon the accused, who objected on the ground that he was already sworn in chief, and was thereby understood by the presiding judge to insist on the juror's sitting in the cause; held that nothing had occurred in relation to such juror to constitute a good cause of challenge; and that if there had, the accused had waived it. *Malone* v. *the State*, 8 Ga. 408.

399. Where two persons are joined in an indictment, and wish the privilege of each challenging twenty jurors, they must claim the privilege before trial, and cannot make the objection in arrest of judgment, that they were allowed but twenty peremptory challenges jointly. *The State* v. *Monaquas*, T. U. P. Charlt. 16.

400. To constitute good ground of challenge to a juror, on the ground of preconceived opinion of the case formed by him, it is necessary that it should appear that such preconceived opinion was a decided one. *Osiander's case*, 3 Leigh 780.

401. Though neither party has a right of challenge after a juror is sworn, it is a motion within the discretion of the Court, to protect the administration of justice by investigating, at any stage of the trial, an objection to the impartiality of a juror, and by withdrawing the case from the jury when any juror is found incompetent to sit. *U. States* v. *Morris*, 1 Curtis' Ct. Ct. 23.

402. The alteration of the law which relates to challenges of jurors, enlarging the privilege of the prisoner, applies to the trial of one who offends before the alteration. *Lore* v. *the State*, 4 Ala. 173.

403. When any irregularity in forming a jury is silently acquiesced in at the time by the prisoner, and especially when he partially consents, for the sake of a trial, to such irregularity, he waives his right to except after conviction, and thereby takes a double chance. *State* v. *Ward*, 2 Hawks 443.

404. When a juror has once been sworn in chief, he cannot be challenged or set aside from the jury, for any cause which existed at the time of his being put on the prisoner. *State* v. *Morea*, 2 Ala. 275.

405. When an opinion is formed by a juror (but never expressed), on mere rumor, this is no cause of challenge. *Ib.*

406. An opinion formed from a conversation held with a physician, who is not a witness to any of the facts of the prosecution, but who, in the course of the trial, is called as a witness to give his professional opinion, does not disqualify a juror. *Ib.*

407. That the sheriff was not present the whole time during which the selection of jurors was made, is no ground to challenge. *Com.* v. *Lippard*, 6 Serg. 395.

408. In the United States Court, the right of the defendant to challenge the jurors in capital cases, is limited to twenty. *U. States* v. *Magill*, 1 Wash. C. C. 463.

409. On a trial for destroying a vessel on the high seas, the defendant has a right to challenge thirty-five of the jurors, the number of challenges allowed at Common Law in capital cases. *U. States* v. *Jones*, 1 Wash. C. C. 363.

410. It is no ground of challenge that a juror has been called as a witness for the prosecution, on a former trial of the same indictment, to testify against the general character of the accused. *Fellows' case*, 5 Green. 333.

411. In Mississippi, when a juror is neither a householder nor a freeholder, it is held a good ground for a challenge for cause. *Byrd* v. *State*, 1 Howard 163.

412. Jurors cannot be challenged in a criminal case propter defectum, after they have been sworn to try the cause. *Ward* v. *State*, 1 Humph. 253.

413. A juror must be sworn and chal-

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lenged, before he can be interrogated. *King* v. *State*, 5 How. 730.

414. The juror testified that he had formed and expressed an opinion as to the defendant's guilt, from report; but that he had heard no witness, as he knew of, speaking of the transaction; that he lived 18 miles from the neighborhood of the defendant, and had never been in the defendant's neighborhood since the transaction complained of; held that there was no ground of challenging. *McGregg* v. *State*, 4 Blackf. 101.

415. The objection to the juror must be made by challenge before he is sworn, or it is waived. *Gillespie and others* v. *State*, 8 Yerg. 507.

416. In New York, the act of April 27, 1847, providing for additional challenges to jurors, and the provisions of the Revised Statutes respecting challenges to jurors, are in pari materia, and must be construed as if they formed parts of the same statute, and were enacted at the same time. *President, Directors & Co. Turnpike* v. *People*, 9 Barb. 161.

417. By force of the statutes so construed, the public prosecutor on the trial of an indictment, has a right to the same number of peremptory challenges that are allowed to parties in civil actions. Cady, J., dissented. *Ib.*

418. The statute 33 Edw. 1, with regard to challenges of jurors, is of force in South Carolina, and the solicitor can only challenge for cause. *State* v. *Barrontine*, 2 Nott & McCord's R. 553.

419. It is no ground for challenge to a juror that he is a freeman, where one of the parties to a suit at law is a freeman, and the other not. *Purple* v. *Horton*, 13 Wend. 1.

420. On a trial for murder, after the jurors impanelled to try the issue upon a plea of not guilty, had been sworn to answer questions touching their qualifications, the Court permitted the prosecuting attorney to propound to each juror the question, whether he entertained such conscientious scruples upon the subject of capital punishment as would deter him from finding a verdict assessing the death penalty in any case of murder in the first degree, and the Court also allowed the prisoner to ask each juror whether, in his opinion, death was the only adequate punishment for the commission of murder in the first degree; one of the jurors having answered the first of said questions affirmatively, was challenged by the prosecuting attorney, and the challenge being sustained by the Court, the juror was discharged from service before the second question was put. *Gross* v. *State*, 2 Carter's R. 329.

421. Held that a grand juror might also be challenged for that cause. *Ib.*

422. If the cause of challenge to a juror tend to his infamy, he cannot be examined on oath respecting it. The challenge must be supported by extrinsic proof. *Hudson* v. *State*, 1 Blackf. 317.

423. In Pennsylvania it is a good cause of challenge to a juror by the State, in a capital case, if he declares that he has conscientious scruples on the subject of capital punishment, and that he would not because he conscientiously could not consent or agree to a verdict of murder in the first degree, death being the punishment, though the evidence required such a verdict. *Commonwealth* v. *Lesher*, 17 Serg. & Rawle 155.

424. When the facts on which a challenge rests are doubtful, the proper course is to submit the question to *triers*; but if neither of the parties ask for triers to settle the issue of fact, and submit their evidence to the judge, and take his decision thereon, they cannot afterwards object to his competency to determine that issue. The production of evidence to the judge without asking for triers, will be considered as the substitution of him in the place of triers, and his decision will be considered in like manner as would the decision of triers; and therefore, although the determination of the judge should be against the weight of evidence, a new trial will not be granted for that cause when the defendant is acquitted, in analogy to the principle that if on the main question in a criminal case the defendant is found not guilty, there cannot be a new trial. *People* v. *Mather*, 4 Wend. 229.

425. Where the defendant waived his right to object to a juror against whom good cause of challenge existed on his

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part, it was held that the public prosecutor could not insist upon having the juror excluded under an agreement that all should be regarded as being challenged by both parties. *Ib.*

VII. Challenging Grand Jurors—Proceedings before the Grand Jury, how Conducted.

426. Where a person is under a prosecution for a capital offence, about to be submitted to a grand jury, he may challenge any of the grand jurors for cause, but not peremptorily. *Jones* v. *the State*, 2 Blackf. 475.

427. A person charged with a crime may challenge any one returned on the grand jury. *Com.* v. *Clark*, 2 Brown 223.

428. An objection to the mode as to the selecting and drawing of grand jurors, must be made by way of challenge, before the grand jurors are sworn. *Bellair* v. *State*, 6 Blackf. 104.

429. The law on this subject, as laid down in Hawk. 215, is, that any one under a prosecution for a crime may, before he is indicted, challenge any one of the persons returned on the grand jury. *Hudson* v. *State*, 1 Blackf. 317.

430. In Mississippi the accused has the right to challenge by plea in abatement the competeney of the grand jury by whom he is indicted *Burney* v. *State*, 12 Smedes & Marsh. 68.

431. It is improper and illegal to examine witnesses on behalf of the accused before the grand jury. *Respublica* v. *Shaffer*, 1 Dall. 236.

432. In Vermont a town grand juror could not, before the act of 1804, complain on his official oath, of the breach of any law, with the exception of the Sabbath act, or for the apprehension of persons and tools of counterfeiters. *Brackett* v. *State of Vermont*, 2 Tyler 152.

433. Witnesses called to give testimony before a grand jury, should be so sworn that if their testimony is false, they may be indicted for perjury. *State* v. *Fassett*, 16 Conn. 457.

434. In the State of Connecticut witnesses before a grand jury, according to ancient and uniform practice, are sworn by a magistrate in the grand jury room, and not in court, and this is a lawful mode of administering the oath. *Ib.*

435. It is the policy of the law in the furtherance of justice, that the preliminary inquiry before a grand jury should be carried on in secret. No evidence will, therefore, be allowed, for the purpose of vitiating an indictment, either from the grand jurors, or from the witnesses before them, or from any other person required by law to be present, as to the evidence given on such inquiry. *Ib.*

436. The party accused, however, may be present while witnesses are being examined before the grand jury. *Ib.*

437. In the preliminary examination before a grand jury, the same nicety in regard to legal evidence is not required, as in the trial of causes before a petit jury. It seems, therefore, that the admission by a grand jury of evidence not strictly legal, would not, if shown, be of course a sufficient reason for quashing the indictment. *Ib.*

VIII. Grand Jury;—their Duty—Number requisite to constitute a Grand Jury.

438. In Mississippi it is the duty of the Circuit Courts to charge the grand jury when impanelled, in regard to the nature of the duty which they are required to perform, and the motives which should govern them in the discharge of their duty; but the charge so given is not to be placed upon the record, nor can it be essentially necessary that it should appear by the record that it was given, as the matter charged does not constitute a ground of error. *McQuillen* v. *State*, 8 Smedes & Marsh. 595.

439. A disclosure by a grand juror of the names of witnesses who testified before the jury, and the fact that they did testify, and the subject-matter about which they testified, is not an offence within the provisions of the seventeenth section of the fourth article of

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the act concerning practice and proceedings in criminal cases. *State* v. *Brewer*, 8 Mo. 373.

440. Where it appears from the record that the grand jury returned a bill of indictment, it must be intended to have been done as the law requires. *State* v. *Lassley*, 7 Porter 526.

441. Where the record shows a foreman was appointed and the indictment was returned signed by him, and the caption stated that the grand jury returned the bill into court by their foreman, it is sufficient evidence that the bill was returned by the grand jury. *Greeson* v. *State*, 5 Howard 33.

442. In this country the practice has been after an indictment has been duly enrolled, to add the finding it a true bill, and affix to it the signature of the foreman; and indictments thus found are presented to the Court in the presence of the jury. *State* v. *Squire*, 10 N. Hamp. 558.

443. It is not usual or necessary to insert in the record of each case the names of the grand jurors. *Turns* v. *Com.*, 6 Metc. 225.

444. In Tennessee the record must show that an indictment was returned into court by the grand jury, otherwise the conviction cannot stand. *Chappel* v. *State*, 8 Yerger's R. 166.

445. Imprisonment for life cannot be inflicted as the punishment of an offence at Common Law; and therefore on a trial for such offence, the intervention of a grand jury is not required by the constitution of Connecticut. *State* v. *Danforth*, 3 Conn. 112.

446. In order to justify a grand jury in finding a bill, the testimony before them should be of such a character as that, ex parte and unexplained, it would sustain a conviction. *The People* v. *Hyler, et al.*, 2 Parker's Crim. R. 570.

447. It is the duty of the grand jury to inquire diligently into all offences against law committed in their several counties. *Ward* v. *State*, 2 Mo. 120.

448. In the exercise of their duties they may cause such persons to come before them to give evidence as they believe most likely to have a knowledge of any violation of the law. *Ib.*

449. A witness summoned to appear before the grand jury and give evidence, and refusing to tell what person or persons have so bet on faro, other than himself, and not naming himself, is liable to imprisonment. *Ib.*

450. In Georgia grand jurors are competent *talesmen* to try criminal causes. *Rouse* v. *State*, 4 Ga. 136.

451. It is within the power and duty of a grand jury to present by indictment all those who are charged with crime, whether such persons are or are not under arrest and examination before any of the county magistrates. *The People* v. *Hyler*, 2 Parker's Crim. R. 566.

452. The form of a recognizance is of no consequence except as to the liability of the conusors, in an action upon it. It cannot take away the right of the grand jury to inquire freely into all offences. *The State* v. *Jackson*, 32 Maine 40.

453. The rules of law require the grand jury to state their charge with as much certainty as the circumstances of the case will permit. *Com.* v. *Webster*, 5 Cush. 295.

454. The provision contained in the seventh article of Amendments to the Constitution of the United States, providing that, in all capital or otherwise infamous crimes, the accused shall be entitled to the farther safeguard of liberty or life or character afforded by a grand jury, evidently has reference only to proceedings in the tribunals of the United States. *State* v. *Keyes*, 8 Vt. 57.

455. By the Common Law, a grand jury may consist of any number between twelve and twenty-three. Our statute upon the subject of a grand jury is only directory to the Court, and does not declare void a bill or presentment found by a grand jury consisting of the Common Law number. *State* v. *Davis*, 2 Iredell 153.

456. A grand jury legally constituted of thirteen members, is competent to act, although it may be subsequently reduced by the absence of one juror to twelve; and this is also the case notwithstanding the Court, by statute, has the authority to re-constitute the grand jury on account of the absence or inability to serve, of all or any of the grand jurors. *State* v. *Miller*, 3 Ala. 343.

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457. In Arkansas, under existing statutes, it requires sixteen legally-qualified men to constitute a lawful grand jury, and an indictment found by a less number is invalid. *State* v. *Hawkins*, 5 Eng. 71.

458. Though by Sec. 83, Chap. 52, Digest, an indictment may be found by the concurrence of not less than twelve of the grand jurors, yet the panel must consist of sixteen lawful men. *Ib.*

459. In Mississippi, a grand jury composed of all the regular venire in attendance on the Court, and two persons summoned by the bailiff, under the direction of the Court, from the bystanders, is a good grand jury. *Johnston* v. *State*, 7 Smedes & Marsh. 58.

460. In Tennessee, the act of 1779 and the act of 1811, are only directory as to the number beyond which jurors shall not be sworn upon the grand jury, and the number twelve, as heretofore, will constitute a valid grand jury. *Pybos* v. *State*, 3 Humph. 49.

PETIT JURY;—THEIR DUTY—NUMBER REQUIRED TO CONSTITUTE A PANEL.

461. In criminal trials the jury have a right to determine both as to the law and facts of the case. The Court is bound to decide the questions of law, and to state them to the jury; but the jury have a right to overlook the decision of the Court upon questions of law, especially in favor of life, if they are fully convinced that such decision is wrong. The decision of questions of fact belongs exclusively to the jury, though it is the right and sometimes the duty of the Court to comment upon the evidence for the purpose of presenting such questions properly to the consideration of the jury. *The People* v. *Thayers*, 1 Parker's Crim. R., 596. *People* v. *Videto*, 1 Parker's Crim. 603.

462. The jury are the judges of the facts, both in civil and criminal cases, but they are not in either the judges of the law. They are bound to take the law as it is explained to them by the Court. They may find a general verdict, embracing both the law and the facts; but if in such verdict they find the law contrary to the instructions of the Court, they thereby violate their oath. *Townsend* v. *State*, 2 Blackf. 151.

463. Under the Constitution and laws of the United States, the jury are not the judges of the law in a criminal trial. They are to take the law from the Court, and apply it to the facts which they may find from the evidence, and thus form their general verdict of guilty or not guilty. *United States* v. *Morris*, 1 Curtis' Ct. Ct. 23.

464. In a case where there is a conflict of testimony, the decision as to its effect should be left to the jury. *Bill* v. *the People*, 14 Ill. 432.

465. A judge in a criminal trial should not express an opinion as to the facts of the case which may influence the jury. *Ib.*

466. A Court may properly correct counsel where they mistake the evidence, or assume as facts what is not proved. *Ib.*

467. In criminal as well as in civil cases, except in a criminal trial for libel, it is the duty of the Court to decide the questions of law, and of the jury to pass upon the questions of fact. *The People* v. *Finnegan*, 1 Parker's Crim. Rep. 147.

468. The credibility of witnesses is exclusively for the jury to consider, and it is not erroneous in the Court to refuse to charge the jury how they ought to find, in a case depending on the credibility of witnesses. *Woodin* v. *the People*, 1 Parker Crim. Rep. 464.

469. It seems that the jury are no more judges of the law in criminal trials than in civil. *Safford* v. *the People*, 1 Parker's Crim. R. 474.

470. A man may use force enough to protect his property; whether he has used more than that is matter to be settled by the jury. *State* v. *Clements*, 32 Maine 279.

471. On criminal trials, the jury are the judges of both the law and the fact, *State* v. *Snow*, 18 Maine 346.

472. As the jury may find the general verdict, they are judges both of law and fact, and may, if they think proper to do so, disregard the opinion of the Court upon the law. *State* v. *Jones*, 5 Ala. 666.

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473. In Ohio, the right of a jury to judge of the law in a criminal case, is not absolute, but is to be exercised agreeably to the 6th Sec., Art. IV. of the Constitution, under the direction of the court. *Montgomery* v. *State*, 11 Ohio 424.

474. It is the province of the Court, and not of the jury, to determine whether a confession is made with that degree of freedom which is necessary to make it admissible evidence. *Horton* v. *State*, 2 Mo. 135.

475. In a case of larceny, the jury have a right to determine the law as well as the facts of the case. *Warren* v. *State*, 4 Blackf. 150.

476. An alien is not entitled to a jury de medietate linguæ in North Carolina. *State* v. *Antonio*, 4 Hawks' R. 200.

477. The act of 1846, requiring the jury in certain cases to assess the amount of punishment to be inflicted, is not an ex post facto law in reference to offences for which there were prosecutions pending at the period of its enactment. *Hall* v. *State*, 2 Texas 363.

478. The intent with which a child under twelve years of age is forcibly taken from its parent, is a fact to be inferred from the evidence, and falls within the exclusive province of the jury. *Oliver* v. *State*, 17 Ala. 588.

479. There is no doubt the jury are judges of the law as well as the fact; that is the true principle of Common Law, and is peculiarly applicable to a free government, where it is unquestionably both wise and fit that the people should retain in their own hands as much of the administration of justice as is consistent with the regular and orderly dispensation of it, and security of persons and property; this power the people exercise in criminal cases in the persons of jurors, selected from amongst themselves from time to time, as occasion may require; and while the power thus retained by them furnishes the most effectual security against the possible exercise of arbitrary power by the judges, it affords the best protection to innocence. *State* v. *Crotean*, 23 Vt. 14.

480. The *right* as well as the *power* of juries in criminal trials to resolve both the law and the facts by their general verdict, was a favorite doctrine of the early jurists and statesmen throughout the United States, and continued such (as will be shown hereafter) until the contrary doctrine was broached by Mr. Justice Story, in 1835, in the case of the *United States* v. *Battiste*, 2 Sunn. 240; since which time the lead of Judge Story has been followed by the Supreme Court of Massachusetts, in the case of the *Commonwealth* v. *Porter*, Met. 10 263, and perhaps by judges and elementary writers in some of the other States. *Ib.*

481. The *power* of juries to decide the law as well as the fact involved in the issue of not guilty, and without legal responsibility to any other tribunal for their decision, is universally conceded. *Ib.*

482. The jury in a criminal trial have the legal right to decide the law as well as the fact involved in the issue, but this does not give them the right, by a wanton disregard of the law, to decide arbitrarily; they are as much bound to exercise their best judgment and discretion in determining the law as a court is, and they are held by an equally strong obligation to do so; the oath which is administered to them "that they will truly try and true deliverance make between the State and the prisoner at the bar, according to the evidence given them in court, *and the laws of the State*," embraces the whole matter in issue, and binds them equally with the judges, to perform their duty faithfully and conscientiously. *Ib.*

483. The idea that in criminal cases the jury are the judges of the law, as well as of the facts, is erroneous, and is not founded upon principle or supported by authority. *Carpenter* v. *People*, 8 Barb. 603.

484. As to how far the jury in criminal cases are *judges* of the *law* as well as of the *facts*, vide *People* v. *Pine*, 2 Barb. 566.

485. In Iowa, the statute makes it the exclusive province of the jury to decide questions of fact, and these questions they are to determine from their own view and judgment of the testimony submitted to their consideration. *Franks* v. *State*, 1 Greene 541.

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486. In Iowa, where there is any latitude given as to the amount of fine or time of imprisonment, it is the exclusive province of the jury to fix the amount of the fine, and of the judge to fix the time of imprisonment. *Cook* v. *United States*, 1 Greene 56.

487. It is the peculiar and exclusive province of a jury, to weigh the evidence; and it is their duty to find the facts, alone, from the evidence, and to look for them to no other quarter whatever; for the law, it is their duty to look to the Court. *Nels* v. *State*, 2 Texas 280.

488. In a criminal case, the jury are not authorized to give the slightest weight to any admission or statements of counsel as to the facts. *Ib.*

489. Although the jury have the power, and it is their duty to decide all points of law which are involved in the general question of the guilt or innocence of the prisoner, yet when questions of law arise in the arraignment of the prisoner, or in the progress of the trial, in relation to the admissibility of evidence, they must be decided by the Court, and may not afterwards be reviewed by the jury. *Commonwealth* v. *Knapp*, 10 Pick. 477.

490. In Tennessee, where the pannel of jurors, out of which a grand jury was selected, did not contain the number required by law, it was held that this was not sufficient to arrest the judgment. *Lowrance* v. *State*, 4 Yerger 145.

491. In Georgia, the owner of a slave charged with a capital offence, when acting as the counsel of his slave on the trial, can waive the number of jurors required by the statute, and consent to take the first twelve on the jury list. *Alfred* v. *State*, 6 Ga. 483.

X. Instructing and Charging the Jury in Cases of Murder, and other Cases.

492. It is error in the Circuit Court to instruct the jury, in a prosecution for murder, that "if the prisoner and the deceased engaged in a fight, neither having a deadly weapon to be used in the conflict, but in the progress of the combat the prisoner's *reason being temporarily dethroned*, and acting upon the passion thus aroused, he slew the deceased, the killing would be but manslaughter; from such language as this the jury may infer that no *sudden heat* short of the *dethronement of reason* will mitigate the killing to manslaughter, and thus be misled. *Haile* v. *State*, 1 Swan 248.

493. Where, on the trial of an indictment for murder, there was evidence that a murder had been committed, and that the house in which the dead body was, had been subsequently set on fire, under such circumstances as to raise a suspicion that the same was committed by the perpetrator of the murder to conceal that offence, and the evidence left it doubtful whether the prisoner was in the vicinity of the house when the fire was set, and the Court charged the jury that if the prisoner might have been at the scene of the fire, "the onus was cast upon her to get rid of the suspicion which thus attached to her," and that she was bound to show where she was at the time of the fire; held erroneous. *People* v. *Bodine*, 1 Denio 282.

494. In North Carolina, where the defence of a person indicted for murder, as disclosed by his witnesses, consists of a justification, and the judge in his charge takes it for granted that the homicide was committed by him, he does not thereby violate the act of 1796 (Rev. S. 452), forbidding the expression of his opinion as to the weight of evidence; because the justification necessarily admits the homicide, and its validity cannot be examined except upon the supposition that it was committed by him who seeks to justify it. *State* v. *Miller*, 1 Dev. & Batt. 500.

495. Instructions that the fact of selling spirituous liquor, in any quantity, to be drunk in the seller's house, is evidence that he kept a tippling-house, are too broad, tending to mislead the jury, and cannot be sustained. *Hinton* v. *Com.*, 7 Dana 215.

496. Where a prisoner is on trial for receiving stolen goods, and a charge is made that the discovery of the goods, proved to be stolen, in possession of the defendant shortly after they were

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missed, and his denial that he had them, is presumptive evidence that he received them knowing them to be stolen; held that such charge is erroneous, for the reason that the charge is upon the weight of testimony, and the presumption would rather be that the defendant has stolen the goods. *Sartorius* v. *State*, 24 Miss. 602.

497. The Court may refuse to give abstract propositions of law that are not relevant to the case on trial, in instructions to the jury, even though such propositions be proper and legal. *McDaniel* v. *State*, 8 Smedes & Marsh. 101.

498. Where the Court is asked to give instructions which are so drawn, either from carelessness or design, that they will be more likely to mislead than instruct a jury, although, after careful study and investigation, a correct principal of law may be extracted from them, it is held the duty of the Court to refuse such instructions. *Baxter* v. *People*, 3 Gilman 368.

499. A court is not compelled to give mere abstract legal propositions, not relevant to the evidence, as instructions to the jury; but a judgment will be reversed on the ground of the giving of such instructions. *Corbin* v. *Shearer*, 3 Gilman 482; *Pate* v. *People*, 3 Gilman 644.

500. It is error to instruct the jury, that they are the judges of the law and the evidence; the jury are to decide according to the evidence as they receive it from the witness, and the law as delivered to them by the Court. *Hardy* v. *State*, 7 Mo. 607.

501. It is the right and duty of a judge presiding in a criminal trial, to instruct the jury as to the law when he thinks it proper to do so, and there is no law prescribing any particular time when the instructions shall be given. *Gualtier's case*, 9 Leigh 678; *Blunt's case*, 4 Leigh 689.

502. Where a judge charged a jury in respect to matters of fact in a criminal case, it is held to be a breach of the defendant's constitutional rights, and a judgment rendered against him will be erroneous. *Claxton* v. *State*, 2 Humph. 181.

503. Where a Court charged a jury, that if they should find a special verdict which presented the testimony of one of the witnesses as the facts of the case, he should declare it a case of manslaughter; held that this charge amounted to but a conclusion of law upon a supposed state of facts, and was not a breach of the constitutional rights of the defendants. *Ib.*

504. Where there is any evidence having a tendency to establish a certain fact, the jury are to judge of its strength and sufficiency, and it is erroneous to instruct the jury, under such circumstances, that there is no evidence to establish such fact. *Whitney* v. *State*, 8 Mo. 165.

505. The refusal of an instruction to the jury where the evidence does not appear, will be presumed correct. *State* v. *Beackmo*, 8 Blackf. 246.

506. After an oral instruction has been given to the jury without objection, and the jury have retired to consider of their verdict, the Court is not bound, on the motion of the accused, to recall the jury in order that the instruction may be reduced to writing, or to send them a written instruction. *Booth* v. *Com.*, 4 Gratt. 525.

507. It is right and proper for the judge to modify all instructions of the jury requested by counsel, either in civil or criminal cases, in accordance with his own views of the law. *Cicely* v. *State*, 13 Smedes & Marsh. 202.

508. It is not necessary that the Court charge the jury as to a principle of law, however sound, which does not grow out of the case; nor is it necessary to give in charge, a request in its own precise words, if the request be clearly and substantially stated to the jury; nor is it necessary to be given in direct response to the request; nor is the Court compelled to give in charge a mixed proposition, though each part may be true, if any part be irrelevant; nor is it the duty of the Court to read a request distinctly to the jury and tell them it is law. *Long* v. *State*, 12 Ga. 293.

509. Where a charge, as asked, requires a qualification or explanation to prevent it from misleading the jury, it may be refused. *Swallow* v. *State*, 22 Ala. 20.

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510. Where the charge of the Court asserts a correct proposition of law in favor of the defendant, he has no reason to complain on error that it did not go far enough, and announce to the jury the full extent of his rights; it was his duty to have called for a more complete charge upon the point. *Dow* v. *State*, 22 Ala. 23.

511. A charge will be erroneous when it withdraws from the jury any evidence tending to establish the plaintiff's case or defence. *Holmes* v. *State*, 23 Ala. 17.

512. Though the judge may correctly state the law in his general charge to the jury, yet, when in a subsequent specific charge he puts the case upon the existence of facts on which alone it may not properly be made to turn, the effect of which is to withdraw from them the consideration of other facts which may disprove or materially qualify those on which the charge is predicated, injury will be presumed from the error. *Ib.*

513. Charges given or withheld by the courts in prosecutions for crimes, or misdemeanors, do not necessarily constitute a part of the record; hence they will not be noticed by the Court, unless they are placed there by means of a bill of exceptions. *Preston* v. *State*, 25 Miss. 383.

514. The Court is not compelled to charge on abstract questions of law, or to state legal principles to a jury, however true they may be, where they are not applicable to the evidence before the jury. *Ib.*

515. A few plain propositions, including the law upon the facts of the case, are greatly to be preferred in every case, to a long detail of instructions, running into each other, and involved in intricacies, requiring as much elucidation as the facts of the case themselves. *State* v. *Mix*, 15 Mo. 153.

516. A few short, pithy, and sententious instructions, embracing the law of the case, will always be better understood, and have more effect upon the triers of the fact, than a long detail of instructions, loaded with words tending to confuse rather than lead the jury to a proper conclusion. *State* v. *Floyd*, 15 Mo. 349.

517. The defendant being indicted for betting at a game of cards called pocre, and on the trial, it having been proven that he bet at a game called *draw pocre*, and there being much evidence conducing to show, on the one hand, that draw pocre was but a species of pocre, with some variety as to the rules of the game, and on the other, that it was an entirely different game, the Court properly told the jury that, as it appeared from the evidence there is a variety of games of the same kind, with some other name to distinguish each, if they thought the games were of the same class, they could find the defendant guilty, but if entirely different, not guilty. The players might change the rules of a game, without changing the name; but if, in common acceptation, the game played is draw pocre, and it is used to distinguish an entirely different game from pocre, they ought to acquit. *Barkman* v. *State*, 8 Eng. Rep. 705.

518. This was a legitimate place for the application of the rule of construction, given by the 13th section of the gaming act, as to the change in the name of games, or the invention of new games or devices. *Ib.*

519. But the Court suggests, that by inserting several counts in an indictment, varying the charge in each, this difficulty as to the name of the game, and perhaps any doubt or uncertainty as to the names of the persons by whom it was played, might be obviated. *Ib.*

520. Where the Court refused to give to the jury an instruction asked by defendant's counsel before argument, but afterwards gave the same instruction of its own motion, on motion for new trial, the defendant could not be considered as prejudiced by the refusal of the judge to give the instruction when asked by the counsel. *Ib.*

521. Where a judge is requested by a party to reduce to writing an instruction given by him to the jury, of his own motion, it is a sufficient compliance with the 12th rule of practice for him to dictate it, and for the attorney to reduce it to writing. It is not necessary for the judge to do it with his own hands. *Ib.*

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522. This rule of practice, whilst in force, should be observed, but it is directory, like similar statutory rules, and in its enforcement some discretion is necessarily entrusted to the Court. *Ib.*

523. Where the Court charged the jury, that if they found the deceased in her dying declarations made contradictory statements, that they were not to be governed by the rules of evidence in relation to contradictory statements made by a witness in a court of justice; held that this charge was clearly erroneous. *McPherson* v. *State*, 9 Yerg. 279.

524. The Court will not instruct the jury at the request of the prisoner, in regard to the nature of the evidence proper to be received by them. 9 Pick. 495.

525. The Court instructed the jury that they were the judges of the law and the facts, but that it was their duty to believe the law to be as laid down by the Court; held that the instruction was right. *Carter* v. *State*, 2 Carter's R. 617.

526. It is error in the Court to charge the jury, that the evidence of an accomplice is corroborated by the testimony of another witness, whether it be corroborated or not being a question for the jury. *Nolan* v. *State*, 19 Ohio 131.

527. A judge is never bound to instruct a jury upon an abstract proposition; his duty is to lay down the law to them as applicable to the evidence introduced. *State* v. *Rash*, 12 Iredell 382.

528. It is not error in the judge to tell the jury, that if the witness is credible, it is their duty to believe him, when he adds at the same time, "yet it is possible the witness may be mistaken, or perjured." *Ib.*

529. It is not error in a judge to instruct the jury that "all the circumstances for and against the prisoner which were proved beyond a reasonable doubt, must be taken altogether and not separately." *Ib.*

530. Where, on a criminal trial for carrying deadly weapons, the prosecutor swore positively, that the defendant had carried deadly weapons, and that he saw them during the quarrel between himself and the defendant, and another witness examined for the defendant stated he was present at the quarrel—saw no pistol—looked attentively, and closely, to see if he could see anything of the sort, and must have seen it if defendant had it about his person at that time; upon this state of facts, the Court was requested to charge the jury, that if the prosecutor had sworn falsely in any one particular connected with the transaction, they must discredit him wholly, and the other witness was not to be considered a mere negative witness, &c., but was to be regarded as a positive witness, and to be credited according to his means of observation, &c., the Court refused to instruct the jury as requested; and it was held very properly so refused. *Fitzgerald* v. *the State*, 12 Ga. 213.

531. In a criminal case, the Court, when requested, should instruct the jury, that, if they entertain any reasonable doubt of the prisoner's being guilty of the offence with which he stands charged, they should acquit the prisoner; still, where the Court refuses to give such instructions, it will not be ground to reverse the judgment, if the instructions that were given present the whole case fairly before the jury. *Gardner* v. *State*, 14 Mo. 97.

532. Where a prisoner is arraigned on a charge for an offence, it is necessary to charge the jury according to the law as it existed at the time the offence was committed. *Ewing's case*, 5 Gratt. 701.

533. It is not the privilege of a judge in all cases, but his duty, when called on, to state what the law is to the jury, without regard to what had or had not been read to them as the law, by the counsel on either side. *Nels* v. *the State*, 2 Texas 280.

534. A charge to the jury in a criminal case, "that if any one or more of their number differed from the majority of the panel as to the guilt or innocence of the defendant, they might properly waive their convictions and agree with the majority, but were not bound to do so, is calculated to mislead the jury, and is therefore erroneous. *Swallow* v. *the State*, 20 Ala. 30.

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535. Where an indictment claims a conviction upon a statute, the Court cannot be required to instruct the jury whether it could be sustained at the Common Law. *State* v. *Hart*, 34 Maine 36.

536. The Court in his charge does not violate the provisions of the act of 21st February, 1850, which prohibits the judges of the Superior Courts of this State to express or intimate their opinions, as to what has or has not been proved, or as to the guilt of the accused, by explaining the nature of direct and circumstantial evidence. *Bullock* v. *State*, 10 Ga. 46.

537. The jury, in a criminal case, are not the constituted judges of the law, and consequently have not the legal right to disregard the instructions of the Court. A charge which assumes the contrary principle is properly refused. *Batre* v. *State*, 18 Ala. 119.

538. The power of the Circuit Court to assess and declare the punishment in criminal cases, is merely contingent, and only to be exercised in cases of a failure of duty, or disagreement of the jury; it is erroneous, therefore, to instruct the jury that they "have the right and authority to return a general verdict of guilty without assessing any punishment." See R. S., 1835, 493, title, "Practice and Proceedings in Criminal Cases," art 7, § 4. *Foote* v. *the State*, 7 Mo. 502.

539. In a criminal case, where the charge requested may have been entirely immaterial, and its propriety is not shown by the evidence disclosed, it will be presumed to have been properly refused; in such cases error must be affirmatively shown, and it must not be presumed. *The State* v. *Schuessler*, 3 Ala. 419.

540. Where the Court instructed the jury on the trial of an indictment, that if the defendant has omitted to avail himself of evidence within his reach, by which he might have repelled that which was offered to his prejudice, his omission to do so supplies a strong presumption that the charge is well founded; held to be an erroneous charge. *Doty* v. *the State*, 7 Blackf. 427.

541. The Circuit judge in criminal trials, is not bound to give or refuse the instructions in the precise terms asked by counsel on either side; he may modify the charges asked on both sides, so as to make them conformable to his own views of the law. *Boles* v. *the State*, 9 Smedes & Marsh. 284.

542. Where the Court by its instruction, intended to charge the jury, that the same weight and force was to be given to T.'s statement, as if T. himself had been a witness in the Court; held that it was erroneous so to charge. *Lambeth* v. *the State*, 23 Miss. 322.

543. It is the safer course, and one which, in criminal trials, the Circuit Court ought to adopt, to give the instructions asked by the accused, provided the Court believes them to be the law, and if any explanations are needed, in the opinion of the Court, they can be afterwards given. *Ib.*

544. Where a jury impanelled to try whether a person indicted for murder was then insane, were charged by the Court, that they were to determine "whether the prisoner knew right from wrong, and if he did, then he was to be considered sane;" held that the charge was erroneous. *Freeman* v. *People*, 4 Denio 9.

545. And the jury having found that the prisoner was "sufficiently sane in mind and memory to distinguish between right and wrong;" held that the verdict was defective. *Ib.*

546. It is not the duty of the Court to select each fact constituting an offence, and to instruct the jury if they have a reasonable doubt of that fact they must acquit; all that is requisite is to instruct generally, that they must acquit, if on the whole case they have a reasonable doubt of his guilt. *State* v. *Dunn*, 18 Mo. (3 Bennett) 419.

547. Except the Court is requested by the prosecuting attorney, and the defendant, so to do, it will be error for them to comment on the evidence in a criminal case. *Ib.*

548. It is for the jury to determine whether there has been an intentional, wanton, and indecent exposure of the person of the accused, at such a time and place, and in such a manner, as to offend against public decency; and a charge which withdraws that question

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from the consideration of the jury as a question of fact, is erroneous. *Miller* v. *People*, 5 Barb. 203.

549. An omission on the part of a judge to instruct the jury on a particular point, if no instruction be asked from him on that point, is not error. *State* v. *O'Neal*, 7 Iredell 251.

550. Where, in a case of larceny, the Court instructs the jury, that it must be proved that the original taking was felonious; but that the jury had a right to infer, from all the facts and circumstances of the case, the felonious intent in the original taking; and that not in one case in a hundred could it be proved directly that the original taking was felonious; held that the instruction was proper. *Booth* v. *Commonwealth*, 4 Gratt. 525.

551. On an indictment for larceny, the Court instructed the jury, "if the jury believed from the evidence that the horse belonged to Smith, and that the prisoner took and carried away the horse without the knowledge and consent of Smith, with the intention of selling him or converting him to his own use, they ought to find him guilty. And although the jury may believe from the evidence, that Smith in the contract spoken of had agreed that the prisoner might ride the horse; yet if they believe the prisoner took the horse with the intention of selling him or converting him to his own use, they ought to find him guilty." *Witt* v. *State*, 1 Mo. 663.

552. Where, on the trial of an indictment for larceny, the Court instructed the jury, that "a man who takes property claiming it for himself, or another, commits no larceny," it was held that the instruction was inaccurate, a mere false claim of property not being enough to exclude the criminal intent; but if there is fair bona fide claim of property or right, the offence is only a trespass. *State* v. *Ware*, 10 Ala. 814.

XI. Discharging Jurors in case of Murder, Manslaughter, Felonies, &c.

553. The Court may discharge the jury before verdict, even in capital cases, where it is a matter of absolute necessity; inability to agree is not such necessity, nor even sickness of the jury, where it can be remedied by refreshment. If a jury has been discharged under such circumstances, before verdict, the accused may plead it in bar of another trial. *Com.* v. *Clue*, 3 Rawle 498.

554. Where the jury, in a capital case, had been kept together for nine days without agreeing on a verdict, and the health of one of the jurors was failing from confinement, while the personal attendance of another juror was required by the condition of his wife, and the Court discharged them; it was held that such power was properly exercised. *Fell's case*, 9 Leigh 613.

555. Where the jury, in a capital case, cannot agree, the Court has a discretionary power to discharge them, and such discharge will not operate as an acquittal of the prisoner, unless it clearly appears the discretionary power of the Court was improperly exercised. *S. Tennessee* v. *Waterhouse*, 1 Mar. & Yerger 278.

556. In all such cases the facts upon which the Court exercised its discretion in discharging the jury, should be spread upon the record; if they are not, this Court will presume the inferior Court performed its duty, and exercised its discretion in a proper manner. *Ib.*

557. In cases of felony, as well as of misdemeanor, where the jury, after deliberating so long on the prisoner's case, as to preclude a reasonable expectation that they will agree on a verdict unless compelled to do so by famine or exhaustion, they may be discharged, and the accused be again tried by another jury. *People* v. *Goodwin*, 18 John 187.

558. Where a jury are discharged for no better reason than that they were not agreed; held that such discharge was irregular and unwarranted by law. *Ned* v. *State*, 7 Port. 187.

559. C. and D. were indicted for a conspiracy to defraud E. D. was acquitted, and the jury being unable to agree on a verdict whether C. was guilty or not, the Court, against the consent of C., ordered a juror to be withdrawn, and the jury discharged; it was

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held that the Court may in their discretion, in a criminal case, discharge a jury who are unable to agree on a verdict, and against the consent of the accused, who may be brought to trial a second time for the same offence. *People*, v. *Olcott*, 2 John. 301.

560. Where on an indictment for grand larceny, the jury were not able to agree up to the last moment when the term of the Court ceases by limitation of law; it was held that they might be discharged without the prisoner's consent, and that he might be lawfully remanded to the jail for trial at the next term of the Court. *State* v. *Moor*, Walker 134.

561. The discharge of a jury, after they had heard the evidence, and retired in consequence of the sickness of one of the jurors, is not error in a trial for burglary, *Hector* v. *State*, 2 Mo. 135.

562. One of a venire in a criminal case may be discharged on the day of trial. *King* v. *State*, 1 Mo. 514.

563. It is discretionary with the Court whether witnesses shall be removed during the trial. *Ib.*

564. The Court has no right to discharge a jury to which the case of a defendant has been submitted, without his consent, except in cases of manifest necessity. *State* v. *Brooks*, 3 Humph. 70.

565. The disagreement of the jury up to the time at which the Court is about to adjourn, is one case of such necessity. *Ib.*

566. The Court has power to discharge the jury in a criminal case, whenever it is necessary for the purposes of justice. *U. States* v. *Coolidge*, 2 Gall. 364.

567. After a juror is accepted and sworn, the Court cannot discharge him from the panel without the consent of the prisoner, for any cause in esse at the time he was sworn, although the cause may have been discovered after he was impanelled. *State* v. *Williams*, 3 Stewart 454.

568. Where a juror is so erroneously discharged, and the prisoner is convicted, a reversal of the judgment does not discharge him from a second trial. *Ib.*

569. In a case of felony, the Court has no authority to discharge the jury without the consent of the prisoner, merely because the Court is of opinion that the jury will not agree; there must be some necessity for the discharge of the jury to warrant it. *Williams' case*, 2 Gratt. 567.

570. Where the Court improperly discharges the jury against the consent of the prisoner, he is entitled to be discharged from trial. *Ib.*

571. On this trial, the practice of finally adjourning the Court without noticing the jury, whereby it is discharged by operation of law, or of discharging them simultaneously with the final adjournment of the Court, was adopted. *Ib.*

572. Where a juror is summoned in a criminal case, the sickness of his family, if of such a nature as to demand his personal attention, is a sufficient excuse to warrant his discharge on application to the presiding judge. *Parsons* v. *the State*, 22 Ala. 50.

573. But where the record shows that after a list of jurors directed by the Court to be summoned, had been served upon the prisoner, and before the day appointed for his trial two of the panel were discharged from their attendance by the judge without the knowledge or consent of either the prisoner or his counsel, and that the prisoner, by his counsel, objected at the trial to this proceeding on the part of the Court, the judgment of the conviction will be reversed on error, although the bill of exceptions states that they were discharged on the ground of sickness of their families. *Ib.*

574. In such case the accused may move for a venire de novo; but where the record states that he objected at the trial to the action of the Court, and that the Court then decided that the jurors were properly discharged, this is the same as deciding that there was no ground for a venire de novo, and the objection may be taken on error assigned in the Appellate Court. *Ib.*

575. In Pennsylvania, in capital cases, the Court has no power, without the consent of the prisoner, to discharge the jury because they have not agreed. *Com.* v. *Cook and others*, 6 Sergeant 577.

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576. In a capital case, insanity of one of the jurors is a good cause for discharging the jury. *U. States* v. *Haskell & Francois*, 4 Wash. C. C. 402.

577. Such discharge of the jury is in the discretion of the Court. *Ib.*

578. When a jury have been regularly drawn for the trial of one charged with a capital offence, the accused is entitled to be tried by such jury, and the Court have not the right capriciously to discharge such jury. *Judge* v. *State*, 8 Ga. 173.

579. A jury charged in a case of capital felony cannot be discharged before rendering a verdict, at the discretion of the Court, without the prisoner's consent, nor can they in such case be discharged but for evident, urgent, overruling necessity arising from some matter occurring during the trial which was beyond human foresight and control, and generally such necessity must be set forth in the record. *State* v. *Ephraim*, 2 Dev. & Batt. 162.

580. Whether the Court can discharge a jury in a capital case, on the ground that the jury cannot agree, —*Quere*, per Kent, J. *People* v. *Olcott*, 2 John. 301.

581. Where, on the trial of an indictment for manslaughter, the jury, after a trial of five days, and after being kept together to consider of the verdict for seventeen hours, declared that there was no probability of their agreeing on a verdict, and it being within half an hour of the time when the Court was bound by law to close its session, the jury were discharged, and the accused again tried at another court. *People* v. *Goodwin*, 18 John. 187.

582. On the trial of a misdemeanor, the Court has a discretionary power to discharge the jury before they have rendered a verdict, and to require the defendant to be again put upon his trial for the same offence. *State* v. *Morrison*, 3 Dev. & Batt. 115.

583. The power of the Court to discharge the jury in a case of misdemeanor, without, and against, the consent of the defendant, has been too long and too well settled in Virginia, in England, and some, if not all, the States of the Union, to be now questioned. *Dye* v. *Com.*, 7 Gratt. 662; *State* v. *Weaver*, 13 Iredell 203.

584. The Court of Sessions has power to discharge a jury without the consent of the accused, in case of an indictment for a misdemeanor; but the power rests in the sound discretion of the Court, and ought to be exercised with caution. *People* v. *Denton*, 2 John. Cas. 275.

585. Where a jury were unable to agree on a verdict, after being out all night, and part of a day, and the Court discharged them without the consent of the party, the discharge was held to be proper, and the accused was again arraigned on the indictment for the same offence. *Ib.*

586. In any criminal case, whether capital or otherwise, the Court has authority, for good cause, to discharge the jury, and put the prisoner upon his trial before a new jury. *Fell's case*, 9 Leigh 613.

XII. Miscellaneous.

587. Where a juror, during the trial of a cause, converses with a bystander, or leaves the court-room, against the will of the Court, it is a misdemeanor, for which he is liable to punishment. *Barlow* v. *State*, Blackf. 114.

588. The verdict of the jury at the Oyer and Terminer, upon a mere question of fact, cannot be reviewed by the Appellate Court, on a writ of error; although it appear affirmatively that the bill of exceptions contains all the testimony offered and received on the trial. *Colt* v. *the People*, 1 Parker's Crim. Rep. 611.

589. On the trial of an indictment for murder, where it is alleged for error that the Court improperly overruled a challenge of the prisoner to one of the jurors, the record must show for what cause the challenge was made, otherwise the Supreme Court cannot say whether there was error or not. *The State* v. *Dove*, 10 Iredell 469.

590. In Iowa, it was not contrary to the constitution of that State to form two jury districts, and two places for the sittings of the District Court in Lee

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county. *Trimble* v. *State*, 2 Greene (Iowa) 404.

591. Misconduct on the part of a jury, to impeach their verdict, must be shown by other testimony than their own. *State* v. *McLeod*, 1 Hawks 344.

592. In North Carolina, where there is a statement in the record that, "on balloting, the following jurors are duly elected, sworn, and charged to serve as grand jurors," &c., it will be a sufficient compliance with the provisions of the act of 1799. *The State* v. *Seaborn*, 4 Dev. 305.

593. It is necessary that the names of the grand jurors should appear in some part of the record. *Mehan* v. *the State*, 10 Ohio 232.

594. It is not necessary that the venire facias should be spread upon the minutes of the Court; it is enough if the record shows the return of the venire, and the selection of a grand jury. *Conner* v. *State*, 4 Yerg. 137.

595. Where an indictment is laid for murder, it must appear by the record that the grand jury were sworn; a recital in the bill that they were duly elected, impanelled and sworn, is not enough. *Abram* v. *the State*, 25 Miss. 589.

596. While the jury will be heard in their vindication, they will not be allowed to impeach their own verdict. *Bishop* v. *State*, 9 Ga. 121.

597. The Circuit Court should not permit juries to take law-books to their room, for the purpose of investigating the law of the case, but they may be permitted to take a law-book in their retirement, when the paragraph applying to the case is separately marked out, as in the case of a statutory provision. *Hardy* v. *State*, 7 Mo. 607.

598. Where the jury have found, upon the testimony of witnesses, of whose credibility they were the only competent judges, and their verdict is confirmed by circumstances direct, consistent, and cumulative, there is no ground on which to remand the case for a new trial. *State* v. *Anderson*, 2 Bailey 565.

599. Where the prisoner is furnished with an imperfect list of the jurors, and the Court refuses, on his motion, to cause him to be furnished with a correct list the requisite time before the trial, and forces him into trial without such list, and he excepts to the decision of the Court, and rests upon the exception, without moving for a new trial, which is addressed to the sound discretion of the Court, this Court is bound to presume that he was prejudiced by the denial of a legal right, and for this cause will reverse the judgment. *Stewart* v. *State*, 8 Eng. 720.

600. The Court has a right to excuse jurors who have been summoned upon a venire in a capital case, upon their application, for any reasonable cause. *State* v. *Craton*, 6 Iredell 165.

601. For counsel to undertake, by a side wind, to get that in as proof which is merely conjecture, and thus to work a prejudice in the minds of the jury, cannot be tolerated; nor ought the presiding judge to wait until he is called on to interpose. *Berry* v. *State*, 10 Ga. 511.

602. Upon the arraignment, the entering of the plea, the impanelling and swearing, when the jury and the Court are ready to hear the argument of the counsel and the evidence, the case is then submitted to the jury. *Newsom* v. *the State of Georgia*, 2 Kelly 60.

603. The right to poll a jury cannot be allowed the prisoner, even in capital cases. *Com.* v. *Roby*, 12 Pick. 496.

604. If the Court, in a criminal case, improperly sets aside a competent juror at the instance of the accused, it is an error of which he cannot be heard to complain. *McAllister* v. *State*, 17 Ala. 434.

605. A person who is exempted by law from serving on juries is not bound to serve on a *special venire*. *State* v. *Whitford*, 12 Iredell 99.

606. On the trial of one for a *misdemeanor*, a jury may be withdrawn, on the application of the public prosecutor, after the jury have been impanelled and sworn. *People* v. *Ellis*, 15 Wend. 371.

607. Facts and circumstances which came to the knowledge of a juror from his own personal observation while on the coroner's inquest, and not from the evidence of witnesses sworn before the

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coroner, may be proved by such juror. *State* v. *Powell*, 2 Halst. 244.

608. The discharge of a juror, without legal grounds for so doing, after he has been selected, entitles the defendant to a venire de novo. *Hines* v. *State*, 8 Humph. 597.

609. Too much strictness cannot be used to keep a jury, charged with the life or liberty of a citizen, from mingling with the community during their deliberations, and this the more especially where there is any excitement for or against the prisoner. *Cochran* v. *State*, 7 Humph. 544.

610. A prisoner removed his trial to an adjacent county, and the record sent with him stated that the grand jury was "duly drawn, sworn, and charged." It is not a good objection that the record does not state that the grand jury was drawn from the original panel, for, by the statute of N. C., grand juries can be drawn only from the list of original *venire;* nor is it necessary that a record should set forth the *formula* by which a grand jury is constituted. *State* v. *Lamon*, 3 Hawks 175.

611. If there be on the grand jury persons not competent to be grand jurors, the Court to which the panel is returned may strike them off, and summon others in their stead. *Jetton* v. *State*, 1 Meigs 192.

KIDNAPPING.

1. At Common Law, the offence of kidnapping is an aggravated species of false imprisonment, and all the ingredients in the definition of the latter are necssarily comprehended in the former. The requisites in an indictment would seem to be an allegation of an assult and the carrying away, or the transporting of the party injured, from his own country into another, unlawfully and against his consent. *Click* v. *the State*, 3 Texas 282.

2. It is not enough to charge the defendant with kidnapping generally; the indictment should allege specifically the facts and circumstances which constitute the offence. *Ib.*

3. The 12th sec. 34th chap. Rev. Statutes, in regard to the offence of taking and conveying a free negro out of the State with intent to sell him as a slave, includes only cases in which the taking is by violence, and does not extend to cases where the negro is induced to go by persuasion, seduction or deception. *State* v. *Weaver*, Busbee N. Car. Rep. 9.

4. On an indictment found and tried in Kent county, for aiding and assisting to kidnap and carry away a negroman from this State into the State of Maryland, it was proved that the negro was seized in Kent, and carried through Sussex into Maryland. Held that the indictment was well found in Kent county. *The State* v. *Whaley*, 2 Harrington's R. 538.

5. *Query*—Could not the kidnappers be indicted in either county. *Ib.*

6. Where an indictment alleges that the defendant kidnapped and sold a mulatto boy, etc., and detained him in imprisonment, in order to transport him to a place where slavery was tolerated, and to hold him to slavery during life, and the verdict found that the defendant was guilty of selling the boy, with the expectation of his going into slavery: held that the verdict was defective, and a venire facias de novo was awarded. *The State* v. *Rollins*, 8 N. Hampshire 550.

7. Where an indictment charges that the defendant, with force and arms, took a negro slave from the field and possession of the owner, it does not charge an indictable offence. *The State* v. *Watkins*, 4 Humph. 256.

8. Where an indictment is laid for kidnapping, under the statute of Indiana, it is sufficient if the offence is described in the language of the statute. *The State* v. *Roberts*, 4 Black. 178.

9. A sale or transfer made in another State, of a black inveigled into the State of New York, does not come within the terms of the 32d sec. of 2 R. S. 665, providing for the punishment, as for a felony of every person who shall sell, or in any way transfer, for any term, the services or labor of any black,

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mulatto, or other person of color, who shall have been forcibly taken, inveigled or kidnapped from this State to any other State, place or country. *The People* v. *Merrill*, 2 Parker's Crim. R. 590.

10. To make that section apply to such sale and transfer, would make it liable to the objection of being repugnant to the 6th art. of the Amendments to the Constitution of the United States, which declares that, in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury *of the State and district wherein the crime shall have been committed.* It would also be repugnant to the 2d sec. of the 4th art. of the same Constitution, that declares that the citizens of each State shall be entitled to all the immunities of the citizens in the several States, and provides that a person charged in any State with treason, or felony, or other crime, who shall flee from justice, or shall be found in another State, shall, on demand of the Executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime. *Ib.*

11. With respect to the form of indictments for kidnapping with intent to sell, founded upon sec. 28 of 2 R. S. 664, and of indictments for inveigling persons of color and selling them as slaves under sec. 32, see the above case. *Ib.*

LARCENY.

I. Larceny, what constitutes.
II. Statutes respecting Larceny.
III. What Property may be the subject of Larceny.
IV. Indictment for Larceny.
V. Proof requisite to sustain an Indictment for Larceny.
VI. Evidence admissible and competent on the trial for Larceny.
VII. Places of Trial in cases of Larceny.
VIII. Warrant in cases of Larceny—Miscellaneous matters.
IX. Verdict and Judgment in cases of Larceny.

I. Larceny, what constitutes.

1. A negro, by the laws of Mississippi, is prima facie a slave; if a person, therefore, who is not the owner, take a runaway negro into his possession with the intent of feloniously converting him to his own use, knowing or having the means of knowing the owner or master, it would be larceny. *Coon* v. *State*, 13 Smed. & Marsh. 246.

2. There must be an intent to convert property taken, to the party's own use, in order to constitute a taking larceny. *The State* v. *Hawkins*, 8 Port. 461.

3. If one assists a slave to escape from his master, in order to obtain his freedom, it is not larceny. *Ib.*

4. There can be no larceny unless the thing be taken against the will of the owner. *Dodd* v. *Hamilton*, 2 Tayl. 31.

5. To constitute the larceny of a slave, it must appear that the negro was in possession of the prisoner, and that such possession was obtained against the consent of the owner, so as to constitute the taking a trespass. *Kemp* v. *State*, 11 Humph. 321.

6. An affidavit made by the defendant, that certain goods of the value of thirty dollars, the property of certain persons named in the affidavit, had been feloniously stolen by some person or persons unknown to the affiant, and that from probable cause he suspected said goods were concealed in a trunk belonging to the plaintiff and another person, does not amount to a charge of larceny against the plaintiff, if he fails to account satisfactorily for his possession. *Field* v. *Ireland*, 21 Ala. 240.

7. But such an affidavit is equivalent to a charge of knowingly concealing stolen goods, although it may not contain the statutory requisitions necessary to constitute that offence, and authorizes the justice to issue his warrant for the arrest of the person in whose possession the goods are alleged to be. *Ib.*

8. To lose, is not to place or put anything carefully and voluntarily in the place you intend, and then forget it; it is casually and involuntarily to part from the possession, and the thing is

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then usually found in a place or under circumstances to prove to the finder that the owner's will was not employed in placing it there. *Mayor, &c.*, v. *Beasly*, Ib.

9. To place a pocket-book, therefore, upon a table, and to omit or forget to take it away, is not to lose it in the sense in which the authorities speak of lost property. *Ib.*

10. If a man be leading another's horse out of a close, and be apprehended in the fact, it must not be supposed that a literal interpretation is to be placed on the term carrying away; if one entice a horse, hog, or other animal, by placing food in such a situation as to operate on the volition of the animal, and he assumes the dominion over it and has it once under his control, the deed is complete. *State* v. *Wisdom*, 8 Porter 512.

11. The criminal intention constitutes the offence, and is the only criterion by which to distinguish a larceny from a trespass. *State* v. *Hawkins*, 8 Port. 461.

12. To constitute the offence, it is not sufficient that the goods be taken for the purpose of destruction, as if one should take the horse of another for the purpose of destroying him, to injure his neighbor, and should destroy him; such an offence would be punishable as malicious mischief, but it would want one of the essential ingredients of larceny, the lucri causa. *Ib.*

13. If the finder of bank-notes convert them to his own use, with a full knowledge of the owner, it is not larceny, there being no trespass committed in obtaining the possession; it is a civil injury only. *Porter* v. *State*, 1 Mart. & Yerg. 226.

14. If property is taken under a fair color of claim or title, a felonious intent is wanting, and it is therefore no larceny without such intent. *The State* v. *Homes*, 17 Mo. (2 Bennett) 379.

15. To constitute larceny, the intention of the prisoner need not be to convert the property to his own use in the county where it is taken. *State* v. *Ware*, 10 Ala. 814.

16. It is an indictable offence to take skins from an Indian camp, in the absence of the Indians. *Pennsylvania* v. *Becomb*, Addis. 386.

17. Where the defendant takes the goods of another out of the place where they were put, though he is detected before they are actually carried away; held that the larceny was complete. *State* v. *Wilson*, Coxe 439.

18. Where the defendant is charged with stealing a free mulatto boy, knowing at the time he was free; held that the offence was complete under the statute by the kidnapping, without the actual sale. *Davenport's case*, 1 Leigh 588

19. Held, also, that the stealing a free negro with felonious intent to appropriate him, was a criminal offence, whether the person so stealing him knew him to be free or not; and the allegation of knowledge, in the indictment, need not be proved, but might be regarded as surplusage. *Ib.*

20. And it was further held that the consent of the boy, if given, he being only eight years of age, would not excuse the offence. *Ib.*

21. Where a miller had received barilla to grind, and fraudulently retained part of it, returning a mixture of barilla and plaster of Paris; held to be larceny. *Commonwealth* v. *James*, 1 Pick. 375.

22. In Vermont, the finder of lost goods is bound to advertise them. If he conceal or convert them, he is guilty of larceny. *State* v. *Jenkins*, 2 Tyler 379.

23. Where a person is employed by a mercantile firm as a salesman in their store, having full control over the goods in the store-room, and the money in the cash drawer, for the purposes of his employment, and abstracts a part of the goods and money with a fraudulent intent to convert the same to his own use, he will be held guilty of larceny. *Walker's case*, 8 Leigh 743.

24. Where a person obtains possession of property from an owner, by a false and fraudulent pretence of buying it for cash, and then carries it away without the consent or knowledge of the owner, he is still not guilty of larceny, except in case he obtained possession of the property, and carried it away with a felonious intent. *Blunt's case*, 4 Leigh 689.

25. Where the possession of person-

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al property was obtained from the true owner by false and fraudulent representations, under pretence of hiring, the person thus obtaining the property intending at the time to convert it to his own use; it was held that this was no larceny. *Felter* v. *the State*, 9 Yerg. 397; contra, *Starkie's case*, 7 Leigh 752.

26. Where on the trial of an indictment for the felonious taking of a deed, it appeared that the defendant had contracted verbally to sell certain real estate to B.; that they met to settle the contract, and agreed upon a final meeting for that purpose; that in the meantime the defendant delivered to B. confidentially, a deed, that he might ascertain its correctness, neither party considering the business settled; that B. gave the deed to his counsel to examine the title, and if satisfactory, to leave it at the registry to be recorded, which was done; that at the time of meeting for the final settlement at the registry office, a dispute arose between the parties on a collateral point, and the defendant asked the register for the deed, and on receiving it destroyed it, calling upon those present to witness the act; it was held that if the defendant actually supposed that he had a right to the paper, the idea of a felonious intent was done away with. *The Commonwealth* v. *Weld*, Thacher's Crim. Cas. 157.

27. Where, upon a settlement between a lessor and a lessee, under which an unexpired lease was to be given up by the lessor, upon the payment of a sum of money by the lessee, a misunderstanding arose as to the amount of the money, and the lessee carried away the lease and receipt for the money, and the money offered in payment; it was held that such taking was not larceny. *Commonwealth* v. *Robinson*, Thacher's Crim. Cases 230.

28. To constitute the crime of larceny, there must be a felonious taking and carrying away the goods of another. It is supposed to be *vi et armis invito domino;* but actual violence is not necessary; fraud may supply the place of force. *Commonwealth* v. *James*, 1 Pick. 375.

29. To constitute the offence of larceny, by entering into, and stealing from a dwelling-house, and out-house, &c., there must be an entry against the consent of the owner, unless the crime be meditated at the time of a permissive entry. *State* v. *Chambers*, 6 Ala. 855.

30. A receipt for the payment of a debt is the subject of larceny, per Beardsley, J. But stealing a receipt or other instrument, from the hands of one to whom it belongs, it never having taken effect by delivery, is not larceny. *People* v. *Loomis*, 4 Denio 380.

31. Accordingly, where a debtor got his creditor to sign a receipt for the debts, under the pretence that he was about to pay him, and then took it from him with a criminal intent, and without paying him the money; held that he was not guilty of larceny. *Ib.*

32. In South Carolina the facts of inveigling, persuading a slave to leave his owner, and then carrying off the slave, so that his owner is deprived of his service, makes one offence, and constitutes stealing a slave, under the act of 1745. *State* v. *Brown*, 3 Strob. 508.

33. To chase and shoot a hog, with a felonious intent, without removing it after it is shot, will not constitute hog-stealing. *State* v. *Seagler*, 1 Rich. 30.

34. The stealing of several articles of property, at the same time and place, constitutes but one offence, and the circumstance of several ownerships of the property cannot increase or mitigate the nature of the offence. *Lorton* v. *State*, 7 Mo. 55.

35. Where the prisoner found a sum of money in the highway, which he soon after converted to his own use, with various circumstances of fraud and concealment, it was held "That if the prisoner, at the time of finding the pocket-book, and before he removed the money, knew it to be the property of the prosecutor," the conversion, under these circumstances, would be larceny. *State* v. *Ferguson*, 2 McMull. 502.

36. In Missouri, since the act of the General Assembly (Rev. Co., p. 179, § 42), if A. hires a horse, and either at the time he gets possession of him, or afterwards, he conceives the design of stealing him, and carries him away with that design, he is guilty of larceny. *Norton* v. *State*, 4 Mo. 461.

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37. In order to constitute the offence of larceny, or of receiving stolen goods, it is enough where the thing stolen or received is of *same value*, however small; *semble*. *People* v. *Wiley*, 3 Hill 194.

38. Where the personal property of a person is, through *inadvertence*, left in the possession of another, and the latter, animo furandi, conceals it, he is guilty of *larceny*, knowing it to be the property of another; his possession will not afford him protection from the charge of felony. *People* v. *McGarren*, 17 Wend. 460.

39. Where one finds personal property on the highway, knowing, or having the means of knowing the owner, and instead of restoring it, converts it to his own use, such conversion will constitute larceny. *State* v. *Weston*, 9 Conn. 527; *People* v. *McGarren*, 17 Wend. 460.

40. Where property (*e. g.*, a pocket-book containing bank-bills), with no mark about it showing who the owner was, was lost and found in the highway, and there was no evidence to show that the finder, at the time, knew who the owner was; held that he could not be found guilty of larceny, though he fraudulently and with intent to convert the property to his own use, concealed the same immediately afterward. *People* v. *Cogdell*, 1 Hill 94.

41. To render one who finds lost property liable for a larceny, he must know who the owner is at the time he acquires possession, or have the means of identifying him instanter, by marks then about the property which the finder understands; it is not sufficient that he has general means of discovering the owner by honest diligence, &c. *Ib.*

42. Although every larceny embraces a trespass, and cannot exist unless there has been a taking from the possession of another, yet where a party having only the *care*, *charge* or *custody* of property for the owner, converts it animo furandi, it constitutes larceny, the possession, in judgment of law, remaining in the owner until the conversion. *People* v. *Call*, 1 Denio 120.

43. So, where the holder of a promissory note, having received a partial payment from the accused, who was the maker, handed it to him to make an endorsement of the payment, who took it away and refused to give it up; held that the possession remained in the owner, the accused acquiring only a temporary charge or custody for the special purpose, and that his subsequent conversion, the jury having found it felonious, was larceny. *Ib.*

44. In such a case it is not essential that there should be a felonious intent when the accused received the note; it is enough if he converted it animo furandi. *Ib.*

45. Where one got stones upon the land of another, upon a contract to have half for getting them, it was held, that while they remained on the land, undivided, the manufacturer was neither a tenant in common with the owner of the land, nor a bailee of them, and that therefore he, or any other person with his connivance, might be guilty of larceny in taking them. *State* v. *Jones*, 2 Dev. & Batt. 544.

46. Where one, in good faith, finds an article *lost*, as a trunk containing goods—lost from a stage-coach, and found on the highway—he is not guilty of larceny by any subsequent act, in secreting or appropriating to his own use the article found. *People* v. *Anderson*, 14 John. 293.

47. False pretences or artifices to obtain another's property, by one entertaining a felonious desire, will make larceny, provided it does not appear that a temporary trust or possession was extended to the party. *Wilson* v. *State*, 1 Porter 118.

48. If one to whom a wagon-load of goods, consisting of several packages, is delivered to be transported from one place to another, fraudulently takes away one of the packages, such taking is felony. *Com.* v. *Brown*, 4 Mass. 580.

49. If an hostler, who has the care and charge of a horse, take him with an intent to convert him to his own use, it is felony; otherwise, if he only take him to use him, and then return him again, in the latter case it is only a breach of trust. *State* v. *Self*, 1 Bay 242.

50. Where one takes away a letter

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from another, which is of no intrinsic value, or importing any property in possession of the person from whom it was taken, it is not larceny, nor any criminal offence of which a Special Sessions has cognizance. *Payne* v. *People*, 6 Johns. 103.

51. Where, on the trial of an indictment for stealing a pocket-book and sundry bank-bills, which had been lost on the highway, the judge instructed the jury, that if the accused, at the time he found the property, knew or had the means of knowing the owner, and did not restore it to him, but converted it to his own use, he was guilty of larceny; it was held a misdirection, because if the accused, at the time he took possession of the property, meant to act honestly with regard to it, no subsequent felonious intention to convert it to his own use could render him guilty of larceny. *Ransom* v. *State*, 22 Con. 153.

52. The finder of lost goods who takes possession of them, not intending to steal them at the time of the original taking, is not rendered guilty of larceny by any subsequent felonious intention to convert them to his own use. *Ib.*

53. Every taking of the property of another without his knowledge or consent, does not amount to larceny; to make it such, the taking must be accompanied by circumstances which demonstrate a felonious intention. *Smith* v. *Shultz*, 1 Scam. 490.

54. Larceny from the house is defined to be, the breaking or entering any house with an intent to steal, or after breaking and entering said house, stealing therefrom any money or thing of value. *Berry* v. *State*, 10 Geo. 511.

55. One may be guilty of this crime where the original entry was not felonious or with an intent to steal. *Ib.*

56. The stealing of bank-notes is put on the same footing as the stealing of goods; and as it is not necessary to constitute the latter offence that the larceny should be from the person—that is, the actual possession of another—so neither can it be necessary in the former. *Angel* v. *Com.*, 2 Virg. Cas. 228.

57. If the owner of goods parts with the possession for a particular purpose, and the person who receives possession avowedly for that purpose, has a fraudulent intention to make use of the possession as the means of converting the goods to his own use, and does so convert them, it is felony. *Lewer* v. *Com.*, 15 Serg. & Rawle 93.

58. There is no judicial decision in Pennsylvania which is authority in the Pennsylvania court, carrying the doctrine of what may be called constructive larceny beyond the case where possession only was intended to be delivered. *Ib.*

59. The offence of larceny consists in the felonious taking and carrying away of the property of another, without his consent and against his will, and with the intent to convert it to the use of the taker. *Com.* v. *Low*, Thach. Crim. Cas. 477.

60. If one, having no cause of action, sues out a writ for a fictitious demand, and so gets possession of the property of another, which he converts to his own use, and with intent to defraud the owner, it is larceny. *Ib.*

61. If a man, having a right of action, makes use of a process which he knows he has no right to adopt, to get the property of his debtor, and with intent to defraud him, it is larceny. *Ib.*

62. Where one obtains possession of goods by false representations, intending to convert them to his own use, and afterwards does convert them, entirely or partially, the owner not having parted with the right of property, it is larceny. *State* v. *Lindenthall*, 5 Rich. 237.

63. Larceny will lie against a bailee for the eloigning of goods. *The State* v. *White*, 2 Tyler 352.

64. A larceny may be committed of goods obtained by delivery from the owner, if it was done animo furandi. *The State* v. *Gorman*, 2 Nott & McCord 90.

65. The defendant was a common carrier, owned a boat on the Santee, and undertook to transport cotton from Orangeburgh district to Charleston, belonging to various persons. Before reaching Charleston, and while passing down the river, he communicated his intention to one of the hands on board,

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of converting the cotton to his own use. Afterwards, at "Euchaw Creek," in Charleston district, he consummated his previous intention by burning a portion of the cotton and disfiguring the marks upon the other bales by patching, and had the cotton shipped on board a steamer to Charleston, and sold, and appropriated the sales to his own use. Upon an indictment for grand larceny in Orangeburgh district, the jury were charged by the Court.—First: That, to convict the prisoner of larceny, there must be a taking and carrying away of the goods laid in the indictment, with a felonious intent, in the district of Orangeburgh. Second: That, when the prisoner received said goods, if he intended to deliver them in good faith to the consignee in Charleston, that his subsequently fraudulent appropriation of them to his own use could not make him guilty of larceny. Third: If, when the goods were delivered to him, he received them with the intention of stealing them, then it was larceny from the beginning, as laid in Orangeburgh district. *The State* v. *Thurston*, 2 McMull. 382.

66. The prisoner was found guilty, under this charge, of petit larceny; and the Appeal Court held, upon appeal, among other things,—1st. That the jury, under the circumstances, were at liberty to infer that the defendant, at the time he received the cotton in Orangeburgh, intended to steal it and convert it to his own use; and the verdict of guilty was very properly given. 2d. That the cotton so stolen by the defendant, belonged to three different individuals, and he was very properly indicted in three cases; and a conviction in one case was no bar to a conviction in the two others. The stealing of goods of different persons is always a distinct larceny. *Ib.*

67. When one finds lost property, which has no marks upon it by which the owner can be ascertained, he is not guilty of larceny, though he takes it animo furandi. *The State* v. *Conway*, 18 Mo. (3 Bennett) 321. Vide *Tyler* v. *the People*, Breese 227.

68. There must be an intention to steal, at the time of taking the goods, in order to constitute larceny. *Ib.*

69. Where a shawl was dropped and picked up by the defendant, and afterwards appropriated to his own use, it does not amount to larceny. *The State* v. *Roper*, 3 Dev. 473. Vide *Lawrence* v. *the State*, 1 Humph. 228.

70. It is a settled principle of law, that if one lose his goods and another finds them and converts them to his own use, not knowing the owner, this is not larceny; but if the latter knew the owner, or had the means of knowing him, it would be larceny. *Randal* v. *the State*, 4 Smedes & Marsh. 349. Vide *Coon* v. *the State*, 13 Smedes & Marsh. 246; *Lane* v. *People*, 5 Gilman 305; *People* v. *Swan*, 1 Parker's Crim. R. 9.

71. Where one obtains possession of goods by false representations, intending to convert them to his own use, and afterwards does convert them entirely or partially, the owner not having parted with the right of property, it is larceny. *The State* v. *Lindenthall*, 5 Rich. 237. Aliter, where the owner has parted with the possession of his goods. *Mowry* v. *Walsh*, 8 Cow. 238; *Ross* v. *the People*, 5 Hill 294.

72. The stealing of a horse in another State, and bringing him into this State, constitutes the crime of horse-stealing here. *The State* v. *Ellis*, 3 Conn. R. 185.

73. To constitute larceny there must be a trespass in the taking; that cannot be where the possession is obtained by consent of the owner; nor could it be if the goods were lost; because they would not, in such case, be in the owner's possession, so as to make it possible a trespass could be committed in taking them; all that is said in the books, therefore, in relation to the consent of the owner to part with his goods, amounts only to this: to make a taking larceny, there must be a trespass, and as there can be no trepass where the party taking has the owner's consent, so neither can there be larceny. *Felter* v. *the State*, 9 Yerg. 397.

74. To constitute the crime of larceny, a trespass in the original taking must have been committed upon the right owner, the taking must have been invito domino against the will of the owner, and the property at the

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time must have been either in his actual or constructive possession. *Hite* v. *the State*, 9 Yerg. 198. Vide *Felter* v. *the State*, 9 Yerg. 397.

75. If a person receive property from a slave, with a fraudulent and felonious intent of converting it to his own use, he is guilty of a larceny, because he has taken it from the possession of the owner of the slave, and without his consent. *Ib.*

76. A bailee could not be guilty of larceny, at Common Law, by a fraudulent conversion of the deposit. *Wright* v. *Lindsay*, 20 Ala. 428.

77. Larceny may be committed when one steals his own property, where the intent is to charge another with the value of it. *Palmer* v. *the People*, 10 Wend. 166.

78. To constitute larceny, there must not only be a taking, but a carrying away; a bare removal, however, from the place where the goods are found, though the thief does not make off with them, is a sufficient asportation or carrying away. *The State* v. *Wisdom*, 8 Porter 512.

79. To constitute the offence of larceny, the goods must be wrongfully or fraudulently taken and carried away, with the intent to convert them to the taker's own use, and make them his own property; if there be no such intention, it amounts to a trespass only, and not to a felony; if the taking be open, and in the presence of the owner, or of other persons, this carries with it evidence that it is only a trespass. *McDaniel* v. *the State*, 8 Smedes & Marsh. 401.

80. In order to constitute larceny, there must be a taking of the goods, either actual or constructive, and the felonious intention must exist at the time of the taking; otherwise, no subsequent felonious intention will render the previous taking felonious. *Fulton* v. *the State*, 8 Eng. 168.

II. Statutes respecting Larceny.

81. At Common Law, a dog was not the subject of larceny; but it seems the Common Law in this respect has been changed by the Revised Statutes of the State of New York, which recognize dogs as property, by subjecting them to taxation, and defines larceny so as to embrace the taking and carrying away of all kinds of property, except the freehold and things which are parcel of it. *The People* v. *Maloney*, 1 Parker's Crim. Rep. 593.

82. Therefore, where one was indicted for grand larceny, in stealing a Newfoundland dog of the value of $100, the property of A. B., and arrested on a warrant, issued on such indictment, after a hearing on habeas corpus, before a justice of the Supreme Court at Chambers, his discharge was refused. *Ib.*

83. The statute declaring a second offence of petit larceny to be an offence punishable in the State prison, does not apply to a case in which the first conviction took place in another State. *People* v. *Cæsar*, 1 Parker's Crim. 645.

84. Accordingly, where a defendant pleaded guilty to an indictment, charging petit larceny as a second offence, and it appeared by the indictment that the first offence was committed and the first conviction had in Massachusetts, it was held that the defendant could only be punished for simple larceny. *Ib.*

85. Under the Rev. Sts. of Massachusetts, c. 126, stealing in a dwelling-house in the night-time, property not exceeding the value of $100, is simple larceny only, and punishable by imprisonment not more than one year; and when a defendant, convicted of such offence, is sentenced to any term of solitary imprisonment, in addition to one year's confinement to hard labor, such sentence will be erroneous and will be reversed on a writ of error. *Tully* v. *Commonwealth*, 4 Met. 357.

86. Entering, breaking in and stealing, in a dwelling-house, shop, &c., in the night-time, property of less value than $100, is only larceny, although by the Rev. Sts. of Massachusetts the same offence if committed in the day-time is made an aggravated larceny. *The Commonwealth* v. *Tuck*, 20 Pick. 356, 363; *Hopkins* v. *Commonwealth*, 3 Met. 460.

87. The Revised Statutes of Massa-

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chusetts provide, as for an aggravated larceny, for the offence of breaking and entering in the night-time with a fenonious intent, a shop, warehouse, &c., adjoining to and occupied with a dwelling-house, but not adjoining, &c., in such a manner as to make it part of the messuage. *Devoe* v. *Commonwealth*, 3 Met. 316; but see the *Commonwealth* v. *Tuck*, 20 Pick. 356.

88. In North Carolina, by the act of 1799, a slave may commit larceny. *The State* v. *Hall*, 1 Tayl. 126.

89. In South Carolinia, by the act of 1736–'7, making it felony to steal any warrant, bill, or promissory note for payment or securing of payment of any money, being the property of any other person or persons, &c., the stealing of a bank-bill of an incorporated bank, is an offence within the act; it is not a good exception that the indictment describes the bill as a promissory note instead of as a bank-bill, although the words promissory note and bank-bill are not convertible terms, for the reason that any promissory note is not a bank-bill, yet every bank-bill is a promissory note. *The State* v. *Wilcox*, 3 Brevard 96.

90. Where a certificate given to A. by B. whom C. had promised to pay for work, stated that A. had paid for the work and that B. had no claim therefor on C., it is a receipt or release within the Rev. St. c. 126, § 17, and is the subject of larceny. *Ib.*

91. In Virginia, the statute of 1806, which made it felony to steal any "bank-note," embraced any available chose in action bearing the name, nor is the meaning of the term limited by the 8th section of the act of 1819. *Pomeroy* v. *Com.* 2 Virg. Cas. 342.

92. All the public officers of the State are required to keep entries or records of their proceedings; and it is the stealing of these the Legislature interdicted, and that whether they belonged to Courts of record properly speaking, or to any of the public officers. *Wilson* v. *State*, 5 Ark. 513.

93. The taking bank-notes from a justice's court, where they were regularly filed as part of the papers, falls within the offence contemplated by the penal code of Arkansas. *Ib.*

94. By the act of March 22d, 1817, stealing a note of the nature of a bank-note, issued by an individual, is held to be larceny. *Sylvester* v. *Girard*, 4 Rawle 185.

95. In South Carolina, the statute of March 5th, 1737, makes it larceny to steal a bank-note, where it is proved to be a genuine bank-note. *State* v. *Tillery*, 1 Nott & McC. 9; *State* v. *Casados*, Ib. 91.

96. In Pennsylvania, by statute of April 5th, 1790, the taking of bills obligatory is punishable as larceny, and it was held that the taking of one bill obligatory was larceny. *Commonwealth* v. *Messenger*, 1 Binn. 273.

97. The 16th section of the Crimes act of 1790, ch. 36, provides "if any person, &c., upon the high seas, shall take and carry away, with an intent to steal or purloin, the personal goods of another, the person, &c., shall, on conviction, be fined not exceeding the fourfold value of the property so stolen," &c.; held that foreign coin and domestic coin, and bank-bills, or any of them, were "personal goods," within the intent of the statute. *United States* v. *Moulton*, 5 Mason 537.

98. The Crimes act of 1790, ch. 36, (9) § 16, provides "that if any person within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away with intent to steal or purloin the personal goods of another, he shall, on conviction," be liable to a certain punishment prescribed by the act; it is clear that no person is punishable under this act, unless his case falls within the descriptive terms used in the act; if he should take and carry away with intent to steal or purloin, anything not the "personal goods" of another, or should commit the offence in a place not "under the sole and exclusive jurisdiction of the United States" he would not be liable to punishment under the act. *United States* v. *Davis*, 5 Mason 358.

99. And an indictment which did not contain all the material statements to bring the case within the statute, would be bad, and judgment might, even after verdict, be arrested for the defect. *Ib.*

100. And an indictment, to be prop-

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erly framed, must follow, if not the very words, at least the substance of the statute. *Ib.*

101. If the words of the act of 1790 describe the offence of larceny, or theft at the Common Law, still the indictment must use the words of the statute, for it is punishable as a statute offence, and it would not be sufficient to allege that the party was guilty of larceny or theft. *Ib.*

102. And for the same reason it would not be sufficient to use any other words, not being those of the statute, although, in the sense of the Common Law, they may be descriptive of the same offence. *Ib.*

103. *Quere*—Whether the words, "take and carry away, with intent to steal," are exactly, in all cases, of the same legal import with "feloniously steal, take, and carry away." *Ib.*

104. An indictment, on the act of 1790, lies only where the offence is committed in respect to the "personal goods" of another. *Ib.*

105. To bring a case of larceny within the act of 1790, the offence must be committed in a place within "the *sole* and *exclusive jurisdiction* of the *United States*;" and when the allegation in an indictment is that the site of the *Marine Hospital* "has been and is ceded by the State of *Massachusetts* to the *United States*," this allegation is quite consistent with its not being a sole or exclusive jurisdiction. *Ib.*

106. *Semble*—That the Revised Statutes of the State of New York have not made the offence of petit larceny a *misdemeanor*, but that it is still a *felony* at Common Law. *Ward* v. *People*, 3 Hill 395.

107. The crimes of larceny and embezzlement are wholly separate and distinct. The 5th section of article 3, ch. 51, Dig., was designed simply to extend and lay down with greater particularity the crime of embezzlement, and make the punishment the same as in larceny. *Fulton* v. *State*, 8 Eng. 168.

108. In New Hampshire, section 7, chap. 215, Rev. Stats., provides, in substance, that if any person shall break and enter any shop, &c., in the night-time, with intent to steal, he shall be punished, &c. Section 9 enacts, that if any person shall, in the night-time, break or enter any shop, &c., and shall therein commit larceny, he shall be punished. Section 8 provides that if any person, with intent to commit any crime, the punishment whereof may be confinement to hard labor, shall, in the night-time, either break or enter any building, &c., he shall be punished. An intent to commit larceny of goods to the value of twenty dollars, would subject the offender to punishment, under this section—see section 13. Under the 7th section, the breaking and entering must be proved, but actual larceny need not be proved, the intent alone being sufficient; but under the 9th section, either the breaking or the entry is sufficient, but actual larceny must be shown. *State* v. *Ayer*, 3 Foster's R. 317.

109. The offence made punishable by the Rev. Stats. c. 126, § 16, is that of stealing from the person of another; and the degree of punishment is not by the statute made to depend upon the value of the property stolen. Under this section, the taking of any amount of property, by stealing the same from the person of another, is punishable in the State prison, as well as in the county jail, or house of correction. *Com.* v. *Nolan*, 5 Cush. 288.

110. The provisions of the 18th sec. of this chapter, enlarging somewhat the extent of the jurisdiction of the offence punishable under the 16th sec. *Ib.*

111. *Quere*—Whether justices of the peace have, by the 18th section, concurrent jurisdiction of a case of larceny from the person, where the property stolen is not over five dollars in value. *Ib.*

112. The terms, "steal," and "larceny," as used in the 25th section of the 24th ch. of the Penal Code (Clay's Digest, 420, § 25), are technical, and do not include an offence which would not amount to a larceny, if committed in this State. *Spencer* v. *the State*, 20 Ala. 24.

113. Breaking and entering a dwelling-house in the day-time, with an intent to steal, and stealing in a dwelling-house, whether by means of breaking

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and entering, or otherwise, are two distinct statute offences; each subjecting the party to the liability of five years' imprisonment. *Com.* v. *Hope*, 22 Pick. 1.

114. Any one fact of breaking, entering, and stealing, necessarily constitutes both of those offences. *Ib.*

115. It is the bringing of the stolen property into this State, and not the taking of it, which constitutes the offence denounced by the 25th section of the 4th chapter of the Penal Code. Where, therefore, the taking is under such circumstances as would make it a larceny if done here, and the property is afterwards brought into this State, the crime is complete, without regard to the law of the State where the act was committed. *Murray* v. *State*, 18 Ala. 727.

116. Whether, under a combined view of the act against receivers of stolen goods (a.), and the act of 1806, entitled an act to punish certain thefts and forgeries (b.), and the act of 1812, in amendment thereof, the stolen bank-note could be considered as "goods," within the meaning of the said act of 1792; the Court was of opinion that, upon principle, as well as upon the authority of *Sadi & Morris' case* (c.), it could not. *Rutherford* v. *Com.*, 2 Virg. Cas. 141.

117. Goods received criminally within the intent and meaning of the A. A. of 1769, must be such, the stealing whereof must be a capital felony, or they must be taken burglariously, inasmuch as the act subjects the receiver of such stolen goods, as accessory, to the pains of death, which the legislature never could have intended as the punishment of an accessory in any offence less than capital. *State* v. *Harkness*, 1 Brevard 276.

118. Stealing from a dwelling-house in the night-time, is not made an aggravated larceny by the Rev. Sts., c. 126. *Tully* v. *Com.*, 4 Metc. 357.

119. In South Carolina, the acts of 1736–'7 make it felony to steal any warrant, bill, or promissory note, for the payment, or securing the payment, of any money, being the property of another person or persons, &c. Before this law was passed, notes of hand, being choses in action, and not considered as valuable in themselves, were not deemed property, the stealing of which could be felony; but this act puts them on the same footing as the money they are meant to secure. *State* v. *Wilson*, 3 Brevard 196.

120. Choses in action, except to the value of the paper and wax, were not, at Common Law, subjects of larceny. The act of Assembly of 1736–'7, makes those mentioned therein the subject of larceny, in the same manner as goods and chattels. Among those enumerated in the act are promissory notes. *State* v. *Casados*, 1 Nott & McCord 91.

121. It is clear and manifest beyond a reasonable doubt, that bank-bills are included under the term promissory notes, and were intended by the legislature to be so included. *Ib.*

122. At Common Law, larceny could not be committed of bank-notes, bank-bills, and of bills of credit. *Damewood* v. *State*, 1 Howard 262.

123. Although the statute has not expressly enumerated bank-notes, and made them subjects of which larceny could be committed under that description alone; yet as they are in verity promissory notes, possessing all the properties which constitute a promissory note, a count, charging the larceny of a promissory note, for the payment of money, purporting to be a bank-note, would be sustained by proof of the felonious taking, &c., of a Bank-note of the Planters' Bank. *Ib.*

124. The Virginia statute of 1824, as to larceny, did not operate as a repeal of the statute of 1819, as to larcenies committed before the first of May, 1824. *Allen's case*, 2 Leigh 727.

125. In Virginia, the 1st section of the act of February 21st, 1823, c. 32, does not refer to grand larceny, nor to any offence which at the time of the passage thereof, might have been punishable by imprisonment in the penitentiary for more than two years. *Commonwealth* v. *Shelton*, 2 Virg. Cas. 384.

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III. What Property may be the subject of Larceny.

126. Where a key is in the lock of a door in a house, it is the subject of larceny. *Hoskins* v. *Tarrence*, 5 Blackf. 417.

127. A slave who has absconded from the possession of his owner, is nevertheless in his constructive possession. *Coon* v. *State*, 13 S. & Marsh. 246.

128. Where bees are in the possession of the owner, they are subjects of larceny. *State* v. *Murphy*, 5 Blackf. 498.

129. It is clear that a larceny may be committed by taking any creatures whatever, which are domitae naturæ, and fit for food, as ducks, hens, geese, turkeys or their eggs, or young ones. *Norton* v. *Ladd*, 5 N. Hamp. 203.

130. But things of a base nature, in contemplation of law, as dogs, cats, bears, foxes, monkeys, ferrets, &c., cannot, by the Common Law, be the subjects of larceny, although a man may have a property in them which the law will protect by a civil action. *Ib.* Vide *Warren* v. *State*, 1 Green 106.

131. It is clear that a sable caught in a trap in the woods cannot be the subject of a larceny. *Ib.*

132. A bank-note is personal property and the subject of larceny, within the meaning of the thirty-second section of the third article of the act of 1835, concerning crimes and punishments. *McDonald* v. *State*, 8 Mo. 283.

133. Doves are ferae naturæ, and as such are not subjects of larceny, except when in the care and custody of the owner, as when in a dove-cot or pigeon-house, or when in the nest before they are able to fly. *Commonwealth* v. *Chace*, 9 Pick. 15.

134. If, when thus under the care of the owner, they are taken furtively, it is larceny. *Ib.*

135. Where an indictment against a defendant, alleged, that he at Boston, on the 23d of April, 1844, stole one certain original book of accounts concerning money due, of the value of twenty dollars, one receipt, release, or defeasance, containing an acquittance of money due of the value of six dollars; held that the memorandum-book of accounts was the subject of larceny within the Rev. Stats. of Massachusetts. *Commonwealth* v. *Williams*, 9 Met. 273.

136. By the South Carolina statute of 1826, corn growing in a field is a subject of larceny, even before it is severed from the soil. *State* v. *Stephenson*, 2 Bailey 334.

137. By the law of Pennsylvania, notes of unincorporated banks are not subjects of larceny; the fact of incorporation should be alleged in the indictment. *Spangler* v. *Commonwealth*, 3 Binn 533.

138. In the strict sense of the Common Law, personal goods are goods which are movable, belonging to or the property of some person, and which have an intrinsic value. *U. S.* v. *Davis*, 5 Mason 358.

139. Bonds, bills, or notes, which are choses in action, are not esteemed by the Common Law goods whereof larceny may be committed, being of no intrinsic value, and not importing any property in possession of the person from whom they are stolen, but only evidence of property. *Ib.*

140. In penal statutes, a more strict construction is adopted, and the analogy of the Common Law in respect to larceny may well furnish the proper rule for decision. *Ib.*

141. Turpentine which has run out of the trees into boxes cut into the tree for the purpose of receiving the liquid, is the subject of larceny. *State* v. *Moore*, 11 Iredell 70.

142. Where ice is put away in an ice-house for domestic use, it is private property, and as such, the subject of larceny. *Ward* v. *People*, 3 Hill 395.

143. In order to render bonds, notes, &c., the subject of larceny, they must be, at the time of taking, legally valid and subsisting securities for the payment of money or some specific article of value. *Wilson* v. *State*, 1 Porter 118.

144. Lost goods may be the subject of larceny, and should receive the same protection from the civil and criminal law as goods in any other situation. *Ransom* v. *State*, 22 Conn. 153.

145. Bank-bills, eo nomine, are the

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subjects of larceny or robbery. *Greeson* v. *State*, 5 Howard 33.

146. At Common Law, choses in action are not the subject of larceny. *Ib.* Vide *Culp* v. *State*, 1 Porter 33.

147. Bank-bills, after they are redeemed by the bank, are the subject of larceny. *Com.* v. *Rand*, 7 Metc. 475.

148. A runaway slave is the subject of larceny. *Cash* v. *State*, 10 Humph. 111; vide *Morehead* v. *State*, 2 Humph. 635; *Murray* v. *State*, 18 Ala. 727.

IV. Indictment for Larceny.

149. An indictment for stealing corn charges an offence at Common Law, in the State of Maryland, and the person indicted, upon conviction, may be punished under the act of that State of 1809, c. 138, upon an indictment which concludes contra pacem; that act repeals the Common Law punishment, and provides only for a different punishment of the offence. *The State* v. *Evans*, 7 Gill & Johns. 290.

150. To make an indictment for larceny good, the goods alleged to have been stolen, must be proved to be the absolute or special property of him who is the alleged owner; a larceny also must be made out. *The State* v. *Furlong*, 1 App. 225.

151. In a case of larceny, where the property stolen was alleged to be that of Richard G., and it was afterwards described as the property of Robert G.; held that it was a mere clerical error and not ground for objection. *Greeson* v. *the State*, 5 How. 33.

152. The word steal need not be used in an indictment for larceny. *Damewood* v. *the State*, 1 How. 262.

153. Where an indictment alleges a watch stolen to be the property of A., and it was proved that B. was the general owner, but that he had exchanged it with A., for a few weeks, and that it was stolen while in A.'s possession; it was held that A. had a special property in the watch sufficient for the purpose of sustaining the indictment. *Yates* v. *State*, 10 Yerg. 549.

154. Where an indictment alleges that the defendant stole a parcel of oats, it is sufficiently certain. *The State* v. *Brown*, 1 Dev. 137.

155. Where an indictment was laid for stealing a bank-note, a description of the note in the following words, one twenty-dollar bank-note on the State Bank of North Carolina, of the value of twenty dollars, is sufficient. *The State* v. *Rout*, 3 Hawks. 618.

156. In an indictment for larceny of bank-bills and promissory notes, it is necessary to charge and prove that the defendant knew that the papers stolen were bank-bills and notes. *Rich* v. *the State*, 8 Ohio 111.

157. Where an indictment lies for petit larceny, it will not be quashed for the omission of the name of the Court in which it is found. *The State* v. *Jeffries*, 1 Tayl. 216.

158. Where a warrant directed a Court to be summoned for the examination of a prisoner charged with feloniously stealing sundry checks drawn by sundry individuals upon the Exchange Bank at N., and sundry other checks drawn in like manner upon the Farmers' Bank at N., also treasury notes and other bank-notes, the whole of which checks, treasury notes, and bank-notes, amount to $2,324, of the value of $2,324, the property of J. S. M., and the record of the examining Court showed that the prisoner was examined upon a charge of feloniously stealing divers goods and chattels, the property of J. S. M.; it was held that the warrant and examination were good, and that an indictment for the larceny of divers checks, bank-notes, and United States treasury-notes, the property of J. S. M., was sufficiently sustained thereby. *Boyd's case*, 1 Robinson 691.

159. Where an indictment alleges that the defendant did embezzle, steal, take, and carry away certain goods, it will not be bad for duplicity as charging the two offences of embezzlement and larceny; the word embezzle may be rejected as surplusage, and the indictment will be regarded as charging a larceny only. *The Commonwealth* v. *Simpson*, 9 Met. 138.

160. To warrant the admission of testimony that an indicted party has embezzled moneys or goods, the indict-

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ment should charge matter sufficient to apprise him of the charge of embezzlement against him. *Ib.*

161. In Virginia, where an indictment lies against A., for a second offence of petit larceny, and alleges a former conviction and punishment, for a like offence, but does not in terms allege that the Court in which the first offence was tried, had competent authority to try the same, and does not allege that the former conviction remained in force, nor that such conviction appeared by record, nor that A., who was formerly convicted, was the same person who was charged with the subsequent offence, and the verdict was guilty; held that none of these omissions was ground for arrest of judgment. *Stroup's case*, 1 Robinson 754.

162. Where an indictment is laid for stealing in a dwelling-house, shop, &c., in the day-time, property of less value than $100, it must contain the allegation of day-time, or it will only stand as an indictment for simple larceny. *Haggett* v. *the Commonwealth*, 3 Met. 457; *Hopkins* v. *the Commonwealth*, 3 Met. 460.

163. Where an indictment lies for larceny, it must state the value of the articles alleged to be stolen, and when it alleges the stealing of various articles, but states only the collective value of the whole of them, and the jury find the defendant guilty of stealing only a part of them; held that no judgment can be legally rendered against the defendant. *Hope* v. *the Commonwealth*, 9 Met. 134.

164. Since the Vermont statute, which made horse-stealing larceny, the question cannot arise, which did under the former statute, with respect to joining of horse-stealing and simple larceny in the same count of an indictment. *The State* v. *Nutting*, 16 Ver. 261.

165. Where an indictment is found for breaking and entering an office in the night-time, under the Massachusetts statute of 1804, c. 143, § 4, it is not necessary to aver that the office is not adjoining to or occupied with a dwelling-house. *Devoe* v. *the Commonwealth*, 3 Met. 316.

166. Where a count in an indictment charges that the defendant broke and entered a shop with intent to commit a larceny, and did there and then commit a larceny, it is not bad for duplicity. *The Commonwealth* v. *Tuck*, 20 Pick. 356.

167. In South Carolina the term pig not being in the statute against hog-stealing, an indictment for stealing a pig contrary to that act cannot be supported. *The State* v. *M'Lain*, 2 Brevard 443.

168. A criminal prosecution may be maintained for the larceny of checks, bank-notes, and United States treasury notes. *Boyd's case*, 1 Robinson 691.

169. Where personal chattels are the subject of an offence, as in larceny, they must be described specifically by the names usually appropriated to them, and the number and value of each species or particular kind of goods stated. *State* v. *Longbottoms*, 11 Humph. 39.

170. Where the defendant was charged with having stolen ten dollars good and lawful money of the State of Tennessee; held that it was not a sufficient description of the thing; stolen money should be described as so many pieces of current gold or silver coin, and the coin must be stated by its appropriate name. *Ib.*

171. An indictment on the Rev. Sts. c. 126, § 16, describing the offence of larceny by stealing from the person of another, was held to be within the language of the Rev. Sts. c. 126, § 16, which is simply larceny by stealing from the person of another. *Commonwealth* v. *Dimond*, 3 Cush. 237.

172. When property is levied upon by a constable he acquires a special property in it; and when stolen, it may be alleged in an indictment or complaint as the property of the constable. *Palmer* v. *People*, 10 Wend. 166.

173. Necessary articles, furnished by a parent to a minor child for use, may well be described in an indictment as belonging to either the parent or child. *State* v. *Williams*, 2 Strobh. 229.

174. A saddle furnished by a father to his infant son, is such an article as in an indictment may be laid in either the father or son. *Ib.*

175. Goods stolen from a washerwo-

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man may be described as hers, because she is answerable for them. *U. States* v. *Burroughs*, 3 McLean 405.

176. If a coach be standing in the yard of a coach-maker, to be repaired, and a plate of glass and hammercloth be stolen from it, the property may be well laid in the owner of the premises. *Ib.*

177. Where a parcel is stolen from the boot of a stage the property may be laid in the driver, though he may be no proprietor of the goods or the coach, and though as against his employers he has a bare charge, but as against the rest of the world he has a legal possession. *Ib.*

178. In an indictment under the Michigan statute (Sess. 1, 1840, p. 42, § 1) which provides for the punishment "of larceny by stealing of the property of another" any bank-note, bank-bill, etc., a description of the property stolen as "bank-notes" or "bank-bills," merely following the language of the statute, will be good. *People* v. *Kent*, 1 Doug. 42.

179. Where there is an allegation in an indictment for stealing bank-notes, that the bank-bills were the goods and chattels of A., it is a sufficient averment that they were his property, the word "chattels" denoting property and ownership. *Ib.*

180. In cases where bank-notes are stolen from the mail, they may be laid as the property of the person forwarding them. *United States* v. *Burroughs*, 3 McLean 405.

181. Where a horse escaped from the owner, and was taken in the field of a third person, and placed in his stable, from whence he was stolen, it was held that was in the constructive possession of the owner, and in the actual possession of such third person, and that the indictment may well aver the possession to be in the owner or such third person. *Owen* v. *State*, 6 Humph. 330.

182. Where an indictment is found for stealing a bank-note of the *State Bank of Ohio* for the payment of ten dollars, it was held that it was not necessary that the note should have been described with greater particularity. *Crawford* v. *State*, 2 Carter 132.

183. Where an indictment charges a larceny of certain county orders, and describes them as follows—"five county orders drawn by the auditor of the county of *Allen*, in the State of *Indiana*, on the treasurer of said Allen county, and one of these county orders being of the denomination of 87 dollars and 27 cents, and of the value of 25 dollars, and one other of said county orders," etc., (describing each order after the manner of the first,) "of the personal goods," etc., "then and there did feloniously take and carry away, contrary,"—it was held that the description in the indictment was good, and that the larceny was well described without using the word "steal." *Engleman* v. *State*, 2 Carter 91.

184. Where the indictment alleges that the defendant stole a bank-note of the value of ten dollars, of the goods, chattels, etc., this is a sufficient allegation of property and value, and as particular a description as the law requires. *Ib.*

185. Where in an indictment for larceny the first count charged the defendant with stealing a slave "of the goods and chattels of J. H., from the possession of J. H.," and the second count was like the first, with the exception that it did not charge the slave with being taken from the possession of any one, and neither count found the offence to have been committed contra formam statuti, the jury found that the slave was at that time a runaway—it was held that the defendant must be discharged on the first count, the slave being not in the actual possession of J. H., and the second, the offence charged was not one at Common Law. *Commonwealth* v. *Hays*, 1 Virg. Cas. 122.

186. Where an indictment is founded upon the act of Maryland of 1809, c. 138, for stealing a bank-note, it is good if the offence is charged in the language of the statute. *State* v. *Cassell*, 2 Harr. & Gill 407.

187. Where an indictment is laid for stealing three promissory notes called bank-notes, on the bank of the United States, it is good. *McLaughlin* v. *Commonwealth*, 4 Rawle 464.

188. An indictment will lie under the Virginia act of 1806, for stealing a bank-

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note of any other State. *Cummings* v. *Commonwealth*, 2 Virg. Cas. 128.

189. Where an indictment charges stealing one bank-note of the Bank of Baltimore; held bad. *Commonwealth* v. *McDowell*, 1 Browne 359.

190. Where one hires a pistol from the State, he has such a property therein that in the indictment for larceny of it it may properly be alleged to be his property. *Jones* v. *State*, 13 Ala. 153.

191. Where an indictment contains several counts charging the same larceny in different modes, the defendant cannot, without showing other cause than what appears on the face of the indictment, on motion compel the prosecutor to elect on which count he will proceed; but the prosecutor may apply the evidence relating to the larceny to whichever count it will sustain; but where on the trial evidence tends to prove distinct larcenies which might be embraced in the indictment, the prosecutor will be obliged to elect as to which of the larcenies he will rely upon on the trial, and confine his evidence to that. *Engleman* v. *State*, 2 Carter 91.

192. In Alabama, where an indictment charges a larceny of a bank-note and other articles, and there is a variance between the indictment and the proof in respect to the bank-note only, the Court cannot, under the 11th section of the 8th chapter of the Penal Code, permit a nolle prosequi to be entered, that another indictment may be preferred; because the accused will not consent to an amendment of the indictment so as correctly to describe the bank-note. *State* v. *Kreps*, 8 Ala. 951.

193. Where an indictment for larceny alleged the offence to have been committed in a vessel in the *first* ward of the city of New York, and it appeared on the trial that it was lying in the river at a wharf in the *third* ward; held that the variance was not material. *People* v. *Honeyman*, 3 Denio 121.

194. Objected that the property laid in one of the bills as the property of Isabella Chadwick, should have been laid as the property of her father, she being a minor, and living with him; but the Court thought the property well laid in the daughter, the articles being in her possession, and being for her exclusive use. *State* v. *Koch*, 4 Harrington 570.

195. An indictment will lie under our statute, for feloniously taking and carrying away a runaway slave, "with intent to dispose of him to another," &c., even though the taker did not know who was the owner of the slave. *State* v. *Williams*, 9 Iredell 140.

196. An indictment in a case under our statute for the abduction of negroes, which charges that the defendant, "by violence, feloniously took," is as good as if it had averred that the defendant "feloniously, by violence, took," &c. *Ib.*

197. In an indictment relating to the larceny or abduction of a slave, in describing him as the property of A. B., you may use indifferently the phrases "then and there being the property, or of the proper goods and chattels of A. B.," &c.; or, and "the property of A. B.," after laying the value, &c., of the slave. *Ib.*

198. In an indictment for stealing, &c., a slave, under our statute, the words "with an intent to sell and dispose of the said slave," are sufficient. *Ib.*

199. Counts for horse-stealing and grand larceny of other property, may be joined in the same indictment. *Barton* v. *State*, 18 Ohio 221.

200. In an indictment for larceny, the goods alleged to be stolen may be described by the names by which they are known in trade, and the same principle extends to articles known by particular names in all the arts, pursuits, and employments of life. *State* v. *Clark*, 8 Iredell 226.

201. Where an indictment for grand larceny, in stealing bank-notes, charged that the defendant feloniously stole, took, and carried away ten promissory notes, called bank-notes, issued by the Chickopee Bank, for the payment of the divers sums of money, amounting in the whole to the sum of $50, and of the value of $50, ten promissory notes, called bank-notes, issued by the Agawam Bank, &c., of the goods, chattels, and property of one B. M.; held, on motion of arrest of judgment, that the

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indictment was sufficient. *People* v. *Jackson*, 8 Barb. 637.

202. *Held, also*, that it was immaterial whether the banks were organized within the bounds and under the laws of this State; or were banks of other States or countries, so far as the allegations in the indictment were concerned, the names of the banks being mentioned by way of description of the property stolen. *Ib.*

203. In an indictment for stealing bank-notes, it is enough to set them forth in the same manner as other things which have an intrinsic value, by any description applicable to them as chattels. *Ib.*

204. The property stolen must be set forth with certainty to a common intent—by which is meant such certainty as will enable the jury to say whether the chattel proved to have been stolen is the same with that upon which the indictment is founded, and as will show judiciously to the Court that it could have been the subject-matter of the offence alleged. *Ib.*

205. If goods, the separate property of the wife, be stolen from the possession of the husband, it is sufficient to describe them in the indictment as the goods of the husband. *Davis* v. *State*, 17 Ala. 415.

206. In Alabama, an indictment under the 18th section of the first chapter of the Penal Code, for inveigling slaves, &c., must allege all the facts necessary to create the offence denounced by the statute; an indictment charging the offence generally as a larceny at Common Law, is insufficient. *Williams* v. *State*, 15 Ala. 259.

207. Where an information for theft sets forth the property charged to be stolen as "thirteen bills against the *Hartford* Bank, each for the payment and of the value of ten dollars, issued by such bank, being an incorporated bank in this State;" it was held that this description was sufficiently certain. *Salisbury* v. *State*, 6 Conn. 101.

208. Where the indictment alleged that the defendant stole "four promissory notes, commonly called bank-notes, given for the sum of fifty dollars each, by the Mechanics' Bank in the city of New York, which were due and unpaid, of the value of 200 dollars, the goods and chattels of P. C., then and there found," &c., it was held a sufficient description without alleging that they were the *property of* P. C. The word chattel denotes property and ownership. *People* v. *Holbrook*, 18 John. 90.

209. In an indictment for larceny, the name of the person to whom the goods belong must be truly set forth, as it serves to inform the prisoner of the precise offence with which he is charged, and as a security against another prosecution for the same offence; and for the same reason, it is equally necessary that the proof should correspond with the allegation. *State* v. *Dwyre*, 2 Hill S. C. 287.

210. The indictment under the statute respecting bringing stolen property from a sister State, must charge that the possession of the property in this State was felonious. *State* v. *Levy*, 3 Stew. 123.

211. In an indictment, nothing can be taken by an intendment. *Ib.*

212. There is no need of distinguishing between negroes and mulattoes in indictments for larceny. *State* v. *Warrington*, 3 Harrington 556.

213. In such an indictment, the christian and surname of the party injured, if known, must be stated, and the name so stated must be either the real name, or that by which he is usually known —either is sufficient. *State* v. *Godet*, 7 Cow. 210.

214. Where the goods of A. are stolen by B., and subsequently they are stolen from B. by C., an indictment against the latter may aver the title to be in either A. or B., at the election of the pleader. *Ward* v. *People*, 3 Hill 395.

215. Where an indictment for petit larceny describes it as a *second offence*, charging a previous conviction of forgery, the accused may, nevertheless, be convicted of the larceny as a *first offence*. *Palmer* v. *People*, 5 Hill's Rep. 427.

216. An indictment for petit larceny, charging it as a second offence, is valid, though, in respect to the first offence, it only charges that the accused *was convicted*, &c., without alleging in terms

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a *judgment* or *sentence*, and though it does not specify the property to which the first offence related, or the person from whom it was stolen. *Stevens* v. *the People*, 1 Hill 261.

217. Otherwise, however, where the indictment omits to charge that the accused had been *pardoned, or otherwise discharged from the first conviction, before the commission of the second offence. Ib.*

218. In an indictment charging the larceny of promissory notes, omission to charge the value of the notes is a material defect. *Wilson* v. *State*, 1 Port. 118.

219. An indictment for larceny will not lie, if it appear that the articles alleged to be stolen, have been transferred, so as to create any trust-right or property, by any consideration express or implied, or agreement; and this is a question to be considered by the jury. *Ib.*

220. The description of such notes as being of certain amounts, is not tantamount to averments of their being of that value, nor a compliance with the established rule, "that indictments for larceny must state the value of the articles." *Ib.*

221. An indictment for larceny of "bills of credit on the United States Bank," will not lie on its appearing that the amounts charged were less than the Bank of the United States is authorized to issue by its charter. *Culp* v. *State*, 1 Porter 33.

222. A count in an indictment charging generally the larceny of "bills of credit," is bad, the State having no authority to issue such choses in action. *Ib.*

223. In the case of larceny for stealing letters, the description of the termini between which letters are sent by the post, cannot be regarded as surplusage, but it is necessary to prove the description as laid. *United States* v. *Foye*, 1 Curtis' C. C. 364.

224. Where an indictment for larceny from a letter, under the 21st section of the act, is laid, it is necessary to allege the property to be on some person other than the prisoner. *Ib.*

225. Where a manufacturer receives leather to manufacture into shoes, to be delivered to his employer when done, an indictment for stealing them, while yet in the hands of the manufacturer, may allege the property of the shoes to be in the manufacturer. *State* v. *Ayer*, 3 Foster 301.

226. Goods stolen from washerwomen, who take in the linen of other persons to wash, may be laid to be their property, for such persons have a possessory property. *Ib.*

227. The property in a box belonging to a benefit-society, deposited in a public-house, the landlord being entitled to have a key to the box, may be laid to be in the landlord. *Ib.*

228. It has been held in Maine, that proof that the person alleged to be the owner had a special property, or that he held it to do some act upon it, or for the purpose of conveyance, or in trust for the benefit of another, would be sufficient to support the allegation in the indictment. *Ib.*

229. A charge of larceny does not render an indictment for burglary liable to the charge of duplicity. *Ib.*

230. Stealing a promissory note is not an offence at Common Law, and a count in an indictment for stealing it should therefore conclude contra formam statuti. *People* v. *Cook*, 2 Parker's Crim. R. 12.

231. An indictment under the act, 3 stat. 470, for stealing bank-bills, need not state that they were the bills of some incorporated bank, or give such a minute description of them that they may be identified and distinguished from other bills of the same bank; such an indictment is sufficient if it describes the bills as the bills of a certain bank, naming it. *The State* v. *Smart*, 4 Rich. 356.

232. An indictment for larceny need give no more than a general description of the thing stolen. *Ib.*

233. Where the grand jury intended to indict for a compound larceny, under the statute, ch. 156, § 2, which provides against the breaking and entering into and stealing within any building, in which goods, merchandise, or any valuable thing is kept for use, sale, or deposit; held that where the proof shows the building to have contained the goods, the indictment is defective in

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not setting forth that it was a building of that description, but is good for simple larceny. *State* v. *Savage*, 32 Maine 583.

234. The offences of stealing, and receiving stolen goods, are different offences, and punished by different degrees of severity; but they differ only in degree, and belong to the same class of crimes, and may be well united, and often must be if justice is to be administered; for it may be doubtful whether the proof will sustain the charge of larceny, or only the more mitigated offence of receiving stolen goods, knowing them to be stolen, and the indictment must therefore be found so as to meet either charge, and such is the common practice. *Hampton* v. *State*, 8 Humph. 69.

235. Where the statute describes a bank-note as property that may be the subject of larceny, and the indictment charges the stealing of *bank-bills;* held that it is in effect the charge of larceny under the statute, and that the indictment is good. *Low* v. *People*, 2 Parker's Crim. R. 37.

236. As the punishment for stealing from the person does not depend on the amount stolen, there is no occasion for any allegation as to value in the indictment, it is not necessary to describe the particular goods attempted to be stolen, nor is it necessary that there should have been anything in the pocket of the unknown person which could have been stolen; the offence was complete by the general attempt to steal, and the act done towards the commission of the offence by the defendant, by thrusting his hand into the pocket of the unknown person. *Commonwealth* v. *McDonald*, 5 Cush. 365.

237. Where a slave is stolen in another State and brought into this, the indictment should charge the offence in the same form as if it had been committed here; a Common Law indictment is not sufficient. (See 18th and 25th sections 1st ch. Penal Code.) *Ham* v. *the State*, 17 Ala. 188.

238. It was contended that a bill of indictment was bad, because it embraced in one count distinct and separate crimes, viz., horse-stealing, grand larceny, and petit larceny, and that this defect might be taken advantage of upon motion in arrest of judgment, as well as by demurrer, or on motion to quash; but the Court decided otherwise. *State* v. *Williams*, 10 Humph. 101.

239. The mode of charging the double offence of house-breaking and theft, when used in regard to burglary properly so called, that of breaking and entering a dwelling-house in the night-time, and the kindred offence of breaking and entering dwelling-houses and other buildings in the day-time, seems to have been long in use, and has not been considered obnoxious to the charge of duplicity. *Com.* v. *Hope*, 22 Pick. 1.

240. It ought to be expressly alleged in an indictment for larceny, that the stealing of the bank-notes therein mentioned, was done feloniously; and that the said bank-notes ought to be alleged, in and by the said indictment, to be the bank-notes of, or to belong to, any person or persons, or to a person or persons to the jurors unknown. *Barker* v. *Com.*, 2 Virg. Cas. 122.

241. *Quere*—"Whether it is sufficient ground for arresting a judgment, after a verdict of conviction on an indictment for stealing bank-notes, that the bank-notes charged by the said indictment to have been stolen, are thereby described as the money, goods and chattles of the individual from whom they are said to have been stolen, connecting such description with that part of the said indictment which states that they were the bank-notes of, and were stolen from, the said individual." *The Com.* v. *Moseley*, 2 Virg. Cas. 154.

242. *Quere*—"Whether it is sufficient ground for arresting a judgment, after a verdict of conviction, on an indictment for stealing bank-notes, that the said indictment does not contain any description of the stolen bank-notes, except such as states that they were bank-notes current within the United States; and that one of them, two only being charged to have been stolen, was for the sum of ten dollars, and the other for five dollars; in other words, is it necessary to name the bank or banks from which they issued, and that they are genuine bank-notes of a chartered bank." *Ib.*

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243. The Court was unanimously of opinion, and did decide, that it is not sufficient ground to arrest judgment on the verdict of conviction, in the record set out, on an indictment for stealing bank-notes, that the bank-notes charged by the said indictment to have been stolen, are thereby described as the money, goods and chattels of the individual from whom they are said to be stolen; the Court being of opinion that the words "of the money, goods and chattels," may be rejected as mere surplusage, and then the indictment will contain a sufficient averment of property in the said notes, in the person from whom they were stolen. *Ib.*

244. And upon the second point, the Court was unanimously of opinion, and did decide, that the said indictment doth contain a sufficient description of the bank-notes alleged to have been stolen. *Ib.*

245. The use of the word stal instead of steal in an indictment for stealing is not a sufficient cause to arrest the judgment. *Wills* v. *State*, 4 Blackf. 457.

246. In an indictment for stealing bank-notes, the indictment may omit all allegations concerning the bank's having been chartered, the offence being complete without them. *Pomeroy* v. *the Com.*, 2 Virg. Cas. 342.

247. And the charge "and being notes of banks chartered," &c., may be rejected as surplusage. *Ib.*

248. Where the averment, "contra formam statuti," in an indictment for horse-stealing was unnecessary, the whole Court were of opinion, that even if the indictment were erroneous in this respect, yet the objection came too late after verdict, being cured by the statute of Jeofails in Criminal Cases. *Chiles* v. *the Com.*, 2 Virg. Cas. 260.

249. In South Carolina, under the act of Assembly, 1789, against cattle-stealing, all indictments for that offence must conclude against the act of Assembly, and cannot be maintained for larceny at Common Law. *State* v. *Ripley*, 2 Brevard 300.

250. An indictment for stealing bank-notes is good if it merely describes them as such, without setting them forth. *State* v. *Rout*, 3 Hawks 618.

251. Where the charge was for stealing from the person of A. one bank-note of the value of ten dollars of the goods and chattels of the said A.; held to be sufficient. *Ib.*

252. Where a prisoner was indicted for breaking, entering, and stealing, and it was moved in arrest of judgment that the indictment was bad for duplicity; held that the indictment was good. *State* v. *Squires*, 11 N. Hamp. 38.

253. In cases of larceny at Common Law it is not necessary that the indictment should charge that the goods were stolen from the possession of the owner, or of any other person. *Thompson* v. *Commonwealth*, 2 Virg. Cas. 135.

254. Form of an indictment for petit larceny where it is charged as a second offence. *The People* v. *Cæsar*, 1 Parker Crim. Rep. 645.

255. To sustain an indictment for stealing bank-bills, it is necessary to allege in the indictment that the bills expressed a promise to pay money, or contained some agreement to that effect. *State* v. *Emery*, Brayt. 131.

256. An indictment for stealing bank-bills must aver a scienter, or it is defective. *Gatewood* v. *State*, 4 Ohio 386.

257. Where a defendant was indicted for stealing the property of A., B. and C., and it appeared by the proof that he had stolen property from each, but in none of which they had any joint interest. *State* v. *Ryan*, 4 McCord 16.

258. Where the indictment was for stealing horses, it was held that the property of the horses might be alleged to be in one who had the lawful possession of them, though not the real owner. *State* v. *Addington*, 1 Bailey 310.

259. Where an indictment describes the article stolen as "one bridle of the value of," &c., it was held sufficiently certain. *State* v. *Dowell*, 3 Gill & John. 310.

260. Where an indictment charges that the defendant feloniously stole, took, and carried away sundry promissory notes for the payment of money, of the value of $80, of the goods and chattels of the said M.; it was held that the indictment was too vague and uncertain. *Stewart* v. *Commonwealth*, 4 Sergeant & Rawle 194.

261. Where an indictment contains

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two counts, the first a charge against W. for stealing certain goods, and the second a charge against R. for receiving the said goods, knowing them to be stolen. An objection, on a motion in arrest of judgment, that the first count does not state the time, place, or the value of the goods, &c., was not available because these requisites were properly laid in the first count, and referred to in the second, which answered all the purposes of certainty required by law. *Redman* v. *State*, 1 Blackf. 429.

262. An indictment charging A. with stealing a book of the value of $3, is sufficiently certain, and the title of the book need not be stated. *State* v. *Logan*, 1 Mo. 532.

263. In all indictments for larceny, the articles alleged to have been stolen must be averred to be of the goods and chattels of the right owner, if known; or of the goods and chattels cujusdam ignoti, which form of indictment contains an implied averment that the owner is not known. *Commonwealth* v. *Morse*, 14 Pick. 217, 218.

264. In indictments for larceny, it is necessary to describe the articles supposed to be stolen, as the property of the true owner, if he can be ascertained, and if not, as the property of some person unknown. *Commonwealth* v. *Manly*, 12 Pick. 173, 174.

265. In an indictment for larceny, the fact that the defendant had purchased a large number of lottery tickets before the money was taken from the bank, for which he was indicted, taken in connection with his pecuniary embarrassments, affords evidence of at least a motive on his part, to have the use of money; and as such, it is proper to be submitted to the jury, as a circumstance taken in connection with the other evidence, affording a presumption of his guilt. *Bullock* v. *State*, 10 Geo. 46.

266. Where the defendant is accused with having stolen sundry bank-bills of a particular denomination, and of a particular value, of the Central Railroad and Banking Company of Georgia, signed by the president of that company, and countersigned by the cashier thereof, the same being the property of that bank, which were entrusted to the defendant as such cashier; this description of the bills alleged to have been stolen by the defendant is sufficient to inform him of the general nature of the offence of which he is accused. *Ib.*

267. In an indictment for larceny, it is enough if the goods stolen are laid as the goods and chattels of the bailee. *People* v. *Smith*, 1 Parker's Crim. 329.

268. Thus, where in an indictment for burglary and larceny, the property stolen was laid as the goods and chattels of William S. Amigh, and it appeared in evidence that the goods were owned by one Winters, and that Amigh had the lawful custody of them from Winters, with authority to dispose of them, and account for the proceeds; it was held no variance. *Ib.*

269. Where an indictment contains ten counts, in each of which the subject of larceny is stated to be, "eleven hundred and forty pounds of tobacco, of the value of one hundred dollars," but each of which is different from the others in some incidental circumstance; the first is a common count for larceny, stating the owner of the property to be a person to the jurors unknown, the next six are for receiving stolen tobacco, knowing it to have been stolen, and the last three are for aiding John Bailey, a free man of color, in concealing stolen tobacco, knowing it to have been stolen. In all of the last nine, the property is stated to have been stolen by a person to the jurors unknown. In three of them, it is stated as the property of Nathaniel M. Osborne, in the other three as the property of George McGlasson, and in the other three as the property of a person to the jurors unknown. In three of the six counts for receiving, the property is stated to have been received of John Bailey, a free man of color, and in the other three of a person to the jurors unknown. Held that the indictment was good. *Dowdy* v. *the Commonwealth*, 9 Gratt. 727.

270. And in such case the Court ought not to compel the attorney for the Commonwealth to elect under which count or counts he would prosecute the prisoner. *Ib.*

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271. If, when the prosecutor in an indictment for larceny, brought forward his evidence, it tended to prove distinct larcenies, which might be embraced by the charges in the indictment, the prosecutor might then be compelled to elect as to which of the larcenies he would rely upon on the trial, and to confine his evidence to that. *Engleman* v. *the State*, 2 Carter 91.

272. Where it is claimed that the judgment should be arrested, because three distinct larcenies of the goods of different persons are charged in the indictment, but one of these larcenies is charged in separate counts; it was held that such course was admissible where the offences were of the same nature. *State* v. *Nelson*, 29 Maine 329.

273. The statute c. 156, § 10, makes the buying, receiving, or aiding in the concealment of stolen goods, but one offence, although it may be committed in three modes. If it is charged in all three of the modes, still but one offence is committed, and only one punishment can be inflicted; the offence is established by proof of either of the modes, but the penalty is the same for one as for all three of them. *Ib.*

274. In indictments for larcenies, where the goods of several persons are taken at the same time, so that the transaction is the same, one count may embrace the whole. *Ib.*

275. No reason is apparent why the same rule should not prevail for receiving stolen goods, as for larcenies. *Ib.*

276. It is generally true that but one offence can be charged in one count. *Ib.*

277. Where a party was convicted before a Court of Special Sessions, on a complaint of feloniously taking property, and neither the complaint nor warrant of arrest charged the *value of the property, or the place where the offence arose;* held that the conviction was erroneous. *Howell* v. *People*, 2 Hill 281.

278. In an indictment for stealing money, the *value* must be averred. *Commonwealth* v. *Smith*, 1 Mass. 245.

279. An indictment for larceny, alleging that the defendant stole "*a bank-note of the value of* ——, *of the goods and chattels of* ——," is sufficient without a more particular description of the note. *Commonwealth* v. *Richards*, 1 Mass. 337.

280. Under a statute making "promissory notes" the subject of larceny, an indictment for larceny of "bank-notes" is not sustainable. *Culp* v. *State*, 1 Porter 33.

281. In all indictments for larceny, the articles alleged to be stolen must be averred to be "of the goods and chattels" of the right owner, if known; or of the goods and chattels cujusdam ignoti. *Com.* v. *Morse*, 14 Mass. 217.

282. An indictment for larceny of "bank-notes," eo nomine, which states their number, denomination, and value, is sufficient. *State* v. *Williams*, 19 Ala. 15.

283. In indictments for larceny, it is necessary to describe the articles supposed to be stolen, as the property of the true owner, if he can be ascertained, and if not, as the property of some person not known. *Commonwealth* v. *Manley*, 12 Pick. 174.

284. Where an indictment lies for stealing several articles, it need not allege the separate value of each article; it is sufficient if the total value is stated. *Clifton* v. *the State*, 5 Blackf. 224.

285. Where an indictment lies for the larceny of a bank-note, it must describe it as a promissory note for the payment of money, purporting to be a bank-note. *Damewood* v. *the State*, 1 How. 262.

V. Proof Requisite to Sustain an Indictment for Larceny.

286. To prove that the defendant stole a mare or gelding, will be sufficient to support an indictment for stealing a horse. *Baldwin* v. *the People*, 1 Scam. 304.

287. Where an indictment lies for stealing and carrying away a horse, it will be supported by proof that it was ridden, driven, or led away. *Ib.*

288. Where an indictment lies for stealing bank-bills, it will not be supported by proof that the prisoner stole the orders of a railroad company on

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its treasurer. *Grummond* v. *the State*, 10 Ohio 510.

289. To give evidence of embezzlement will not support an indictment for mere larceny, although the Rev. Sts. Massachusetts, c. 126, declare that a party who embezzles money or goods shall be held to have committed the offence of larceny. *The Commonwealth* v. *Simpson*, 9 Met. 138.

290. Where a defendant was indicted for stealing a shovel-plough, but the proof was that he only stole the rim part of what is called a shovel-plough; it was held that it should have been left to the jury to decide whether the thing stolen was according to common understanding a shovel-plough as laid in the indictment. *The State* v. *Sansom*, 3 Brevard 5.

291. If in an indictment for larceny, the ownership of the property was charged to be in A. B., and it appeared in evidence that it was in A. B. junior; held that the ownership was proved as charged. *The State* v *Grant*, 9 Shep. 171.

292. Where the person who is the alleged owner of goods charged to have been stolen, thinks he has lost such property, but refuses to swear to it, or that he has not sold the same to some other person than the defendant, this is no sufficient proof of ownership of the alleged stolen property. *State* v. *Furlong*, 1 App. 225.

293. An indictment under section 20, chap. 154, R. S., 1846, for aiding in the concealment of any articles, money, goods, or property, knowing the same to be stolen, is supported by proof of acts of the aider, which will assist the principal felon in converting it to the use of the thief, or which will aid him in preventing its recovery by the owner, and it is not necessary to prove that the property was actually hidden or secreted anywhere. *People* v. *Reynolds*, 2 Mann. 422.

294. The rule in criminal trials is, that all material allegations in the indictment be proved. The color and kind of animal alleged to be stolen are made material by being set out in the indictment. *Rowell* v. *Small*, 30 Maine 29.

295. In an indictment for larceny, if there is any testimony tending to prove that the respondent took the property and removed it with the felonious intent charged, it is entirely a question to the jury whether the evidence is sufficient. *State* v. *Carr*, 3 Weston 571.

296. The two offences of larceny and embezzlement are so far distinct in their character, that under an indictment charging merely a larceny, evidence of embezzlement is not sufficient to authorize a conviction. *Commonwealth* v. *Simpson*, 9 Metc. 138.

297. Where the defendant is charged in the indictment, with a felonious stealing of two notes of Stephen Girard, for $1,000 each, from the Bank of the United States, being the property of that bank, and also for stealing from the said bank two notes of the said Girard for $1,000 each, the precise tenor of which notes is stated; to warrant a conviction of the defendant on that indictment, it must be proved to the satisfaction of the jury, that the notes described in these counts, or in some of them, was stolen by the defendant, he being at the time a person employed as a servant in the Bank of the United States. *U. States* v. *Clew*, 4 Washington' C. C. 700.

298. In a criminal prosecution for larceny, it appeared that the alleged owner of the property stolen, bought the same at a sheriff's sale, subject to a mortgage, after condition broken, as the property of the prisoner, and had the lawful possession; held that this was sufficient to support the allegation of ownership. *Robinson* v. *State*, 1 Kelly 563.

299. Where there is proof that a trunk was taken, and carried away from the house, in which there was money, it was held to be sufficient to sustain a charge of taking and carrying away money, especially when all the facts show the quo animo with which the trunk was taken. *Berry* v. *State*, 10 Ga. 511.

300. On a trial for larceny, in stealing bank-bills of another State, the prosecution must prove the existence of the banks, and the genuineness of the bills. *Johnson* v. *People*, 4 Denio 364.

301. Evidence that the accused had

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passed the stolen bills as genuine, would have been sufficient. *Semble*, per Beardsley, J. *Ib.*

302. Evidence that bills of the same kind have been received and passed away in the ordinary course of business as a part of the currency of the country, would be presumptive evidence of the existence of the bank, and of the genuineness of the notes ; per Beardsley, J. *Ib.*

303. But a fact, that a witness for the prosecution had exchanged the bills charged to have been stolen, giving other money for them after the larceny, but who did not speak of any former knowledge of such bills, or express any belief as to their genuineness, is held to be no evidence upon that point, though it appeared that he was a broker. *Ib.*

304. Where a man was indicted for stealing a "bull touge," and it appeared in evidence, that he had stolen a particular kind of ploughshare, usually known in the neighborhood in which he resided by that name; held that the allegation of the indictment was well supported by the evidence. *State* v. *Clark* 8 Iredell 226.

305. In order to support an indictment for stealing two barrels of turpentine, it must appear that the turpentine was in barrels when it was stolen, and that it was dipped from the boxes in small quantities from time to time, and then deposited in barrels. *State* v. *Moore*, 11 Iredell 70.

306. Two slaves having been stolen, or inveigled in the State of Florida, and found in this State, in the possession of the prisoner, who proved that he had obtained them from one Smith, by a sale, or what purported to be a sale from Smith to him ; held that he could not be convicted on an indictment for stealing the slaves without proof that they were stolen by him in Florida, and were brought by him into this State. *State* v. *Adams*, 14 Ala. 486.

307. The defendant was indicted for stealing "one pair of boots," and the proof was that he stole two boots mismatched, being the right boot of two pair ; it was objected by his counsel that this proof did not sustain the indictment, and the objection was held good. *State* v. *Harris*, 3 Harrington 559.

308. On the trial of an indictment for larceny of a bank-note, proof must be given of the genuineness of the note. *State* v. *Dobson*, 3 Harrington 563.

309. Where, in a Court of Special Sessions, a prisoner was convicted of petit larceny, upon a complaint for stealing one white woollen flannel sheet, and the evidence on the trial referred to a blanket made of cotton and woollen —the warp being cotton and the filling woollen, and the variance was objected to ; it was held that the variance was material and fatal, and the conviction was reversed. *Alkenbrack* v. *People*, 1 Denio 80.

310. Evidence of stealing a lamb, will support an indictment for stealing a sheep. *State* v. *Tootle*, 2 Harr. Rep. 561.

311. An indictment for stealing a hog, is well supported by showing that the defendant stole a shoat. *State* v. *Godet*, 7 Iredell 210.

312. Where an indictment alleges the property stolen to be the property of Elizabeth Moore, and the evidence shows that it was the property of a woman called Betsey Moore, it must be left to the jury to decide whether the person so described was known by both names. *Ib.*

313. In an indictment for stealing a horse, it is not necessary to prove by direct evidence that the horse was of some value, but this may be sufficiently established by proof of facts from which the jury may infer it; as where the prisoner said he borrowed the horse, and again that he stole it, it might be inferred that the animal was of some value, as no one would borrow or steal a horse totally valueless; so, evidence that a witness went one hundred miles to hunt the horse after he was stolen, would tend to prove that he was of some value, as one would hardly go so far for a worthless horse; so, proof that the horse possessed the power of locomotion, and travelled a hundred miles and back again, would go to establish the fact he was of some value ; these facts appearing, this Court refuse to award a new trial on the ground that

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the value of the horse was not proven. *Houston* v. *State*, 8 Eng. 66.

314. On the trial of an indictment for larceny of bank-bills, some evidence that the bills were of value and genuine is necessary, but the same degree of evidence that would be required in an action to recover the money due on the bills is not necessary; nor is it necessary that the testimony should furnish a minute description of the bills, or should show that the banks were incorporated. *State* v. *Smart*, 4 Rich. 356.

315. Where the charge in an indictment that the defendant stole gold and silver coin of the value of two thousand dollars, and bank-notes of the value of five thousand dollars, &c, is from the necessity of the case all the allegation of property and value that the law requires, the evidence need not be more particular; it is not necessary to prove that so much of the coin were Washingtons or eagles, or half eagles, or Spanish milled dollars, or American half-dollars or that the bank-notes were of such a date, issued by a particular bank and payable to some certain person. *Berry* v. *State*, 10 Ga. 511.

316. Where a prisoner was indicted for the larceny of a slave, of the goods and chattels of one Elizabeth Edwards, and out of the possession of the said Elizabeth Edwards, and the evidence showed the possession in Thomas Edwards; held that the indictment was not sustained. *Com.* v. *Williams*, 1 Virg. Cas. 141.

317. Proof that the person alleged to be the owner had a special property, or that he held it to do some act upon it, or for the purpose of conveyance, or in trust for the benefit of another, would be sufficient to support an allegation of ownership, in an indictment for larceny. *State* v. *Somerville*, 21 Maine 14.

318. Where a bailee of a sheriff took from him personal chattels, which had been attached, and gave an accountable receipt with a promise to deliver the same on demand, held that the bailee had no such special property in the chattels as to sustain an indictment for larceny from such bailee. *Commonwealth* v. *Morse*, 14 Mass. 217.

319. When an indictment for larceny charges the goods stolen to be the property of A., it is not sustained by evidence that they were the property of A. and B., who were partners. *Commonwealth* v. *Trimmer*, 1 Mass. 476.

320. On a criminal trial for stealing notes belonging to a certain corporation, the Court will be bound to presume after verdict, that the corporate existence of the company was proved to the jury or admitted by the prisoner. *Lithgow* v. *Commonwealth*, 2 Virg. Cas. 297.

321. Where an indictment is laid for larceny, a taking as well as carrying away must be shown. *Pennsylvania* v. *Campbell*, Addis. 232.

322. A defendant may be found guilty of petit larceny, without proof of the value of the article stolen, when it is of any intrinsic worth. *State* v. *Slack*, 1 Bailey 330.

323. In an indictment for larceny, the production of the stolen notes is not necessary upon the trial. *Moore's case*, 2 Leigh 701.

324. On an indictment for stealing a bank-note, where the proof is that the prisoner feloniously stole the note and passed it away as genuine, he will not be allowed to call upon the government for further proof that the note was of value. *Cummings* v. *Commonwealth*, 2 Virg. Cas. 128.

325. Where an indictment for larceny alleges that the goods stolen were the property of A., it will not be sustained by proof that they belonged to A. and B. as partners, and that they were at the time of the larceny in A's. possession. *Hogg* v. *State*, 3 Blackf. 226.

326. An indictment for larceny will not be sustained by evidence that the defendant had received or purchased the goods knowing them to be stolen, although by statute the punishment for the offence established is the same with that charged. *Ross* v. *State*, 1 Blackf. 390.

327. An indictment for larceny, alleging the property to have been in one who appeared at the trial as a witness for the prosecution, and on cross-examination testified that the goods, when stolen, were the joint property of himself and another, the prisoner is entitled to a verdict in his

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favor; and if he objects, the Court has no authority to take the case from the jury and to continue the indictment. *The State* v. *McCoy*, 14 N. H. 364.

328. If such a case comes before the Superior Court of New Hampshire, on exceptions to the orders of the court below, that court has no right to order the discharge of the prisoner, but can only declare the proceedings in the court below erroneous. *Ib.*

329. But it seems that the Superior Court would discharge the prisoner, if brought before them on habeas corpus. *Ib.*

VI. Evidence Admissible and Competent on the trial for Larceny.

330. Where a defendant is indicted for larceny, in whose possession a portion of the cargo of a vessel is found under circumstances which, if unexplained, would authorize a jury to presume a felonious taking by him, he is not entitled, in order to negative the inference of an intent to steal, to offer in evidence a custom for the officers of vessels to appropriate a small part of the cargo to themselves, or to show that instances had occurred where the mates of vessels, under a claim of right, had appropriated to themselves parts of the cargoes in their possession. Such evidence will be held inadmissible, because the custom which it purports to establish is wanting in the elements of a legal custom, and cannot be sustained as such, and if established would only be applicable to the officers of the vessel. *The Commonwealth* v. *Doane*, 1 Cush. 5.

331. On a criminal trial for stealing a slave, though the fact that the accused was at a particular place, not far from that where the alleged larceny was committed, may be shown in order to trace him step by step to the latter place; but no act which is unconnected with the crime can be shown, as conversation with other slaves. *The State* v. *Wisdom*, 8 Porter 511.

332. Proof by the person whose property is charged to have been stolen, that the property belonged to him, is not necessary; the testimony of other persons, who knew the fact, is admissible. *Lawrence* v. *the State*, 4 Yerg. 145.

333. Where the thief is found in possession of goods in the State of Tennessee, the presumption is that the larceny was committed in that state; and if the thief wishes to evade a trial he must show that they were stolen in another State. *Simpson* v. *the State*, 4 Humph. 456.

334. On the trial of an indictment for larceny, possession of the articles stolen soon after the larceny was committed, raises a reasonable presumption of guilt in the possessor. But he need not, in such case, satisfy the jury that he became possessed of the articles otherwise than by stealing; proof, though not sufficient to establish that fact, might raise a reasonable doubt of the guilt. *The State* v. *Merrick*, 1 App. 398. *State* v. *Bennett*, 3 Brev. 514.

335. The presumption arising from possession is not rebutted by the lapse of two months between the theft and finding. *The State* v. *Bennett*, 3 Brevard 514.

336. Where a portion of the chattels were found upon the premises of the accused, eighteen months after they were stolen, unaccompanied by other suspicious circumstances; held that it is not prima facia evidence that the accused was guilty of larceny. *Warren* v. *the State*, 1 Greene 106.

337. The possession of stolen property soon after robbery, is not in itself a felony, it only raises a presumption that the prisoner is the thief. *Ib.*

338. Recent possession of goods, not according to the habits and circumstances of the party charged, is a presumption against him. *Ib.*

339. The lapse of three months after the articles were stolen, has been recognized as sufficient to rebut the presumption of guilt in a person in whose possession the goods were found; but it has been otherwise determined after the expiration of only two months, when connected with evidence of concealment and other suspicious circumstances. *Ib.*

340. Where one is in possession of stolen property after the theft, to raise

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a presumption of guilt the possession must be recent; possession at "any time" will not raise the presumption. "Any time" may refer to a period too remote; it must be recent possession. *The State* v. *Wolff*, 15 Mo. 68. Vide *State* v. *Floyd*, 15 Mo. 394.

341. In cases where various articles of property, other than those mentioned in an indictment for larceny, are found in the defendant's possession, there may be some pretext for proving them to be stolen, in order to fix a guilty knowledge upon him; but where the things stolen were found in the possession of another, with whom the defendant had been living a short time as a hired hand, such evidence was held inadmissible. *Ib.*

342. Where testimony, proving a larceny, had been given on the trial of an indictment for stealing a package of bank-bills in December, it was held that proof that two of the bills (which were identified), each of the denomination of one hundred dollars, were in the defendant's possession, one of them in March, and the other in April following, might be given to the jury, and that they might infer therefrom, and from accompanying circumstances, that he stole the whole package; it was further held that, although none of the stolen bills were identified, yet the testimony to prove that the defendant, after the larceny, was in possession of two one hundred dollar bills like those that were proved to have been stolen, and, also, a large amount of other bank-bills, and that such testimony, together with evidence that the defendant was destitute of money before the larceny, might be given to the jury to be considered in connection with other accompanying circumstances indicative of guilt. *Commonwealth* v. *Montgomery*, 11 Met. 534.

343. On an indictment against a married woman, held that evidence of acts done by the defendant's husband, without her knowledge, could not be admitted. *Commonwealth* v. *Robbins*, 8 Pick. 63.

344. The possession of a stolen thing is evidence to some extent against a prisoner of a taking by him. Ordinarily it is stronger or weaker in proportion to the period intervening between the stealing and the finding in possession of the accused; and after the lapse of a considerable time before a possession is shown in the accused, the law does not infer his guilt, but leaves that question to the jury, under a consideration of all the circumstances. *The State* v. *Williams*, 9 Iredell 140. *Engleman* v. *the State*, 2 Carter 91.

345. On the trial of an indictment containing counts for horse-stealing and grand larceny, it is error to permit evidence to go to the jury for the purpose of proving that just before the defendant committed the act for which he is on trial, he committed another larceny. *Barton* v. *State*, 18 Ohio 221.

346. When one is on trial for stealing a bank-bill, note, etc., under the statute (1 N. R. L. 174, Sess. 24, ch. 88), *parol* evidence of the contents of the bills or notes stolen is admissible, without accounting for their non-production. *People* v. *Holbrook*, 18 John. 90.

347. Association with horse-thieves, or subsequent confederation to steal horses, is not admissible evidence on a prosecution for stealing specified horses. *Cherry* v. *State*, 7 O. 222.

348. The presumption that he who is found in possession of stolen goods, recently after the theft was committed, is himself the thief, applies *only* when this possession is of a kind which manifests that the stolen goods have come to the possessor *by his own act*, or at all events with his undoubted *concurrence*. *State* v. *Smith*, 2 Iredell 402.

349. Thus, where the defendant Scipio Smith and two of his sons who lived with him, were indicted for stealing tobacco, and the tobacco, which had been stolen in the night, was found the next day in an out-house of Scipio, occupied by one of his negroes, and in which Scipio kept tobacco of his own, and the tobacco so found was claimed by him as his own, though proven to be the tobacco that had been stolen: *held*, that it was error in the judge to charge the jury "that the possession of the stolen tobacco, *thus* found in Scipio Smith, raised in law a strong presumption of his guilt. *Ib.*

350. On the trial of an indictment for larceny, it appeared that the owner

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of the goods, on the defendant's expressing contrition for the offence, promised not to prosecute him; but the officer, whom they soon met, told them the matter could not be settled, and immediately arrested the defendant: held, that the defendant's confessions, made afterwards, were admissible in evidence against him, notwithstanding the previous promise of the owner. *Ward* v. *People*, 3 Hill 395.

351. On the trial of an indictment for receiving stolen goods, the accused offered to show that, during the week previous to the receipt, he declared publicly his expectation of getting the goods; held inadmissible, as being not only irrelevant, but a naked declaration of the accused in his own favor. *People* v. *Wiley*, 3 Hill 194.

352. When a larceny has been committed, and the stolen goods are found shortly thereafter, the law presumes he is the thief in whose possession they are found; when nothing more appears than that the goods were stolen, and that they were shortly thereafter found in the possession of the defendant, the presumption interposes, with the full power of law, and demands a conviction; in such case the jurors have no doubt, but it becomes their duty to return a verdict of guilty; this presumption is not conclusive, and of course yielded to sufficient opposing evidence whenever it should be offered. *Hughes* v. *State*, 8 Humph. 75.

353. The law has defined the nature and amount of evidence which shall make a prima facie case of guilt in such case; the burden of proof is cast upon the defendant, and, if unexplained, either by direct evidence or by the attending circumstances, or by the character and habits of life of the defendant, or otherwise, the presumption of law becomes conclusive that his possession is a guilty possession. *Ib.*

354. When an indictment is laid for larceny in a hotel, it is competent for the Commonwealth to prove the presence of the prisoner in the hotel on the night when the larceny was committed, and his acts and conduct there, and the circumstances attending his arrest, as a part of the whole transaction, though these acts only showed an attempt to commit a felony on another person in another part of the hotel. *Burr* v. *the Commonwealth*, 4 Gratt. 534.

355. When an indictment is found for slave-stealing, it must be found that the larceny was committed in the county where the indictment was found, or the Court will have no jurisdiction over the case, and a verdict will be set aside. *Ib.*

356. The possession of stolen property affords presumptive evidence that the possessor is a thief, and the evidence is stronger or weaker as the possession is more or less recent. A recent possession raises a reasonable presumption of guilt. *State* v. *Jones*, Dev. & Batt. 122.

357. If in attempting to rebut the presumption of larceny, arising from the recent posession of stolen property, it be proved that the defendant after the larceny found the property in possession of another, from whom he received it, claiming it as his own, but that before such finding he gave an exact description of the stolen articles, which *he* alleged he had lost, that he made different statements to different persons as to the *time* he lost *his* property, that after finding the property he put false marks upon it, and that afterwards he left the State in consequence of the indictment,—all these circumstances furnish evidence tending to connect the defendant with the felonious possession of the property anterior to the time when he found it in possession of such other person. *Ib.*

358. If a slave be found in the possession of one other than his owner, and under suspicious circumstances, it will be sufficient evidence to compel that person to explain the circumstances of his possession. It is the duty of every good citizen who finds a slave at large without a permit from his owner, etc., to deliver him to the nearest justice of the peace for commitment. A runaway slave, therefore, may be a subject of larceny. *Randal* v. *the State*, 4 Smedes & Marsh. 349.

359. In a prosecution for larceny, the owner of the goods is a competent witness to prove the facts alleged in the information. *Salsbury* v. *the State*, 6 Conn. 101.

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360. In a public prosecution for larceny, an inn-keeper in whose inn, and from whose guest the goods were stolen, is a competent witness to prove the facts alleged in the information, as his liability to the owner cannot be affected by a conviction of the accused. *Ib.*

361. Where one is in possession of stolen goods, it is prima facie evidence of guilt; whether the circumstances amounted to a possession, or how far they were such as to rebut the presumption of guilt, is for the jury to determine. *The State* v. *Brewster*, 7 Verm. 122.

362. Where one is in possession of stolen property, and is not able to give a credible account of the possession, it is prima facie evidence of larceny. *Pennsylvania* v. *Myers*, Addis. 320.

363. On a criminal prosecution for the larceny of a watch, proof of another larceny of a cloak, committed by the prisoner, is not admissible for any purpose. *Walker's case*, 1 Leigh 574.

364. On the trial of an indictment, framed in conformity with the provisions of the 18th section of the 4th chapter of the Penal Code, it is competent to prove that the property described was stolen by the accused in another State, and brought by him into this. *Murray* v. *the State*, 18 Ala. 727.

365. The possession of stolen goods by the defendant, raises a presumption that they were stolen by him, and imposes upon him the burthen of accounting for their possession. *State* v. *Weston*, 9 Conn. 527.

366. Evidence tending to establish the offence of embezzlement, is not admissible under an indictment for larceny; nor can the law defining the former, and prescribing the punishment, govern on an indictment for the latter offence. *Fulton* v. *State*, 8 Eng. 168.

367. The possession of stolen goods is a presumption of guilt, and this presumption is not rebutted by the lapse of two months between the theft and finding. *State* v. *Bennett*, 2 Const. R. 692.

368. It is the right of the judge to comment on the evidence. *Ib.*

VII. Places of Trial in Case of Larceny.

369. A person who steals property in a sister State, and brings it here, is liable to be indicted under the laws of our State. *State* v. *Seay*, 3 Stew. Rep. 123. Vide *Com.* v. *Cullins*, 1 Mass. 116; *Hamilton* v. *State*, 11 Ohio 435; *Hemmaker* v. *State*, 12 Mo. 453.

370. And the statute providing for the punishment of such offence here is not unconstitutional. *Ib.*

371. A foreigner who commits larceny abroad, coming into the State of New York, and bringing the stolen property with him, may be indicted, convicted, and punished in the same manner as if the larceny had originally been committed here. *People* v. *Burke*, 11 Wend. 129.

372. In cases of simple larceny it is proper to try the thief in any county where he may be found, having the goods stolen in his possession; but if he be tried in one county, such trial will be a bar to a trial in every other county. *Tippins* v. *State*, 14 Ga. 422.

373. The doctrine of the Common Law is, that the legal possession of the goods stolen continues in the owner, and every moment's continuance of the trespass and felony amounts, in legal consideration, to a new caption and asportation. It is upon this principle that a person stealing goods in one county and carrying them into other counties, is considered as guilty of the crime, and may be indicted and convicted in any county where he has carried them. *State* v. *Somerville*, 21 Maine 14.

374. And this rule has been applied where the goods have been altered in their character before carried from one county to another; but in such case the indictment should describe the goods in their altered and not in their original state. *Ib.*

375. This rule of the Common Law determines that a prisoner is guilty of theft at all times while he retains the possession of the stolen goods, as well before as since the revision of the statutes. *Ib.*

376. The question raised on an indict-

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ment for larceny was, whether, if bank-notes were stolen in another county, and brought by the thief into this, he could be prosecuted in this. The general rule was admitted, but it was supposed to apply only to cases of stealing property which is the subject of larceny at Common Law, and not to extend to bank-notes, the stealing of which is made a larceny by statute; the Court held that there was no ground for this distinction, either in principle or upon the authorities. The ground upon which the general rule proceeds is, that it is a larceny in both counties. In contemplation of law, after the felonious taking, the goods are still the property of the owner, and he has the lawful right of possession; and therefore, any act of guilty possession and removal is a new and continued larceny. *Com.* v. *Rand*, 7 Met. 475.

377. Where one aids and abets in a larceny in one county, and afterwards is concerned in the possession and disposal of the stolen property in another county, though the goods were removed to this latter county without his agency or consent, he may be convicted of larceny in this latter county. *Com.* v. *Dewitt*, 10 Mass. 154.

378. Where larceny is committed on board an American ship, in an inclosed dock, in a foreign port, it is not punishable under the statute of 30th April, 1790, c. 9, § 16. *U. States* v. *Hamilton*, 1 Mason 152.

379. Where goods are stolen in one county and carried into another, the thief can be indicted in either, the offence being complete in both. *Cousin's case*, 2 Leigh. 708.

380. Where a larceny is committed in a place not under the sole and exclusive jurisdiction of the United States, it can still be made the subject of punishment, under the 3d section of the act of Congress of 1825, c. 270. *U. States* v. *Davis*, 5 Mason 356.

VIII. Warrant in Cases of Larceny—Miscellaneous Matters.

381. A warrant issued by a justice for the arrest of a person charged with larceny, which recites a distinct charge of larceny against the accused, is not rendered invalid by the omission of an allegation as to the value of the property stolen. *Payne* v. *Barnes*, 5 Barb. Rep. 456.

382. The only effect of such an omission is, that the offence charged will be deemed to be petit instead of grand larceny; and a magistrate of the county in which the person accused is arrested will be authorized to admit him to bail. *Ib.*

383. All the statute requires is that the warrant shall recite the accusation, and the accusation need only charge that a criminal offence has been committed. If, therefore, it charges a criminal offence generally, viz., that of larceny, it is sufficient to authorize the issuing of a warrant, although the accusation omits to state the value of the property. *Ib.*

384. The recital in such warrant of the complaint, is presumptive evidence of the fact that such complaint has been made. *Ib.*

385. Where one is indicted for larceny who is deaf and dumb, he may be convicted of the larceny. *Com.* v. *Hill*, 14 Mass. 207.

386. A feme covert is not chargeable for larceny jointly with her husband. *Com.* v. *Trimmer*, 1 Mass. 476.

387. A mittimus omitting to specify the time, place, and subject of an alleged larceny, is illegal upon its face. *The State* v. *Brady*, Ga. Decis. (Part 2) 40.

388. In a prosecution for larceny against one who is proved to be a "negro of black complexion," no plea is necessary to raise the question of jurisdiction as to the person of the defendant in the Court in which the prosecution is pending. The defence which denies the jurisdiction, because the prisoner is a slave, may be made upon the trial, under the plea of "not guilty." *Bennett* v. *the State*, 1 Swan's R. 411.

389. The true rule by which to value a bank-note, for the purpose of graduating the offence of stealing, is the sum which on its face it promises to pay. *State* v. *Cassell*, 2 Har. & Gill. 407.

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390. A person whose property has been stolen cannot claim the right to punish the thief himself, without process of law, and to make him compensate him for the loss of his property by maliciously threatening to accuse him of the offence, or to do an injury to his person or property, with intent to extort property from him. *State* v. *Bruce*, 24 Maine 71.

391. Those who are privy to a petty larceny before the fact, are principals. *The State* v. *Barden*, 1 Dev. 518.

IX. Verdict and Judgment in Cases of Larceny.

392. In the State of Virginia, where one count of an indictment charged petit larceny in the usual form, and another petit larceny, committed after the party had been convicted of a like offence, and the verdict found the prisoner guilty on both counts, and fixed the imprisonment at five years; held to be no objection to the verdict. *Stroup's case*, 1 Robinson 754.

393. A verdict of guilty of petit larceny will not warrant a judgment, unless such offence is included in the charge of the indictment. *Wills* v. *State*, 4 Blackf. 457.

394. Where an indictment is laid for a larceny of several articles, a general verdict of guilty finds the accused guilty of stealing all the articles specified. *State* v. *Somerville*, 8 Shep. 20.

395. The circumstance that an indictment does not state the value of each of the kinds of property alleged to have been stolen, is no reason for arresting the judgment, though the want of such statement might have been a good ground for a motion, made in proper time, to quash the indictment. *State* v. *Murphy*, 8 Blackf. 498.

396. Where, on such an indictment, the defendant is found guilty of stealing all the things named, the judgment should not be arrested merely because the value of each article alleged to have been stolen, is not stated. *Ib.*

397. The verdict in such a case means that the defendant was guilty of stealing all the things alleged in the indictment to have been stolen, but that the value of all of them was less than it was averred in the indictment to be, and that the offence was therefore not grand but petit larceny. *Ib.*

398. A verdict should have fixed the value of the property stolen, that the Court might have known with certainty under which offence the defendant has been convicted, as without such finding, under the statute providing the punishment for larceny, the Court could not well pass the sentence. *Ray* v. *State*, 1 Greene 316.

399. It is no objection to a verdict because it is for the aggregate value of the articles stolen. *Warren* v. *State*, 1 Greene 106.

400. Under the Illinois statute provided against receiving stolen goods, a verdict of guilty, without specifying the value, is not enough to sustain a judgment. *Sawyer* v. *People*, 3 Gilman 53.

401. Where a party is charged in one count in an indictment with stealing several specific articles, he may be found guilty of the larceny of one, and discharged as to the rest; and if in such case the jury find a verdict of guilty of stealing one of the articles, and take no notice of the others, it is in fact a discharge as to the other articles, and a good verdict. *Swinney* v. *State*, 8 Smedes & Marsh. 576.

402. Where the jury did not, in an indictment for larceny, find the value of the property stolen as required by the Alabama statute; held that it was not error. *Jones* v. *State*, 13 Ala. 153.

403. Where a defendant was indicted for simple larceny in stealing a slave, and the evidence on the trial showed that the defendant, by his own confessions, made a promise to carry the slave, with others, north, and the slave, on the way, consented to be sold once; it was held that the jury might, under the 45th section of the 14th division of the Penal Code of Georgia, find the defendant guilty of an attempt to commit the offence charged in the indictment, without any special count for that purpose. *Clifford* v. *State*, 10 Geo. 422.

404. Where, on the trial of an indictment for larceny, the jury found that

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the defendant took the goods with an intent to steal them; held that the verdict was well warranted if, at the time the defendant took them, they were not lawfully in his possession, with the consent of the owner, according to a subsisting special contract, in consequence of an original delivery obtained without fraud. *Com.* v. *James*, 1 Pick. 375.

405. In Alabama, one may be convicted and sentenced on an indictment for stealing a slave, as a case of grand larceny, where its value exceeds twenty dollars, and the offence is not attended with the circumstances of aggravation specified in the 18th section of the 4th chapter of the Penal Code, before it was repealed and re-enacted in other terms. *Nabors* v. *State*. 6 Ala. 200.

406. Where there were sufficient counts in a bill of indictment, one charging a taking by the prisoner, with violence, and another by seduction, and each of them also charging a conveying away, with the intents required by the statute, the jury are not bound to find in which way the taking was had, but the verdict might be general, though there were other defective counts. *State* v. *Williams*, 9 Iredell 140.

407. Where, on the trial of an indictment containing counts for horse-stealing and grand larceny, the jury find a general verdict of guilty, assessing the value of the property in gross, without finding the amount charged in each count, and the Court enter judgment upon such finding, such judgment is erroneous, and will be reversed on error. *Barton* v. *State*, 18 Ohio 221.

408. The obvious and necessary condition of the presumption of larceny, from the possession of the article unaccounted for, is that it should have been stolen; yet, where the evidence against the prisoner was not limited to the presumption arising from possession, and where the whole evidence was brought to the view of the jury, which sufficiently established the fact that the article was stolen, and that the prisoner was the thief, the Court will not disturb the verdict. *State* v. *Clark*, 4 Strobh. 311.

409. Where, in a prosecution for larceny, or for receiving stolen goods, the crime is established in respect to only a single article, though the indictment describes several, the defendant may be found guilty. *People* v. *Wiley*, 3 Hill 194.

410. It is well settled, that upon an indictment charging a larceny of various distinct articles of property, some of which are technically described, and others not so, and a general verdict of guilty is found by the jury, the insufficiency of the description as to certain articles, has no other effect than to strike them out of the indictment, and the verdict is to be applied to the whole property which is properly and sufficiently charged to have been stolen; and for the larceny of such property the punishment is to be awarded. *Com.* v. *Williams*, 2 Cush. 582.

411. The jury may find the defendant guilty of petit larceny, although the goods exceed the value of twelve pence. *State* v. *Bennet*, 2 S. C. Const. Rep. 692; *Ib.* 3 Brevard 515.

412. The jury found the prisoner "guilty of larceny only," and their finding was published as "guilty of larceny only," and so recorded; held that the finding was sufficient. *State* v. *Smart*, 4 Rich. 356.

413. From the provision of the 63d section of the act relative to criminal jurisprudence, it became the duty of the jury to designate in their verdict the value of the property stolen by the prisoner, as otherwise, without that finding, it was impossible for the Court to legally determine whether it was a subject of penitentiary punishment. *Highland* v. *the People*, 1 Scam. 392.

414. The law prescribes as a part of the punishment, on a conviction of a petit larceny, that the culprit be "disfranchised, and rendered incapable of holding any office of trust or profit, for a determinate period, to be found by the jury." *Doty* v. *State*, 6 Blackf. 529.

415. In ordinary cases of larceny, where a person is charged with having stolen several articles, and he is proved to have stolen only some of them, and not all, a general verdict is good, because the punishment will be the same; but where the punishment is double,

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the penalty being increased in proportion to the number of animals stolen, the verdict will be bad. *The State* v. *Bunten*, 2 Nott & McCord's R. 441.

416. In Connecticut, on a qui tam prosecution for larceny, it is held that the jury find the value of the goods stolen, or judgment will be arrested. *Gilbert* v. *Steadman*, 1 Root 403.

417. Where two persons were indicted together for stealing the same goods; held that one cannot be convicted of petit larceny, and the other of grand larceny. *State* v. *Davis*, 3 McCord 187.

418. Where one indicted for horse-stealing was found guilty of petit larceny, the Court declined to pronounce judgment of petit larceny against him, but sent him back for trial. *State* v. *Spurgin*, 1 McCord 252.

419. Where one is convicted of larceny of money, the Court ought not to enter judgment against him for the amount, nor grant an execution in favor of the person from whom it was stolen. *Com.* v. *Henly*, 1 Virg. Cas. 145.

420. In Virginia, where, under the act of February 21st, 1823, a free person of color is convicted for the offence of grand larceny, he may be condemned to be sold as a slave, and transported and banished beyond the limits of the United States. *Aldridge* v. *Com.*, 2 Virg. Cas. 447.

421. An indictment for larceny having been preferred in the Circuit Court of Monroe County, the indictment contained two counts: the first, for larceny of a gray mare of the value of seventy dollars, a saddle of the value of ten dollars, a bridle of the value of one dollar, a saddle-blanket of the value of one dollar, ten dollars in specie, and a bank-note for ten dollars; the second count was for the larceny of a promissory note for the sum of twenty-two hundred dollars; the jury found a verdict of guilty, without assessing any value to the property or any portion of it charged to have been the subject of the larceny; held that this was sufficient to warrant a sentence and judgment for the crime of grand larceny, although it remained with the jury, under the indictment, to have found a verdict of petit larceny, or guilty of feloniously taking, and stealing and carrying away property under the value of twenty dollars. *Wilborn* v. *State*, 8 Smed. & Marsh. 345.

422. Where an indictment is laid for stealing cotton, in which there were two counts, one alleging it to be of the goods and chattels of N. L., the other, of "the goods and chattels of a person unknown;" held that the prisoner may be convicted and sentenced on the second count, and acquitted of the first, and a motion to quash the second count on the ground that he has not been examined for the offence, will not be sustained. *Mabry* v. *Com.*, 2 Virg. Cas. 396.

423. Upon a conviction on an indictment for larceny of a slave in general terms, the prisoner cannot be sentenced to more than five years imprisonment in the penitentiary. *Williams* v. *State*, 15 Ala. 259.

424. Where the indictment charges the stealing of one steer, one bull, one cow, &c., the judge cannot impose the fine for stealing only one steer, although such be the evidence, if there is a general finding of guilty. The evidence must support the finding, and the judgment must conform to the verdict. *State* v. *Keish*, 1 Strobh. 352.

425. Judgment will not be disturbed when the indictment avers the stealing of other articles properly the subject of larceny, in connection with those that are not, and where it appears by the transcript that the nature of the offence could not have been reduced, nor the fine materially lessened by excluding the objectionable article. *Warren* v. *State*, 1 Green 106.

426. An indictment charging a defendant with receiving various articles of stolen property, knowing them to be stolen, and specifically describing each article, alleging the value thereof, the defendant pleading that he is "guilty of receiving $50 worth of said property, in manner and form as set forth in the indictment;" held that no valid judgment can be rendered against him on such plea. *O'Connell* v. *Com.*, 7 Met. 460.

427. In a public prosecution for larceny, the Court will not, on conviction, render judgment that the owner of goods recover the treble value. *Salsbury* v. *State*, 6 Conn. 101.

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428. On indictment for grand larceny, the jury may find petit larceny. *State* v. *Ward*, 1 Mills 9.

LASCIVIOUSNESS AND INCEST.

I. Lasciviousness: what Constitutes.—Incest.
II. Indictment for Lasciviousness.
III. Evidence on the Trial.

I. Lasciviousness, what Constitutes—Incest.

1. When wanton and lascivious acts of one person only are practiced to another person of a different sex, against the will and consent of such person, no other person being present; held that such acts may constitute the offence of "lascivious carriage," within the meaning of the Connecticut statute. *Fowler* v. *State*, 5 Day 81.

2. In Mass., a husband obtained a divorce from the bond of matrimony, for the cause of utter and wilful desertion by the wife, for the term of five years consecutively, without his consent; and the wife subsequently went into another State, and was there married to another man, with whom she returned to this State, and here lived and cohabited; held, that if the wife was indictable for any offence under the Rev. Stats., c. 130, she was indictable under the second section for unlawful cohabitation, and not under the fourth section for lewd and lascivious behavior. *Commonwealth* v. *Hunt*, 4 Cush. 49.

3. Where a man exposes his person indecently to a woman, and solicits her to have sexual intercourse with him, and persists in so doing, notwithstanding her opposition and remonstrance; held that this is "open and gross lewdness and lascivious behavior," for which an indictment will lie, under chap. 99, sec. 8, of the Revised Statutes; and it seems the crime does not depend upon the number of persons to whom a man thus exposes himself, whether one or many. *State* v. *Millard*, 18 Vt. 574.

4. A woman cannot be indicted for keeping a bawdy house merely because she is unchaste, lives by herself, and habitually admits one or many to an illicit cohabitation with her. *State* v. *Evans*, 5 Iredell 603.

5. The offence of keeping a bawdy house consists in keeping a house or room, and therewith accommodating and entertaining lewd people to perpetrate acts of unchastity, meaning acts between the persons thus entertained. *Ib.*

6. The marriage between a free person of color and a white person is, by the law of this State (act of 1838, c. 24), null and void; and, therefore, when such persons bed and cohabit together, they come within the provisions of the act of Assembly against fornication and adultery. Rev. Stat. c. 34, § 46. *State* v. *Fore*, 1 Iredell 378.

7. If two persons of different sex, live, dwell and cohabit together, with the apparent relation of man and wife, without in fact being married, and therefore in lewdness and adultery, although the fact of being unmarried might not be generally known or notorious, the offence would be indictable, without alleging or proving such notoriety, the gravamen of the offence consisting in the adulterous cohabitation of unmarried persons, and not in the general knowledge of the community of the negative fact of their being unmarried. *State* v. *Boling*, 2 Humph. 414.

8. The crime of indecent exposure cannot be made to depend on the number of persons to whom a person thus exposes himself, whether one or many. *State* v. *Millard*, 3 Vt. 574.

9. A public exposure of a defendant to a female, with a view to excite unchaste feelings and passions in her to induce her to yield to his wishes, is lewd, and is gross lewdness, calculated to outrage the feelings of the person to whom he thus exposed himself, and to show that all sense of decency, chastity, or propriety of conduct, was wanting in him, and that he was a proper subject for the animadversion of

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criminal jurisprudence. *Ib.* Incontinence of itself is not punishable at Common Law. *Commonwealth* v. *Jones*, 2 Gratt. 555.

10. Simple incontinence, therefore, is only punishable under the statute, 1 Rev. Code, 555, which provides "that every person, not being a servant or slave, committing adultery or fornication, and being thereof lawfully convicted by the oaths of two or more credible witnesses, or confession of the party, shall for every offence of adultery forfeit and pay twenty dollars, and for every offence of fornication, ten dollars." *Ib.*

11. If the defendant caused and permitted his slaves to go about the country in such a state of nakedness as was alleged in the indictment, he is guilty of lewdness, and ought to be punished. *Britain* v. *State*, 111 Humph. 203.

12. If a master cause and permit his slaves to pass about in public view and observation indecently naked, he is guilty of lewdness, and indictable therefor. *Ib.*

13. And in such case it need not be proved that the slave did exhibit him or herself in such state of nakedness by any command of the master, to sustain the indictment; that the master caused and permitted it, may be inferred from circumstances satisfactory to the mind of the jury. *Ib.*

14. In Illinois, to constitute the crime of fornication under the statute, it is necessary that the parties should dwell together openly and notoriously in illicit intimacy. *Searls* v. *People*, 13 Ill. 597.

15. Circumstances to raise the presumption of unlawful intimacy should be strong enough to produce a belief or conviction of the judgment that the parties have been cohabiting. *Ib.*

16. Several persons in the same venue occupying different houses, and having no community of interest, may be included in the same indictment for keeping bawdy-houses. *State* v. *M'Dowell*, Dudley S. C. 346.

17. The fact that a defendant in an indictment might have been proceeded against and punished for selling liquor to slaves, if it was done without the permission of their owners, or for permitting unlawful assemblies of slaves on their premises, under the statute, does not change the nature of the offence committed, or prevent a prosecution against them for keeping a disorderly house, when the acts alleged and proved constituted them guilty of this offence. *McGurk* v. *Com.*, 9 B. Monr. 361.

18. And if, by selling spirituous liquors to slaves, they induced them to congregate in and around their house, and to behave disorderly on the road or lots adjoining, the public mischief was the same as if the disorder had actually occurred in the house; and such disorder being the result of the liquor furnished in the house, must be regarded as amounting in effect and substantially to the offence charged against them in the indictment. *Ib.*

19. On the trial of an indictment for incest, alleged to have been committed by a father with his daughter, the declarations of the accused are competent evidence upon the question of consanguinity. *People* v. *Harriden*, 1 Park. Crim. Rep. 344.

20. The statute in such case only applies to cases in which the sexual intercourse is by mutual consent; where it is effected by force, it is punishable only as rape. *Ib.*

21. Where an indictment for incest alleged as follows: "A., late of said county, on the first day of December, 1849, at the county of Adams aforesaid, unlawfully did have sexual intercourse with his daughter B., the said B. then and there knowing that she, the said B., was his, the said A.'s daughter;" held that the indictment was defective in not averring that A. had intercourse with his daughter, "knowing her to be such," the word "unlawfully" not being equivalent to that allegation. *Williams* v. *State*, 2 Carter (Ind.) 439.

22. In Massachusetts, an indictment under the Revised Statutes, c. 130, § 2, for continuing to cohabit in this State with a second wife, the defendant having a former wife living, it is sufficient allegation of the time when the offence was committed, to allege that the second marriage was on a certain day, and that the defendant "afterward did

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cohabit and continue to cohabit with said S. J., at L., in said county, for a long space of time, to wit, for the space of six months." *Com.* v. *Bradley*, 2 Cush. 553.

23. Where there is a penetration of a beast by a man, against the order of nature, without emission, it constitutes the crime of buggery. *Com. v. Thomas*, 1 Virg. Cas. 307.

II. Indictment for Lasciviousness.

24. In an indictment for "open, gross lewdness, or lascivious behaviour," under the eighth section of the eighth article of the act concerning "crimes and punishments" (Rev. Stat., 1835, p. 206), it is not sufficient to charge the defendant generally, in the words of the statute, with being guilty of "open, gross lewdness and lascivious behaviour," by then and there publicly cohabiting with one F., &c.; but the specific act in which the lewdness or lasciviousness is displayed, must be specified, with that degree of certainty that would advise the accused of the specific charge he is called upon to answer. *Dameron* v. *State*, 8 Mo. 494.

25. An indictment which charges that the defendants, a man and a woman, did live together in fornication, is sufficient. *Lawson* v. *State*, 20 Ala. 65.

26. An indictment is good which purports to be found by "the grand jurors for the said State, sworn and charged to inquire for the said county," when the names of the State and proper county are stated in the margin. *Ib.*

27. An indictment against an unmarried man for living in open and notorious fornication with a certain woman, need not aver that she is unmarried. *State* v. *Gooch*, 7 Blackf. 468.

28. In the State of Virginia, the offence of fornication cannot be punished by information as a Common Law offence, except it be accompanied with other circumstances which, per se, constitute a misdemeanor, such as the public commission of the act. *Com.* v. *Isaacs*, 5 Rand. 634.

29. An indictment for lewdness should charge that the acts constituting the offence were openly and notoriously committed. *State* v. *Moore*, 1 Swan 136.

30. Where one demises a house with the intent that it shall be kept, and which is accordingly kept for the purposes of public prostitution, and derives a profit from that mode of using the property, he is punishable by indictment for a misdemeanor. *People* v. *Erwin*, 4 Denio 129.

31. In such case the indictment should charge the accused as the keeper of a common bawdy-house, in the ordinary form; and the lessee who lives in and conducts the house may be joined with the lessor in the indictment. *Ib.*

32. An indictment ought to be certain to every intent, and without any intendment to the contrary. But if the sense be clear, and the charge sufficiently explicit to support itself, nice objections ought not to be regarded. *State* v. *Fore*, 1 Iredell 378.

33. An indictment, charging that J. F. did "take into his house, one S. C. and they did then and there have one or more children, without parting or an entire separation, they the said J. F. and S. C. never having been lawfully married," it is sufficiently certain, though carelessly expressed. The Court must intend from these expressions that the parties were of different sexes. *Ib.*

34. The offence of keeping a house of ill-fame is local, and must be described as committed in a particular town; and the prosecutor is confined in his proof, to the town, and cannot, as in other cases, prove an offence within the county. *State* v. *Nixon*, 18 Vt. 70.

35. An indictment charging generally the keeping of a disorderly house, without specification as to the acts of disorder, would not be good; so if the acts specified are not proven, the indictment cannot be sustained upon the proof of other acts not specified; but if the acts specified or such of them as constitute the house a disorderly one be proven, then other acts, which do not amount to a distinct offence, and for which a distinct prosecu-

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tion will not lie, may be proven under the general charge, to increase the fine. *Frederick* v. *Commonwealth*, 4 B. Mon. 7.

III. Evidence on the Trial.

36. In all cases, whether civil or criminal, involving a charge of illicit intercourse within a limited period, evidence of acts anterior to that period, may be adduced in connection with, and in explanation of, acts of a similar character occurring within that period, although such former acts would be inadmissible as independent testimony, and if treated as an offence, would be barred by the statute of limitations. *Lawson* v. *State*, 20 Ala. 65.

37. Acts of indecent familiarity within the limited period, cannot be explained by proof of the subsequent illicit intercourse of the parties; but when such acts of indecent familiarity have been explained by previous acts of illicit intercourse, then proof of the subsequent illicit intercourse become corroborative or cumulative evidence, and is admissible. *Ib.*

38. When a man and a woman are jointly indicted and tried for living together in fornication, the confessions of the woman are admissible evidence against herself. *Ib.* But it is the duty of the Court to caution the jury that such confessions can operate only against the party making them, and the other defendant cannot be convicted, except upon evidence aliunde sufficient to establish his guilt. *Ib.*

39. The admission of the woman that her co-defendant was the father of a bastard child, of which she was delivered more than twelve months after the finding of the indictment, is admissible evidence against her, its relevancy being shown by connecting it with other acts occuring before and within the period covered by the indictment.

40. When evidence prima facie irrelevant is admitted against the objection of the opposite party, and the record affirmatively shows that its relevancy was made to appear from its connection with evidence, subsequently introduced, the Appellate Court will not reverse. *Ib.*

41. The refusal of the male defendant to pay the physician for his professional services rendered during the confinement of the woman, and his declaration that the child was not his, are not admissible evidence for him when unconnected with any conversation or admission offered by the State against him. *Ib.*

42. The fact of illicit connection between a man and a woman is one which from its nature can very rarely be directly proved, and must, in the great majority of cases, be inferred from circumstances, the weight and conclusiveness of which vary according to the situation and character of the parties, the habits of society, and other incidental circumstances. *Ib.*

43. A statement made by another person, or a conversation carried on in the presence and hearing of a party, to which he made no reply, cannot be received in evidence against him, as an implied admission, on his part, of its truth, unless of such a character as would naturally call for a response from him, and he was in a situation in which he would probably have replied to it. *Ib.*

44. A conversation carried on in the presence of the woman, and in the room where she was lying, a few minutes after she had been delivered of a child, between her mother and the attending physician, as to the person to whom the latter should look for payment of his professional services, in which conversation she took no part, is not admissible evidence against her as tending to show her acquiescence in the truth of their statements. *Ib.*

45. Where an information is founded upon the statute of Connecticut against "lascivious carriage and behaviour," the person toward whom such acts are committed, is a competent witness to prove them. *Fowler* v. *State*, 5 Day 81.

46. An indictment for "living in open lewdness, whoredom, and adultery," cannot be supported by evidence proving adultery. *State* v. *Brunson & Miller*, 2 Bailey 149.

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47. An indictment for unlawful cohabitation under the statute of 1784, c. 40, § 6, is not sustained by evidence of one act of criminal intercourse between a married man and a single woman. *Commonwealth* v. *Calef*, 10 Mass. 153.

48. Upon an indictment against two persons for lascivious cohabitation, one of the parties being married; such marriage must be shown by the record of the clergyman, or by witnesses present at the marriage. *Commonwealth* v. *Barbarick*, 15 Mass. 163.

49. In order to sustain an information for a violation of the statute of 1845, c. 20, against keeping a house of ill-fame, it is necessary for the prosecutor to prove, 1. that the general reputation of the house was that of a bawdy-house, and 2. that it was such in fact. *Cadwell* v. *State*, 17 Conn. Rep. 467.

50. That a certain house has the reputation of being a bawdy-house, is a fact to be proved, like any other fact, by the testimony of witnesses having knowledge of its existence. *Ib.*

51. Where an information for keeping a house of ill-fame alleged that the offence was committed after the statute prohibiting it went into operation; and evidence was offered to prove that the house was reputed to be a house of ill-fame previous to that time; it was held that such evidence was competent, as conducing to prove that it sustained the same reputation afterwards. *Ib.*

52. The admission of such evidence has not the effect of giving the statute on which the information is founded an ex post facto or unconstitutional operation. *Ib.*

53. Where the prosecutor, on the trial of such information, offered to prove, by a witness, that divers persons of lewd and dissolute character, for two years next previous to the time when the statute went into operation, resorted to the house in question for lewd purposes, among whom was M., a lewd person, who died before the passage of the statute. This testimony being offered in connexion with other evidence, by which the prosecutor claimed to have proved that the same persons, or persons of a similar character, resorted to that house after the passage of the statute; it was held that the testimony of this witness, in connexion with the evidence which accompanied it, fairly conduced to prove the character of the house, and the purpose for which it was kept after the statute took effect, and was, therefore, admissible. *Ib.*

54. Where there is open and notorious lewdness, a charge for such offence may be sustained by circumstantial evidence. *Peak* v. *State*, 10 Humph. 99.

55. Where an indictment is found for keeping a bawdy-house, the refusal of witnesses, who have frequented the house, to answer questions in reference to the conduct of the inmates and visitors while there, upon the ground that they would degrade themselves by their answers, may be the subject of consideration by the jury. *Clementine* v. *State*, 14 Mo. 112.

56. On a criminal prosecution for keeping a bawdy-house, so as to become a common nuisance, it is proper to prove the character of the women who live and lodged in the house, and the character and behavior while there of the men who frequent the house, and, also, the effect of the establishment upon the peace and good order, and consequent enjoyment of the neighborhood. *Ib.*

57. On the trial of an indictment under the statute for fornication and adultery, it is not necessary to show by direct proof the actual bedding and cohabiting; it is sufficient to show circumstances from which the jury may reasonably infer the guilt of the parties. *State* v. *Poteet*, 8 Iredell's Rep. 23.

58. Where, on such a trial, a witness testified that he went early one morning to the house of one of the defendants, and on knocking was, after some hesitation, admitted by the other defendant, the female, who came to the door with her frock on, but unfastened; that the male defendant was in the only bed in the room; that the shoes of the female were near the head of the bed, and that the bed seemed to be very much tumbled; held that the judge did right in refusing the instruction prayed for by the defendants, that there was no evi-

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dence from which the jury might infer the criminality of the defendants. *Ib.*

59. In prosecutions for this offence, particular facts need not be proved. Common reputation as to the character of the defendants, and of the houses which they kept, is admissible. *State* v. *McDowell*, Dudley S. C. 346.

LIBEL.

I. Libel, what Constitutes; how Published; Party liable for.
II. Of the Indictment.
III. Proof on the Trial for Libel; Competency and Admissibility of.
IV. Justification.—Miscellaneous.

I. Libel, what Constitutes; how Published—Party liable for.

1. It is held not to be libellous to write and publish of and concerning one who is a druggist, the above druggist, in the city of Detroit, refusing to contribute his mite with his fellow merchants for watering Jefferson Avenue. I have concluded to water said avenue in front of Pierre Felle's store, for the week ending June 27, 1846. *The People* v. *Jerome*, 1 Mann (Mich.) 142.

2. A libel is held to be a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intention. *State* v. *Farley*, 4 McCord 317. Nothing but that which is criminal, immoral, or ridiculous, can be libellous, and the burden of proof is on the prosecution to stamp that character on the transaction. *Ib.*

3. Publications of the truth concerning the character of a public elective officer, and relating to his qualifications for such office, made with intent to inform the people, are not a libel; and every one holding such an office may be considered as a candidate for re-election, if he does not disclaim it. *Com.* v. *Clapp*, 4 Mass. 163.

4. For the same reason, the publication of falsehood and calumny against public officers and candidates is a very high offence. *Ib.*

5. The English law of libel was made part of the Common Law, and was used and practised upon by the Courts of Massachusetts, before the adoption of the constitution. *Com.* v. *Whitmarsh*, Thacher's Crim. Cas. 441.

6. The office of an inuendo is not, like that of an averment, to charge facts, but is only to point out and refer to matter already expressed, and for that reason evidence cannot be introduced to support or explain an inuendo. *State* v. *Henderson*, 1 Richard. 179.

7. Where a publication is malicious, and its obvious design and tendency is to bring the subject of it into contempt and ridicule, it will be a libel, although it imputes no crime liable to be punished with infamy. *Ib.*

8. Where a writing, in a form of a letter, addressed to the wife of another man, contained words importing that she had acted libidinously towards the writer, had invited him to an adulterous intercourse with her, and had sought opportunity to effect it, which writing was composed and sent to her, designed to insult and abuse her, to debauch her affections, and alienate them from her husband, to entice her to commit adultery, and to bring her into disgrace and contempt; held that such writing was libellous. *State* v. *Avery*, 7 Conn. 267.

9. Where one sends a letter containing such language to the person to whom it is addressed, it is an offence of a public nature, which may be the subject of an information. *Ib.*

10. A conspiracy to publish what is true of an individual, is not a criminal offence, if the parties act from good motives, and for justifiable ends. *De Bouillon* v. *People*, 2 Hill 248.

11. To publish of another that he is a profane man, or that he habitually allows himself in profanity, is a libel. *Com.* v. *Batchelder*, Thacher's Crim. Cas. 191.

12. Where the tendency of the publication was to degrade the prosecutor in the esteem and opinion of the world, impeached his integrity as a juror, and must, if the charge which it contains were true, make him an object of dis-

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trust and contempt among men; held that it was libellous. *Com.* v. *Wright*, 1 Cush. 46.

13. The offence of the inuendo is to point out and refer to matter already expressed, to explain the meaning of the publication, when it is obscure, and to designate the persons alleged to have been libelled, where they are alluded to in covert and ambiguous terms; but where the paper itself points out with sufficient clearness the persons of or concerning whom it is written, and likewise the purpose for which it was written, the office of the inuendo is superseded, no explanation is necessary. *Giles* v. *State*, 6 Ga. 276.

14. At Common Law any publication is a libel, the tendency of which is to degrade and injure another person, or to bring him into contempt, hatred, or ridicule, or which accuses him of a crime punishable by law, or of an act odious and disgraceful in society; and by the penal code of Georgia a libel is defined to be a malicious defamation, expressed either by printing, or writing, or signs, pictures, and the like, tending to blacken the memory of one who is dead, or the honesty, virtue, integrity, or reputation of one who is alive, and thereby expose him or her to public hatred, contempt, or ridicule. *Ib.*

15. It is immaterial to the character of a libel as a public offence, whether the matter of it be true or false. *Com.* v. *Blanding*, 3 Pick. 304.

16. The propagator of written or printed tales, to the essential prejudice of any one in his estate or reputation, is a public offender, and is not allowed to excuse himself by the additional wrong of proving in a court of justice in a collateral way, the facts which he has unwarrantably promulgated. *Ib.*

17. The reception of a libellous letter, which has not been read or heard by some third person, is no publication of a libel, though the offence of sending a libellous letter is indictable, provided the bill of indictment allege that the intention of sending it was to provoke a breach of the peace. *Hodges* v. *State*, 5 Humph. 112.

18. Actual communication of the contents of a libel, as by singing or reading, is one mode of publication, but it is neither the only nor usual mode. The common method is by the posting up of the paper, written or printed, or its delivery, and no question is ever asked as to whether it was read or not. We say of an author that he has published a book, when he has given its contents to the world, and we speak of the publication of a will without meaning to denote that the contents of the instrument have been actually communicated; so it is with a libel. *Giles* v. *State*, 6 Ga. 276.

19. An editor is liable, if the contents of his paper are libellous, unless the libellous matter was inserted by some one without his knowledge or assent. *Commonwealth* v. *Kneeland*, Thacher Crim. Cas. 346.

20. A person who appears once to have written a libel, which is afterwards published, will be considered as the maker of it, unless he rebut the presumption of law, by proving another to be the author, or show the act to be innocent in itself. *Giles* v. *State*, 6 Geo. 276.

21. The Court charged the jury that if they believed the libel was in the handwriting of the defendant, was afterwards found by the side of a public road, and read, the presumption was that it was published by him, or by his authority; that if it was not so published, it was incumbent on the defendant to show how it came out of his possession; held that this was right. *Ib.*

22. By the Common Law, the publication of a libel is an offence punishable by fine and imprisonment. *State* v. *Burnham*, 9 N. Hamp. 34.

II. Of the Indictment.

23. An averment that the defendant published a libel, "tending to blacken the honesty, virtue, integrity, and reputation of the said A. B., and thereby to expose him to public hatred, ridicule, and contempt, in which said false, scandalous, and malicious libel there are defamatory and libellous matters of and concerning the character of the said A. B.," is a good averment that it was of and

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concerning A. B. *Taylor* v. *State*, 4 Ga. 14.

24. Where an indictment charges that the defendant did publish, &c., a certain libel, appearing as an advertisement in a newspaper, and setting forth the libel in hæc verba, signed by a third person, it is sufficiently certain, without alleging that such libel was written by such third person. *Ib.*

25. Where an indictment for a libel charged the defendant with publishing of the plaintiff, that he "was the most swindling and worthless speculator who ever brought ruin on the city of St. Louis." On the issue of not guilty, the jury found a special verdict of "guilty of charging the plaintiff of being a visionary, worthless speculator;" held that the verdict found matter not alleged in the indictment, and was also defective in not finding malice. *Webber* v. *State*, 10 Mo. 4.

26. Malice is of the essence of libel, and any definition, or any charge of libel which should not embrace this essential characteristic, would be defective. *Commonwealth* v. *Snelling*, 15 Pick. 337.

27. It is not necessary to render an act malicious, that the party be actuated by a feeling of hatred or ill-will towards the individual, or that he entertain and pursue any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of manners; but if in pursuing that design, he wilfully inflicts a wrong on others, which is not warranted by law, such act is malicious. *Ib.*

28. Where an indictment for libel does not profess, on its face, to give an accurate copy of the alleged libel, in words and figures, it will be held bad on demurrer in arrest of judgment. It is not sufficient to profess to set it out according to its substance or effect. *State* v. *Brownlow*, 7 Humph. 63.

29. Where the indictment alleged that the libel "contained amongst other things, in substance, the following false, malicious, and libellous matters and things, according to the tenor and effect following, that is to say," &c. It was held that this allegation professed to set forth the substance, and not the words of the libel, and was, therefore, insufficient. *Ib.*

30. Each specification of libellous matters must charge the words published to have been of and concerning the prosecutor. *Ib.*

31. Prosecutions for libels have always been received with jealousy, and the greatest strictness has been required in the pleadings. *Ib.*

32. In Massachusetts, the legislature, and the highest judicial tribunal of the Commonwealth, have, since the adoption of the constitution, recognized libel as an indictable offence. *Com.* v. *Whitmarsh*, Thacher's Crim. Cas. 441. *Ib.*

33. The indictment charged that the defendant "did write a certain false, malicious libel of and concerning the said E. K., which said false, malicious, and defamatory libel, is of the following purport and effect, that is to say:" and then set out, within inverted commas, what the evidence showed to be, an exact copy of the libel. Verdict, guilty. On motion in arrest of judgment, held that the indictment was bad, because it did not profess to set out the libel in hæc verba. *State* v. *Goodman*, 6 Rich. 387.

34. An indictment must, as a general rule, profess to set out the words of the libel: and to set it forth according to its purport and effect, copying the libel within inverted commas, is not a compliance with the rule. *Ib.*

35. In an indictment for libel, where it does not appear from the paper itself who was its author, or the persons of and concerning whom it was written, or the purpose for which it was written; each of these should be explicitly averred as facts for the consideration of the jury. *State* v. *Henderson*, 1 Rich. 179.

36. Where the persons alleged to have been libelled are alluded to in ambiguous and covert terms, it is not sufficient to aver, generally, that the paper was composed and published "of and concerning" the persons alleged to have been libelled, with inuendos accompanying the covert terms, wherever they occur in the paper, as set out in the indictment, that they meant

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those persons, or were allusions to their names. There should be a full and explicit averment that the defendant, under and by the use of the covert terms, wrote of and concerning the persons, &c. *Ib.*

37. Where a paper is not libellous on its face, but possesses a latent meaning, which renders it libellous, the latent meaning must be explicitly set forth by way of averment or colloquium, so as to make it appear, on the face of the indictment, that the paper is a libel. *Ib.*

38. In an indictment for a libel charging that the prosecutor was called a murderer and foresworn, it is competent for the defendant to justify by proving that there was, and long had been, a general report in the neighborhood, that the prosecutor was a murderer and foresworn. *State* v. *White*, 7 Iredell 180.

39. In an indictment for a libel, the indictment must set forth matter on its face libellous, in which case the Court is to judge whether it be so or not; or it must aver that the matter charged though not on its face libellous, was intended, in fact, to be so, and then the question is to be submitted to a jury. *State* v. *White*, 6 Iredell, 418.

40. Whatever allegation is descriptive of the offence must be proved; but the allegation of sending to more than one person, is not descriptive of the offence, it is only an averment of the mode in which the offence is in part effected. *State* v. *Barnes*, 2 Maine 530.

41. The allegation of sending the libel, and that thereby the defendant published it, is a sufficient averment of publication. *Ib.*

42. It is not requisite that in an indictment for a defamatory publication, the whole of a book containing it should be set out. *Ib.*

43. That the indictment does not allege the residence or addition of said J. B., is not a valid objection. *Ib.*

44. Though described in the disjunctive (letter, circular, or pamphlet), that description is not of the essence of the offence, but is only of the mode of publication, viz., that the libellous matter was published in one or the other of those forms, and it is quite unimportant which. *Ib.*

45. In setting out the libel, where the omission or addition of a letter does not change the word, so as to make it another word, the variance is not material. *Commonwealth* v. *Buckingham*, Thacher's Crim. C. 29.

46. In Massachusetts, the publication of a false and malicious libel has always been an offence punishable by indictment. *Commonwealth* v. *Chapman*, 13 Met. 68.

47. In an indictment for a libel, it is not necessary that the charge in the indictment need be more specific than the libellous publication. *Melton* v. *State*, 3 Humph. 389.

48. It is a general rule of pleading, in civil as well as in criminal cases, that when a charge is brought against a defendant, arising out of the publication of a written instrument, the instrument itself must be set out in the writ or indictment. *Com.* v. *Wright*, 1 Cush. 46. The indictment must not only contain, but it must also profess to set out a transcript of that part of the libel upon which the pleader relies. *Ib.*

III. Proof on the Trial for Libel—Competency and Admissibility of.

49. In Virginia, the truth may be given in evidence before the jury, in mitigation of the fine, because here it is rendered by act of Assembly the duty of the jury to assess the fine. *Com.* v. *Morris*, 1 Virg. Cas. 176.

50. Semble, in a criminal trial for conspiracy to publish a libel imputing certain moral offences to a clergyman, after evidence had been given, tending to show the truth of the imputations, the character of the accused for good morals, great piety, or a laudable aversion to hypocrisy in general, may be shown with a view to the question of motive. *De Bouillon* v. *People*, 2 Hill 248.

51. But a mere proposition to prove good character without particularizing what kind of character is intended, is too vague and indefinite, and may properly be rejected. *Ib.*

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52. Semble, that on error brought by two or three defendants jointly convicted of a conspiracy to publish a libel, the former have the right to avail themselves of an erroneous exclusion of evidence, tending to exculpate their alleged co-conspirators as having acted from good motives and for justifiable ends, for proof of his innocence may tend to their benefit. *Ib.*

53. Semble, on a criminal trial for a libel, mere naked admissions made by the party libelled are in general incompetent evidence against the people even to prove facts tending to a justification. Otherwise as to conversations or declarations, which are a part of the res gestæ. *Ib.*

54. In South Carolina the accused will not be permitted, unless the prosecutor desires it, to give any evidence to prove the truth of libellous matter charged in justification or extenuation. But the jury have a right to give their verdict on the whole matter, and decide the question whether the matter charged be libellous or not, as well as the questions of fact as to the publication and truth of the inuendoes. *State* v. *Lehre*, 2 Brevard 446.

55. It is necessary to prove the averments or application of the libellous matter where the meaning is not clear, and there is an introductory statement and averments in the indictment, in order to justify the inuendoes, as to prove the publication and slanderous meaning. *State* v. *Perrin*, 2 Brevard 474.

56. The admissions of the editor of the newspaper as to the authorship of the publication, made in the absence of the defendant, are not admissible, until it be proved that the defendant was the author. *Com.* v. *Guild*, Thacher's Crim. Cas. 329.

57. Evidence of witnesses that the impressions and conviction produced on their minds by the evidence before the ecclesiastical tribunal, was different from its decision, or of the opinions expressed by others as their decision and conviction upon the same evidence, or of the impression and belief in the community whether the evidence established the charges, is inadmissible in mitigation of damages. The effect of such evidence is to put the opinions of others in the stead of the verdict of the jury upon the same evidence. *Graves* v. *State*, 9 Ala. 447.

58. Evidence that the prosecutor, previous to the publication, had used violent, abusive and slanderous words concerning the defendant, which had been communicated to him about a month previous to the publication, is not admissible in mitigation of damages, it not appearing that the defendant's publication was provoked by, or in any manner connected with the previous slanderous words of the prosecutor. *Ib.*

IV. Justification—Miscellaneous.

59. The truth of the words is no justification in a criminal prosecution for a libel. *Com.* v. *Clapp*, 4 Mass. 163.

60. But the defendant may show the purpose of the publication to have been justifiable, after which he may give its truth in evidence, to negative the malice and intent to défame. *Ib.*

61. The truth of a libel cannot be given in evidence in a criminal prosecution. *The State* v. *Lehre*, 2 Const. R. 809.

62. Although formerly it was the law of this Commonwealth that the truth of the libel could not be given in evidence and justification of the libellous matter ; yet, by a late act of the legislature, 1826, ch. 107, the truth may now be given in evidence in all prosecutions for libels ; "but such evidence shall not be a justification unless on the trial it shall be made satisfactorily to appear that the matter charged as libellous was published with good motives, and for justifiable ends." *Com.* v. *Batchelder*, Thacher's Crim. Cas. 191.

63. There are certain cases in which the defendant, in a prosecution for a libel, may acquit himself, by showing an honest purpose, and proving the truth of his allegations. *Com.* v. *Blanding*, 3 Pick. 304.

64. In Massachusetts, to make out a justification under the statute, it is necessary to prove the facts precisely and strictly ; and in this respect the proof, though in the form of trial it is given on the general issue, must be as strict

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and precise as if pleaded in a civil action. *Com.* v. *Snelling*, 15 Pick. 337.

65. A publication that the prosecutor was charged and proven guilty by the affidavits of some seven or eight of the most respectable gentlemen of the county, of both fraud and lying, is not justified by the production of affidavits used before an ecclesiastical tribunal, upon a charge preferred by the defendant against the prosecutor; and when so produced, it is competent for the prosecution to inquire what was the decision of that tribunal. *Graves* v. *State*, 9 Ala. 447.

66. It is no defence to a criminal prosecution for publishing a libel that the matters contained in it are true, unless it be further proved that the publication was made from good motives, &c. *De Bouillon* v. *People*, 2 Hill 248.

67. Where a libel contains general charges against an individual, of hardness toward the poor, dissoluteness of morals, &c., purporting to be conclusions from instances of bad conduct previously narrated in the publication, it cannot be justified by proof of other instances not specified by the writer. *Ib.*

68. If the end to be attained is justifiable, as if the object is the removal of an incompetent officer, or to prevent the election of an unsuitable person to office, or generally to give useful information to the community, or to those who have a right, and ought to know, in order that they may act upon such information, the occasion is lawful, and the party may then justify or excuse the publication. *State* v. *Burnham*, 9 N. Hamp. 34.

69. Where, however, there is merely color of a lawful occasion, and the party, instead of acting in good faith, assumes to act for some justifiable end, merely as a pretence to publish and circulate defamatory matter, or for other unlawful purpose, he is liable in the same manner as if such pretence had not been resorted to. *Ib.*

70. If it be found that the occasion was of itself a proper one in which matter of the nature set forth might be circulated, the defendant may justify the publication by proving the truth of the matter alleged. *Ib.*

71. But in such case the justification must be as broad as the charge; it cannot be sufficient justification to show that part of the matter is true. *Ib.*

72. If in such case the defendant justifies by showing the truth, his motives are not in question if upon a lawful occasion for making a publication he has published the truth and no more; there is no sound principle which can make him liable even if he was actuated by express malice. *Ib.*

73. Matter in excuse, in a prosecution for a libel, is where the defendant, upon a lawful occasion, proceeded with good motives, upon probable grounds, upon reasons which were apparently good, but upon a supposition which turns out to be unfounded. *Ib.*

74. It can never be required that an obscene book and picture should be displayed upon the records of the Court. *Com.* v. *Holmes*, 17 Mass. R. 336.

75. Legal malice is not malice in its popular sense, viz., that of hatred and ill-will to the party libelled, but an act done wilfully, unlawfully, and in violation of the just rights of another. *Com.* v. *Bonner*, 9 Metcalf's R. 410.

LOTTERY.

I. Lottery; what constitutes.
II. Indictment for.
III. Statutes respecting Lotteries.

I. Lottery; what Constitutes.

1. Where there is a guaranty, in cases where the guarantor binds himself that he will pay the prize which may be drawn to a certain number in a lottery, when sold by the proprietor of the ticket or a duly authorized agent of the proprietor, it is strictly a lottery-ticket, though not in the form of one; and a sale of such guaranty by such proprietor, or his agent, is forbidden by the Virginia act of 1825; and if an individual sells such guaran-

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ties as a substitute for lottery-tickets, and in order to evade and defeat the law, the vender holding the tickets themselves, for the benefit of the purchaser, he sells these things, which are substantially lottery-tickets, and such sale is held to be forbidden by said act. *Commonwealth* v. *Chubb*, 5 Rand. 715.

2. The printer of a newspaper, which contains an advertisement of lottery-tickets, not justified by the laws of the Commonwealth, is liable to indictment, though he may not be concerned in the sale of the tickets. *Commonwealth* v. *Clapp*, 5 Pick. 41.

3. Where there is a signboard at a person's place of business, giving notice that lottery-tickets are for sale there, it is an advertisement within the statute of 1825, ch. 184. *Commonwealth* v. *Harper*, 5 Pick. 42. Such signboard erected before, but kept up after the passing of this statute, is held to be a new advertisement every day, making the owner liable to the penalty of the statute. *Ib.*

4. Under the Revised Statutes (1 R. S., 665, § 28), it is a misdemeanor to publish in this State an account of a lottery to be drawn in another State or Territory, although such lottery be authorized by the laws of the place where it is to be drawn. *Charles* v. *the People*, 1 Comstock 180; *the People* v. *Charles*, 3 Denio 212.

5. The keeping of a common gaming-house is indictable at common law, on account of its tendency to bring together disorderly persons, to promote immorality; and to lead to breaches of the peace. Per Bronson, C. J. *People* v. *Jackson*, 3 Denio 101.

6. Where one keeps a room or place for the sale of tickets in lotteries, not authorized by law, it is indictable. *Ib.*

7. A ticket in a lottery, which entitles the holder to one-fourth of the prize drawn to its numbers, although usually called a quarter of a ticket, is a lottery-ticket within the meaning of the act of December 19, 1842, "to abolish lotteries, and to prohibit the sale of lottery-tickets in this State," and may be so described in an indictment under this act. *Freleigh* v. *the State*, 8 Mo. 606.

8. For the construction of the 10th section of the first article of the constitution, and the 22d section of the article of the Revised Statutes respecting "raffling and lotteries," see the case of *the People* v. *American Art Union*, 13 Barb. 577.

9. It is unlawful under these sections for any one to set up, or propose, that is, to hold forth to others that he has, or will have, any articles, although they may be works of art, which are to be distributed by lot or chance to any person who, before the distribution, shall have paid any money for the chance of obtaining such articles. *Ib.*

10. Therefore, where, by the constitution of the American Art Union, the society was to purchase such works of art as the state of the treasury would warrant, which, at the annual meeting in December, were to become, by lot, the property of the individual members, each member being entitled to one chance, or share, in such distribution for each $5 by him subscribed and paid, the method in which the distribution was to be made being particularly prescribed in its by-laws; and the society published its plan, showing that for the payment of $5 any person would become a subscriber, and entitled to an engraving, to a copy of the bulletin of their proceedings, and to the chance of one of a number of paintings to be "distributed by lot among the members, each member having one share for every $5 paid by him;" held that the mode of distribution adopted by the Art Union was illegal and unconstitutional. Edwards, P. J., dissented. *Ib.*

II. Indictment for.

11. It is not necessary that an information under the statute 1825, c. 184, should allege on trial or show by name what kind of lottery-tickets were advertised, or that they were advertised as for sale within the county where such information is filed. *Com.* v. *Clapp*, 5 Pick. 41.

12. In an indictment for selling lottery-tickets not warranted by statute,

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the name of the lottery should be alleged, and the number of tickets. *Com.* v. *Gillipsie*, 7 Serg. & R. 469.

13. In such an indictment, a variance in the ticket, *e. g.*, in a proper name, is fatal. *Ib.*

14. It was held that a demurrer to an indictment which charged the defendant with publishing, in the city of New York, an account of a lottery to be drawn in the District of Columbia, was not well taken. *Charles* v. *People*, 1 Comstock 180.

15. Where the indictment charged the defendant with publishing an account of an illegal lottery, and set forth in hæc verba the lottery scheme, which showed that the prizes consisted of sums of money; held good, although it was not otherwise averred that the lottery was set on foot for the purpose of disposing of money, land, &c. *Ib.*

16. Where an indictment lies for selling lottery-tickets, it must set forth the lottery as one set on foot for the purpose of disposing of property, according to the terms of § 27 (1 R. S. 685). *People* v. *Payne*, 3 Denio 88.

17. An indictment merely alleging that the defendant kept a common gaming house, without stating what was transacted there, would not, it seems, be sufficient. Per Bronson, C. J. *People* v. *Jackson*, 3 Denio 101.

18. Where an indictment alleged that the defendant kept a certain common gaming house, in which he sold and furnished tickets in lotteries unauthorized by law, to divers persons; it was held not to set forth an indictable offence. *Ib.*

19. It is not necessary that an indictment for selling lottery-tickets should set out the tickets sold. *People* v. *Taylor*, 3 Denio 99.

20. Nor is it necessary, in such an indictment, to give the names of the persons to whom the tickets were sold, it being alleged that their names were unknown to the jurors. *Ib.*

21. Since the sale of tickets in all lotteries is now totally prohibited, it is no longer necessary to aver that the lottery, for the selling of a ticket in which a party is indicted, was not expressly authorized by law. *People* v. *Sturtevant*, 23 Wend. 418.

22. Such a degree of certainty is necessary in the description of the offence of setting on foot a lottery, &c., as that the defendant may not be indicted for one thing and tried for another, that he may know what crime he is called upon to answer, that the jury may deliver an intelligible verdict, that the Court may render the proper judgment, and that the defendants may with proper averments plead the judgment in bar of another prosecution for the same offence. *People* v. *Taylor*, 3 Denio 91.

23. But when a particular fact, which is matter of description and not vital to the accusation, cannot be ascertained, the indictment will be valid if it allege that such fact is unknown to the grand jury. *Ib.*

24. In an indictment, under the act of December 19, 1842, "to abolish lotteries, and to prohibit the sale of lottery-tickets in this State," for selling a lottery-ticket, contrary to the provisions of said act, it is not necessary to set out the ticket by its tenor or purport; it is sufficient to describe the ticket as a "certain lottery-ticket." *Freleigh* v. *State*, 8 Mo. 606.

25. An indictment will lie, on the above act, for the sale of a lottery-ticket, although the statute is in the plural, prohibiting the sale of lottery-tickets. *Ib.*

26. Where it appears by the advertisement set forth in hæo verba, that the lottery was made for the purpose of disposing of money or property, the indictment will be good, although the object of the lottery is not otherwise averred. *People* v. *Charles*, 8 Denio 212.

27. The act to prevent raffling and lotteries, was intended to prohibit the sale of lottery-tickets in the State of New York, whether the lottery was established in that State or elsewhere; and an indictment under the statute, for vending lottery-tickets, need not aver that the lottery was established in this State. *People* v. *Warner*, 4 Barb. 314.

28. An indictment for selling a lottery-ticket, need not expressly allege that the ticket was of a lottery got up or set on foot for the purpose of disposing of real estate, goods, money, or things in action. *Ib.*

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29. It is not necessary that the character and description of the lottery should form the subject of an express averment; it is sufficient if these appear argumentatively in the indictment, especially after verdict. *Ib.*

30. In an indictment for setting on foot a lottery, contrary to 1 Rev. Stat., 665, § 27, it is necessary to specify the purpose for which the lottery was made, since that is a part of the statute description of the offence. *People* v. *Taylor*, 3 Denio 91.

31. But a general allegation of the purpose for which the lottery was made, is not sufficient; some further description must be given where it is practicable to do so. *Ib.*

32. Therefore it was held, that a count in an indictment which stated that the defendant unlawfully, &c., did set on foot a certain lottery, for the purpose of exposing certain money to abide the drawing of such lottery, he being unauthorized, &c., without containing other matter of description, was bad. *Ib.*

33. And a count in a similar form, containing an additional averment that the name of the lottery was unknown to the grand jury, was held bad. *Ib.*

34. But a count in the same form, containing an averment that a more particular description of the lottery was unknown to the grand jury, was held good. *Ib.*

35. The amount of the lottery is not essential in determining the nature or degree of the offence, but only in fixing the amount of the fine; and where such amount cannot be ascertained, the sum of $2,500 is fixed as a limit beyond which the Court cannot impose a fine. *Ib.*

36. Accordingly, it is not necessary that an indictment for setting on foot an illegal lottery, should state the amount for which such lottery was made, or that such amount could not be ascertained. *Ib.*

III. Statutes respecting Lotteries.

37. The act of February 11, 1825, in Virginia, for the prevention of the sale of foreign lottery tickets within the Commonwealth, is within the operation of the Virginia gaming law, and is therefore not to be construed as if it were a remedial law, but like other penal laws. *Com.* v. *Chubb*, 5 Rand. 715.

38. The act of 26th February, 1835, supplementary to the act of 9th February, 1833, entitled "An act to authorize a sum of money to be raised by lottery, to be given to the Sisters of Charity in the city of St. Louis, for the use of the hospital over which they now, or may hereafter, have the control or management," authorizes the commissioners to sell the lottery; and after a sale, the Legislature can pass no law impairing the obligation of the contract of the sale. *State* v. *Hawthorn*, 9 Mo. 385.

39. The commissioners having sold the lottery, the act of 19th December, 1842, prohibiting the sale of lottery tickets in this State, is unconstitutional as to the vendee; and his right to sell under the purchase made in accordance with the act of 26th February, 1835, is not affected by that act. *Ib.*

40. The exceptions in the statute respecting lotteries, excluding from its operation lotteries authorized by law, and similar expressions, have reference to lotteries which had been authorized by this State before the adoption of the new constitution, and do not embrace lotteries authorized by the laws of other States. *People* v. *Sturdevant*, 23 Wend. 418.

41. The act of the Legislature of Missouri, of December 19, 1842, declaring the sale of lottery tickets illegal, is constitutional. *State* v. *Sterling*, 8 Mo. 697.

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MALICIOUS MISCHIEF.

I. The Offence of Malicious Mischief; what Constitutes.
II. Indictment for Malicious Mischief. Trial of. Proof on the Trial.

I. The Offence of Malicious Mischief —What Constitutes.

1. As to the question what malice is, see the case of *The State* v. *Doig*, 2 Rich. 178.

2. To constitute the crime of wrongfully destroying personal property, without the owner's consent, within the meaning of the Revised Statutes of Maine, c. 162, § 13, it is not necessary that the possession of the property was wrongful; the statute intimates no such necessity. The offence may be equally committed, whether the possession in the defendant was by right or wrong. *State* v. *Pike*, 33 Maine 361.

3. Upon the trial of an indictment for a misdemeanor, in secreting the treasury book of records of the town of Amity, it would be no defence if any of the principal inhabitants of the town knew that the book of records was left with the defendant; and the fact that persons had seen it there, could not prevent the defendant from secreting it from the knowledge of the owners. *State* v. *Williams*, 30 Maine 484.

4. If the defendant did no act to conceal the book other than to deny that it was in his possession, and that he had any knowledge of it, he would still be guilty; for by such denials the defendant might have pursued the most successful course to prevent the owners from obtaining it, and it might operate as a most effectual secretion of the book. *Ib.*

5. Even if the book, being left in his custody, was not designedly concealed or placed away with a design to conceal it, but was kept openly with his own books and papers, and he did no more than simply refuse to deliver it, when demanded, and refused to give information where it was, this would be no defence. *Ib.*

6. Malicious mischief consists in the wilful destruction of personal property from actual ill-will or resentment toward its owner or possessor. *State* v. *Robinson*, 3 Dev. & Batt. 130.

7. Where the defendant was indicted for maliciously killing steers, the property of another, under the Tennessee act of 1803, c. 9, it was held that, to bring the case within the statute, there must be malice directed against the owner of the cattle, and so alleged and proved, and not merely against the animal itself. *State* v. *Wilcox*, 3 Yerger 278.

8. Upon an indictment under the 3d section A. A., 1789 (Prov. Laws, 486; 5 Stat. S. Car. 139), for disfiguring a horse, it was held that shaving the mane and cropping the hair and tail of a mare in the owner's stable, did not constitute the offence of disfiguring, under the act. *State* v. *Smith*, Cheves 157.

9. The Revised Statutes of Massachusetts, c. 126, § 39, provides for the punishment of malicious mischief, in destroying or injuring personal property in any manner or by any means not particularly described or mentioned in this chapter, and enacts that the punishment shall be imprisonment in the State prison not more than five years, or by fine, &c. By the statute of 1846, c. 52, § 1, every person maliciously injuring or destroying personal property of another, by any means not particularly described or mentioned in the Rev. Statutes, c. 126, § 39, and following, where the value of the property or damage shall not be alleged to exceed fifteen dollars, shall be punished by imprisonment for not more than thirty days, or by fine not exceeding fifteen dollars; it was held that, in a prosecution for malicious mischief in destroying or injuring personal property, where the property did not exceed in value the sum of fifteen dollars, that the defendant must be punished by imprisonment in the county jail or house of correction for not more than thirty days. *Britton* v. *Com.*, 1 Cush. 302.

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II. INDICTMENT FOR MALICIOUS MISCHIEF—TRIAL OF—PROOF ON THE TRIAL.

10. An indictment for malicious trespass, charging that the defendant did maliciously and mischievously injure and cause to be injured, a certain house, the property of one M., of the value of fifty dollars, contrary to the form of the statute, &c., was held to be bad; the indictment should have shown the specific injury done to the house. *State* v. *Aydelott*, 7 Blackf. 157.

11. On an indictment for malicious mischief, it is not necessary that the indictment should charge the offence to have been committed vi et armis. *Taylor* v. *State*, 6 Humph. 285.

12. And where the indictment charges the killing of a cow, it is sufficiently charged within the meaning of the Tennessee act of 1803, ch. 9, sec 2, to constitute the offence of malicious mischief. *Ib.*

13. An indictment founded on sec. 71, chap. 53, of the Rev. St. of Indiana, for malicious trespass, alleging that the defendant did, unlawfully, maliciously, and mischievously injure and destroy several windows belonging to a certain county seminary, the property of the county of Sullivan; held that the indictment sufficiently charged the property to be public property, and also that the injury charged to have been done to the property was stated with sufficient certainty. *Read* v. *State*, on Appeal, 1 Carter 511.

14. An indictment for malicious mischief, must either expressly charge malice against the owner, or fully otherwise describe the offence. *State* v. *Jackson*, 12 Iredell 329.

15. Setting forth in the indictment that the act was done feloniously, wilfully and maliciously, without averring it was done mischievously, or with malice against the owner, is not sufficient. *Ib.*

16. Acts which would support an indictment for arson, would support a charge for malicious mischief. *State* v. *Leavitt*, 32 Maine 183.

17. And so will an indictment for malicious mischief be sustained, though the acts proved might have supported a charge for larceny. *Ib.*

18. Where an indictment for malicious mischief, in killing a dog, is founded on the Rev. St. of Indiana, ch. 53, § 71, it was held that a dog was the subject of absolute property, and that the killing of a dog, under said act, was an indictable offence. *State* v. *Sumner*, 2 Carter 377.

19. Upon an indictment for malicious mischief, in destroying and injuring the windows of a county seminary, it was held to be in effect an indictment for maliciously destroying public property, under the Indiana statute; and it was further held under this indictment that the prosecution need not prove the title to the seminary to be in the county, it being under the management of the county commissioners. *Read* v. *the State*, 1 Smith 369.

20. Upon an indictment for malicious mischief, which alleges that the defendant did wilfully, maliciously and secretly destroy lobster cars, and cables to which the cars were attached, the evidence was that the cables were cut in the middle, and that the cars had floated away a short distance and were somewhat injured; it was held that the evidence showed enough to sustain the indictment, which was founded under the Rev. Statutes, ch. 126, § 39. *Commonwealth* v. *Soule*, 2 Metc. 21.

21. Where a defendant is charged with knowingly, wilfully, and without lawful authority, cutting down and carrying away a line tree standing on the division line between him and another person, contrary to the form of the statute, &c., it was held that the act was not charged in such a manner as to be punishable by any statute in force in Virginia. *Powell's case*, 8 Leigh 719.

22. In North Carolina, under an indictment founded on the act of Assembly, Rev. St. ch. 34, § 55, which relates to the altering or defacing the marks of cattle, &c., if the act of altering or defacing is proven to have been wilfully done, it necessarily follows that the intent was to defraud the owner, unless there be proof to the contrary. *State* v. *Davis*, 2 Iredell 153.

23. The offence of girdling and cutting fruit-trees is not indictable in the State of Maine, except under the stat-

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ute of 1821, ch. 38. *Brown's case*, 3 Greenleaf 177.

24. No indictment under what is commonly called the Black Act (being the Statute of 9th George 1st), can be sustained in the State of Georgia, as that act was never in force in that State. *State* v. *Campbell*, Charlton 166.

25. Where one is indicted for maliciously killing a domestic animal, it is necessary either that the owner's name should be disclosed in the indictment or that it should be at least stated that the animal was the property of some one, whose name was unknown; and the evidence should show that there was an owner and who he was; but it is not indispensable to a conviction in such case, that the defendant previous to the commission of the act declared a purpose to injure the owner, or did or said anything either before or after, indicative of express malice; malice will be inferable from the circumstances under which the mischief was committed. *State* v. *Pierce*, 7 Ala. 728.

26. In case of indictments for malicious mischief, the statute makes the value of the property maliciously injured or destroyed the basis of the verdict, and permits the jury to go to the extent of four-fold its value; and hence it is necessary to allege the value of the property injured or destroyed, in the indictment. *State* v. *Garner*, 8 Porter 447.

27. An indictment for unlawfully, wickedly and maliciously cutting and destroying a quantity of standing Indian corn, cannot be supported. *State* v. *Helms*, 5 Iredell 364. An indictment for malicious mischief, will only lie for the malicious destruction of personal property; and corn growing, except in a few cases, is regarded as a part of the realty. *Ib.*

28. Where, in an indictment for malicious mischief, the Court, in the instruction to the jury, defined the word maliciously to mean the "wilfully doing of any act prohibited by law, and for which the defendant had no lawful excuse; and that moral turpitude of mind was not necessary to be shown;" it was held that the definition was bad, and contrary to the intention of the legislature. *Commonwealth* v. *Walden*, 3 Cush. 558.

29. The jury should have been instructed, that, to authorize them to find the defendant guilty of malicious mischief, they must be satisfied that the injury was done either out of a spirit of wanton cruelty, or wicked revenge. *Ib.*

30. It is no objection to a conviction on an indictment for altering and defacing marks on cattle, &c., that the cattle, beasts, &c., had at the time the act was done, strayed from their owner. *State* v. *Davis*, 2 Iredell 153.

31. Upon the trial of an indictment under the Tennessee act of 1803, for malicious mischief, when the evidence showed that the act was done not with an unlawful, wilful and malicious intent to injure, but with the belief that the defendant had a right to do the act; it was held that no verdict could be supported. *Goforth* v. *State*, 8 Humph. 37.

32. Under the R. S. of Maine, c. 162, § 13, in an indictment founded on that section, the complainant may be a witness for the government. *State* v. *Pike*, 33 Maine 361.

33. The injured party is disqualified to testify on behalf of the State, on the trial of an indictment for malicious mischief, under the 5th sec. of the 4th article of the Penal Code of Alabama. *Blackstone* v. *State*, 15 Ala. 415.

34. Under an indictment for maliciously cutting and girdling certain fruit trees, described in the indictment as the property of one B., it is sufficient proof of the ownership of the property to show that the premises on which the trees stood were in the possession and occupation of B. at the time of committing the offence. *The People* v. *Horr*, 7 Barb. 9.

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MAYHEM.

MAYHEM—INDICTMENT FOR—EVIDENCE ON THE TRIAL—CONVICTION, &C.

1. To constitute a maim under the statute, by biting off an ear, it is not necessary that the whole ear should be bitten off; it is sufficient if only a part is taken off, provided enough is taken off to alter and impair the natural personal appearance, and, to ordinary observation, to render the person less comely. *State* v. *Gerkin*, 1 Iredell 121.

2. The statute of Arkansas declares maiming to consist in unlawfully disabling a human being, by depriving him of the use of a limb or member, or rendering him lame, or defective in bodily vigor; by which it is understood, that the act being unlawful in itself, evidencing a malicious intent, it is immaterial by what means, or with what instrument the injury is effected, provided the crime is consummated by depriving the party of the use of a limb or member of his body, or that the consequences of the injury sustained render him either permanently lame, or by any means affect his bodily vigor, by decreasing his strength, activity, or the like. *Baker* v. *State*, 4 Ark. 56.

3. And the existence of the disabling having once been proved, its continuance is presumed, till proof be given to the contrary. *Ib.*

4. To support an indictment for putting out an eye of an individual, under the statute of mayhem, it is not necessary, where the injury is done in a sudden conflict, that the defendant should have formed the design previous to the conflict; it is sufficient if the defendant maliciously and on purpose does the act, in pursuance of a design formed during the conflict. *State* v. *Simmons*, 3 Ala. 497.

5. In Alabama, whenever the statute of 1807 speaks of disabling a limb or member, a permanent injury is contemplated, as such was the Common Law notion of the extent of the injury necessary to constitute a mayhem. A temporary disabling of a finger, an arm, or an eye, would not be sufficient to constitute the statutory offence. *State* v. *Briley*, 8 Porter 472.

6. Where a defendant was indicted under the statute against mayhem, and the counts in the indictment each charging the shooting, with intent to maim, disfigure, disable, *and* kill, while the statute uses the disjunctive or, instead of the conjunctive, as in the indictment laid; it was held proper to lay the intent in the conjunctive, and any one of the intentions being proved, the indictment was sustained. *Angel* v. *Com.*, 2 Virg. Cas. 231.

7. An indictment for mayhem need not contain an allegation that the act was done *feloniously*. *State* v. *Absence*, 4 Porter 397.

8. In Alabama, in order to constitute the offence of mayhem, it is not necessary that the member should be wholly mutilated; but to commit the offence there must be so much of the member mutilated as to disfigure the person on ordinary inspection; and if the part of the member is so small as to be observed only on close observation or examination, then the offence is not mayhem. *State* v. *Abram*, 10 Ala. 928.

9. When the mutilation by a slave of any of these members of a white person which are mentioned in the Alabama statute in describing the offences of mayhem, is intentional and without cause, it will be considered as done wilfully; but when it is done in a contest, where the life of the slave is endangered, by reason of the white person having a deadly weapon, and the slave without any weapon, then it will not be so regarded, unless attending circumstances show it to have been done wantonly. *Ib.*

10. The third section of the article of the constitution of the State of Alabama, which relates to maliciously dismembering or depriving a slave of life, was never intended to introduce any new offences against the law, and hence an indictment for maliciously dismembering a slave should be good for mayhem. *State* v. *Coleman*, 5 Porter 32.

11. An indictment for mayhem at Common Law, and under the statute of Tennessee, in addition to the statement

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of injury, must also charge that the party was thereby maimed. *Chick* v. *State*, 7 Humph. 161.

12. In an indictment under the Rev. Stats. of North Carolina, ch. 34, § 48, for maiming by biting off an ear, it is not necessary to state whether it was the right or left ear. *State* v. *Green*, 7 Iredell, 39.

13. In North Carolina, in an indictment for mayhem, under the 48th sec. of the 34th ch. of the Rev. Stat., an intent to disfigure is prima facie to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or, at least, of the absence of the intent mentioned in the statute. *State* v. *Gerkin*, 1 Iredell 121.

14. It is not necessary, in an indictment under this statute, to prove malice aforethought, or a preconceived intention to commit the maim. *Ib.*

15. A previous assault upon a defendant, in a prosecution for mayhem, is received as evidence in justification, under the plea of not guilty; but, in order to make it a good justification, it ought to appear that the striking by the defendant was in his own defence, and in proportion to the attack made on him. *Hayden* v. *the State*, 4 Blackf. 546.

16. Where one is charged in an indictment with aiding and abetting another to commit a mayhem, if it does not appear from the evidence that the aider or abettor was consonant that the principal intended to commit a mayhem at the time aid was given, the abettor can only be convicted of assaulting and beating. *State* v. *Absence*, 4 Porter 397.

17. One indicted as principal in the second degree, for the offence of mayhem, may be guilty of the offence of beating, perpetrated by the principal in the first degree, without being guilty of the mayhem. *Ib.*

MISDEMEANOR.

I. Misdemeanors at Common Law, and under Statutes.
II. Indictment, Trial, &c. Evidence on the Trial.

I. Misdemeanors at Common Law, and under Statutes.

1. In Tennessee, the County Courts have jurisdiction of every description of misdemeanor, of an inferior nature to felony. *State* v. *Fields*, Mart. & Yerg. 137.

2. The selling of spirituous liquors, without being a physician or apothecary licensed for that purpose, is a misdemeanor by the statute of 1838; but the purchasing of such person, although implying an inducement held out to commit a misdemeanor, is still no misdemeanor of itself. *Com.* v. *Willard*, 22 Pick. 476.

3. A conspiracy to commit a misdemeanor is not merged in carrying out the intent of the conspiracy. *State* v. *Murray*, 15 Maine 100.

4. Private drunkenness is no offence by the municipal laws of North Carolina. It becomes so by being open and exposed to public view, so as to become a nuisance; it must be so charged, and the jury must so find it, before the Court can render judgment. *State* v. *Waller*, 3 Murph. 229.

5. To support an indictment for knowingly selling unwholesome provisions, the provisions sold must be in such a state as that, if eaten, they would, by their noxious, unwholesome and deleterious qualities, have affected the health of those who were to have consumed them. *State* v. *Norton*, 2 Iredell 40.

6. The offence of riding or going armed with unusual and dangerous weapons, to the terror of the people, is an offence at Common Law, and is indictable as for a misdemeanor. *State* v. *Huntley*, 3 Iredell 418.

7. It is a misdemeanor to disturb the divine service of a religious society. *State* v. *Jasper*, 4 Dev. 323.

8. The law holds it to be a misde-

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meanor when the offence proposed to be committed by the counsel, advice, or enticement of another, is of a high and aggravated character, tending to breaches of the peace, or other great disorder and violence, being what are usually considered mala in se, or criminal in themselves, in contradistinction to mala prohibita. *Com.* v. *Willard*, 22 Pick. 478.

9. The offence of compounding extends as well to misdemeanors as to felonies. *Jones* v. *Rice*, 18 Pick. 440.

10. In all inferior offences, as misdemeanors, all persons who are in any manner concerned therein, if guilty at all, are principals and equally guilty. *Curlin* v. *State*, 4 Yerger 143.

11. When a party forges a receipt for a note of hand, which would be in full when paid, it does not come within the provisions of "the act to prevent forging and counterfeiting," passed April 2, 1813. It is a misdemeanor at Common Law. *People* v. *Hoag*, 2 Parker's Crim. R. 36.

12. To keep open tippling-houses on the Sabbath day is a violation of a public law, and a misdemeanor, as declared by the first section of the first division of the code. *Hall* v. *State*, 3 Kelly 18.

13. Under the South Carolina act of 1798, P. L. 486, it was held that a person could not be indicted for marking a hog. *State* v. *Roberts*, 1 Const. R. 116.

14. In Tennessee, wine is not a spirituous liquor within the meaning of the statute passed in the year 1837, ch. 120, making it a misdemeanor to retail spirituous liquors. *Caswell* v. *State*, 2 Humph. 402.

15. The act of 1838, ch. 120, makes the offence of selling a quart or greater quantity of spirituous liquors, to be drank at the place where sold, an indictable offence. *Sanderlin* v. *State*, 2 Humph. 315.

16. The act provides that the liquors shall not be drank on the plantation whereon the same are sold, and this word plantation is of very extensive signification, and when applied to a town, would be taken to mean the lot, yard, adjoining room or other house attached to and belonging to the premises where the liquor was sold. *Ib.*

17. And it was held that the person vending the liquor, furnishing the bottles, glasses and conveniences of drinking, was a matter proper to offer in evidence to show that he had sold it, with the intention that it should be drank at the place. *Ib.*

18. The actual drinking is only necessary to be proved as a circumstance from which to infer the intention of the party selling, and need not be alleged in the indictment. *Ib.*

19. As the keeping of a bawdy house is a public offence, every person who voluntarily aids in establishing such a pestilent nuisance should be deemed guilty of a misdemeanor, and is liable to punishment by indictment for a misdemeanor. *Ross* v. *Commonwealth*, 2 B. Monroe 417.

20. The mere breaking and entering the close of another, though in contemplation of law a trespass committed vi et armis, is only a civil injury, to be redressed by action, and cannot be treated as a misdemeanor, to be vindicated by indictment or public prosecution. But when it is attended by circumstances constituting a breach of the peace—such as entering the dwelling-house with offensive weapons, in a manner to cause terror and alarm to the family and inmates of the house—the trespass is heightened into a public offence, and becomes the subject of a criminal prosecution. *Henderson* v. *the Commonwealth*, 8 Gratt. 708.

21. Malicious mischief done to any kind of property, is a misdemeanor, and the party doing the injury may be prosecuted criminally. *Loomis* v. *Edgerton*, 19 Wend. 419.

22. A misdemeanor cannot be indicted as a felony. *Commonwealth* v. *Macomber*, 3 Mass. 258.

23. One who is liable as an accessory in a capital offence, would be liable as principal if it were a misdemeanor. *State* v. *Westfield*, 1 Bailey 132. There can be no accessory after the fact of a misdemeanor. *Commonwealth* v. *Macomber*, 3 Mass. 254; vide *Commonwealth* v *Barlow*, 4 Mass. 439.

24. An intent to commit a misdemeanor, manifested by some overt

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act, is a misdemeanor. *Commonwealth* v. *Kingsbury*, 5 Mass. 106.

25. It was held that, exciting, encouraging, and aiding one to commit a misdemeanor, was of itself a misdemeanor. *Commonwealth* v. *Harrington*, 3 Pick. 26.

26. In Pennsylvania it was held to be a misdemeanor to persuade one to steal a conveyance of land. *Pennsylvania* v. *McGill & Boggs*, Addis. 21.

27. The offence of destroying a tree which stands upon public ground, is indictable as a misdemeanor. *Commonwealth* v. *Eckert*, 2 Browne 249.

28. The act of loading five tons of pearl ashes in a sleigh, with intent to export the same to Canada, contrary to the first section of the act of 9th January, 1809, ch. 72, is a misdemeanor, indictable and cognizable by the Circuit Court. *United States* v. *Mann*, 1 Gallis. 3.

29. Where a defendant was charged with throwing the dead body of a person into river, without the rites of a burial being performed, it was held to be an offence indictable as against common decency. *Kanavan's case*, 1 Greenleaf 226.

30. In the State of South Carolina, cow-stealing is clearly only a misdemeanor by statute, and it cannot be made to have any of the incidents of a felony by looking back to what it was at Common Law. *Burton* v. *Watkins*, 2 Hill's S. C. 674.

31. Where one discharges a gun unnecessarily, within the hearing of a person who is sick, and likely to be affected thereby, and the consequence is that the person is seriously affected by the discharge of the gun, and the offender doing so after full notice of the consequences of his act; it was held to be a misdemeanor, and a matter which was the proper subject for indictment. *Commonwealth* v. *Wing*, 9 Pick. 1.

32. A crime of misdemeanor consists in violation of public law, in the commission of which there must be a union or joint operation of act and intention or criminal negligence. Digest, p. 319. *Yoes* v. *the State*, 4 Eng. 42.

33. Under the New York statute, it is held not to be a misdemeanor when an inn-keeper sells spirituous liquors to be drank on the premises, on Sunday, to persons who are not lodgers or travellers. *Van Zant* v. *People*, 2 Parker's Crim. R. 168.

INDICTMENT, TRIAL, ETC.—EVIDENCE ON THE TRIAL.

34. Where in an indictment for selling spirituous liquors, the State and county are written at full length in the margin, and after which it is stated that the grand jury elected to inquire for the body of the county aforesaid present, that D. S., late of said county, with force and arms in the county, unlawfully, etc.; it was held that as this was an indictment for a mere misdemeanor, the averment of the county was sufficient to sustain the indictment. *Sanderlin* v. *State*, 2 Humph. 315.

35. In indictments for misdemeanors created by statute, it is sufficient to charge the offence in the words of the statute; and there is not that technical nicety required as to form, which seems to have been adopted and sanctioned by long practice in cases of felony. *United States* v. *Lancaster*, 2 McLean 431.

36. An indictment for a misdemeanor, charging a man with being a common Sabbath-breaker and profaner of the Lord's day, was held to be insufficient, as it did not set forth how or in what manner he was a Sabbath-breaker, etc. *State* v. *Brown*, 3 Murph. 224.

37. If the name of the county be stated in the body of an indictment for a misdemeanor, the statement will be held sufficient, although the county is not named in the margin. *Tefft's case*, 8 Leigh 721.

38. In Tennessee, under the acts of 1842 and 1844, an indictment which charges a single act of open and notorious drunkenness, on a certain day, and alleges similar acts on divers other days, without specifying the days, is bad. *Hutchison* v. *State*, 5 Humph. 142.

39. In the case of a misdemeanor, a substantial description of the offence

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is all that is required. *Bilbro* v. *State*, 7 Humph. 534.

40. Where a defendant was indicted for a misdemeanor, and charged with keeping an open tippling-house on the Sabbath-day, it was held that he was properly indicted, under the sixth section of the 10th division of the penal Code in Georgia, and liable to be punished as for a misdemeanor. *Hall* v. *State*, 3 Kelly 18.

41. On a charge for a misdemeanor, every material allegation, though laid under a videlicit, is traversable. *State* v. *Phinney*, 32 Maine, 439.

42. Where an indictment is found in the Quarter Sessions in Pennsylvania, and within the jurisdiction of that court to try, still it may be transferred to the Court of Oyer and Terminer for trial there. *Hackett* v. *Commonwealth*, 15 Penn. State R. 95.

43. It is not necessary to allege, in an indictment for carrying a concealed pistol, that the pistol was loaded at the time; the Revised Statutes of Indiana of 1838, p. 217, does not require that the pistol should be loaded. *The State* v. *Dugan*, 6 Blackf. 31.

44. In indictments for misdemeanors, several counts for different offences may be allowed, if the judgments on the different offences be the same in their nature, as where the punishment for one offence is fixed by statute, or otherwise, and the punishment for another is of the same character, but only discretionary with the Court. *Stone* v. *the State*, 1 Spencer 404.

45. It is held that in misdemeanors so much strictness is not required, as in indictments for felonies is necessary. *Taylor* v. *the State*, 6 Humph. 285. *Sanderlin* v. *the State*, 2 Humph. 315.

46. In indictments for misdemeanors, the Court does not require as great certainty as in indictments for felonies; certainty to a common intent is sufficient. *Martin* v. *the State*, 6 Humph. 204.

47. Where the indictment charges the defendant with selling spirituous liquors to a slave, the property of Abner Vaughn, without a permit from his master; it was held that the name of the slave and the name of his master need not have been specified in the indictment. *Martin* v. *State*, 6 Humph. 204.

48. Several misdemeanors may be joined in the same indictment, and a conviction for all may take place at the same time, and the prosecution cannot be compelled to select a single offence among those charged, and proceed for that alone. *The People* v. *Costello*, 1 Denio 83.

49. But where, in an indictment against three persons for misdemeanor, distinct offences were charged in different counts, and on the trial, the defendants being tried together, the evidence tended to show that two crimes had been committed; and when the prosecution rested, there was no evidence against one of the defendants, in respect to one of the offences charged, though there was testimony tending to show them all guilty of the other offences; and the defendants applied to the Court to compel the prosecutor to elect for which offence he would proceed; it was held that he should have been required to make such election. *Ib.*

50. Such application being addressed to the discretion of the Court before which the trial took place, whether a decision denying it could be corrected by this Court upon a bill of exceptions —*Query*. *Ib.*

51. Where an indictment was found against the defendant for keeping a disorderly house, and charging him with keeping a disorderly and ill governed house, and unlawfully causing and procuring, for his own lucre and gain, certain persons, as well men as women, of evil name and fame, and of dishonest conversation, to frequent and come together in his said house at unlawful times, &c. In answer to an objection that the indictment was too general, the Court held that it was sufficient. *Commonwealth* v. *Stewart*, 1 Sergeant & Rawle 342.

52. By statute (laws of 1845, ch. 260, § 2) it is a misdemeanor to administer drugs, &c., to a pregnant female, with intent to produce a miscarriage, and by statute (laws of 1846, ch. 22, § 1), it is manslaughter to use the same means with intent to destroy the child, in case the death of such child be thereby produced. The indictment charged all the facts necessary to con-

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stitute the crime of manslaughter, except the intent with which the acts were done; and in its conclusion it characterized the crime as manslaughter; but the only intent charged was an intent to produce a miscarriage; held that the indictment was fatally defective for the felony, but good for the misdemeanor, and that the accused was properly convicted of the latter offence. *Lohman* v. *the People*, 1 Comstock's R. 379.

53. A conviction for a misdemeanor, under such an indictment, would, it seems, be a bar to a subsequent indictment for felony. The record would be conclusive that the acts were done with the intent alleged in the indictment, and, therefore, the people could not allege a different intent, so as to constitute a different offence. *Ib.*

54. The act of assembly of 1820, of the State of Alabama, which contains a provision authorizing the judges of the Circuit Court to reserve questions which are novel and difficult in criminal cases, would seem to exclude cases of misdemeanors. *Callahan* v. *the State*, 2 Stewart & Porter 379.

55. A count for a misdemeanor at Common Law, and one for a misdemeanor contra formam statuti, may be joined in the same indictment. *The State* v. *Thompson*, 2 Strobhart 12.

56. Where the statute contains a general prohibitory clause, and even if a specific remedy by a subsequent clause, and no mention had been made of indictment, it might well have been maintained that an indictment would lie for the misdemeanor contained in a violation of the prohibition. *Ib.*

57. But after a general verdict of guilty, if the punishment be diverse of the two misdemeanors—*Query*, which shall judgment follow? *Ib.*

58. And since the statute has enacted a mitigation of the Common Law punishment, even if the indictment were at Common Law only, the provisions of the statute cannot be exceeded by the discretion of the Court, and the judgment must be according to the statute. *Ib.*

59. Where a defendant is indicted, and convicted, for a misdemeanor, the Court held that after the plea of not guilty, and a trial and verdict upon that plea, it is not competent to arrest the judgment for any supposed variance between the information and presentment. *Jones' case*, 2 Gratt. 555.

60. In all cases of misdemeanor, both great and small, it has been the practice of the Superior Court of South Carolina to give the defendant one term to prepare for his defence. *The State* v. *Fraser*, 2 Bay 96.

61. It is the province of the Court to assess the fine in the United States' courts in cases of indictments for misdemeanors. *United States* v. *Mundel*, 6 Call. 245.

62. A judgment for a misdemeanor cannot be given in a case where the indictment is for a misdemeanor, and the conviction is as for a felony. *The State* v. *Wheeler*, 3 Vt. 347.

63. Where the defendant was indicted for a misdemeanor, under the statute of Virginia, and found guilty, but the jury returning a general verdict, and omitting to assess the fine, which it was in their power to do. On a motion in arrest of judgment, it was decided that judgment of imprisonment must pass upon the prisoner. *Commonwealth* v. *Frye*, 1 Virg. Cas. 19.

64. Where a defendant is convicted of a misdemeanor, and that offence is sufficiently charged in the indictment, the conviction will be sustained, if otherwise valid, notwithstanding there is an allegation in the indictment of facts characterizing a higher crime. *People* v. *Lohman*, 2 Barb. 216.

65. In a case of a misdemeanor, where the accused has been recognized to appear, he may be tried whether he appear or not. *Canada* v. *Commonwealth*, 9 Dana 304.

66. An accessory is not liable to be tried as for a misdemeanor, where the principal is amenable to justice; and it was held that the principal ought to be convicted before the accessory is put upon his trial. The act of 1797, ch. 19, does not infringe this rule. That act only extends to cases where the principal escapes and eludes the process of law. *The State* v. *Groff*, 1 Murph. 270.

67. Where the defendant is indicted for a misdemeanor, under the Tennes-

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see act of 1837–'8, ch. 137, passed to prohibit persons from wearing, under their clothes or concealed about their person, any bowie-knife, Arkansas tooth-pick, or other weapon in form, shape, and size resembling such bowie-knife, or Arkansas tooth-pick, &c.; and the proof showed that the knife carried by the defendant was a Mexican pirate knife; held that though not a bowie-knife, still it was a knife resembling one, and that the testimony supported the verdict. *Haynes* v. *the State*, 5 Humph. 120.

68. In cases of mere misdemeanor, it is settled that if the defendant demur to the indictment, whether in abatement or otherwise, and it is overruled, he shall not have judgment to answer over, but the decision will operate as a conviction, and the judgment will be final against him. *Wickwire* v. *the State*, 19 Conn. 477.

69. On an indictment for a misdemeanor, if the evidence be such as to prove a felony actually committed, the prisoner must be acquitted of the misdemeanor, in order to being indicted for the felony. *Commonwealth* v. *Roby*, 12 Pick. 508.

70. In trials for inferior misdemeanors, a verdict may be given in the absence of the respondent. *Sawyer* v. *Joiner*, 16 Vt. 497.

71. And in such cases the justice, after the verdict, if the respondent do not appear, may call the respondent and his bail; he may, also, issue a warrant to apprehend the respondent, and bring him before him to receive sentence, and this is the usual course in the case of a prosecution for a misdemeanor when the verdict is taken in the absence of the defendant. *Ib.*

72. Upon an indictment for keeping a disorderly house, where testimony was offered to show that the house was a matter of general complaint by the neighbors as disturbing them; it was held that such testimony was inadmissible and improper. *Commonwealth* v. *Stewart*, 1 Sergeant & Rawle 342.

NEW TRIAL.

I. Courts having power to grant New Trials. Miscellaneous grounds for New Trials.
II. Newly-discovered Evidence.
III. The admission of improper Evidence.
IV. Separation of Jurors during Trial. Tampering with the Jurors. Misconduct of Jurors. Separation from the Officer in charge of them.
V. When the Verdict is against the weight of Evidence.
VI. When the Evidence is doubtful and insufficient.
VII. Objection to Jurors.
VIII. Motions for New Trials. Affidavits on, admissible.

I. Courts having Power to Grant New Trials—Miscellaneous grounds for New Trials.

1. The Supreme Court of Missouri will not interfere with the finding of the facts by the jury, even in criminal cases, unless it is a case where manifest injustice and wrong have been done, the presumption being in favor of the verdict; nor, with reference to granting new trials, will it exercise any control over the discretion of the lower courts, except in cases "strong and unequivocal." *The State* v. *Cruise*, 16 Mo. (1 Bennett) 391.

2. *Quere*—Whether the Supreme Court of Texas will revise a refusal by the court below to grant a new trial in a criminal case, where the question is one of fact only. *Herber* v. *the State*, 7 Texas 69.

3. Courts of Sessions, as they are organized under the Judiciary Act of 1847, have no power to grant new trials. *The People* v. *Court of Sessions*, 1 Parker's Crim. Rep. 369.

4. Therefore where, in a Court of Sessions, the accused had been found guilty of arson in the third degree, and the Court granted a new trial upon the merits, and refused to pass sentence according to the verdict; held that the granting of a new trial was a nullity, and a mandamus was awarded to compel the Court to proceed and pass sentence. *Ib.*

5. *Semble*, a Court of Oyer and Terminer is invested with power to grant new trials. *Ib.*

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6. The Court of Oyer and Terminer has power to grant a new trial on the merits, after a party has been convicted of felony. *The People* v. *Morrison*, 1 Parker's Crim. Rep. 625.

7. The cases of *the People* v. *the Judges of the Dutchess Oyer and Terminer* (2 Barb. S. C. R. 282), and *the U. States* v. *Gilbert* (2 Sumner 19), reviewed and disapproved. *Ib.*

8. A new trial ought never to be granted, notwithstanding some mistake or even misdirection by the judge, provided the revisioning Court is perfectly satisfied that justice has been done, and that, upon the evidence, no other verdict could have been found. *Johnson* v. *the State*, 14 Georgia R. 55.

9. The Court has the right to grant the prisoner a new trial after a conviction in a capital case, if sufficient cause be shown. *State* v. *Prescott*, 7 N. Hamp. 287.

10. New trials can be granted in the Courts of the United States, in criminal cases, both capital and others. *United States* v. *Keene*, 1 McLean 429.

11. Where the error for which a former judgment was reversed, occurred during the progress of the trial, after issue joined, and did not in any degree affect the plea which remained unimpaired by the reversal; held that so long as this plea stood, the prisoner could not be arraigned a second time, except by a withdrawal of his first plea. *Byrd* v. *State*, 1 Howard 247.

12. In South Carolina, where an indictment was found against road-commissioners for obstructing a road, and the indictment contained two counts, upon the second of which the jury found the defendants guilty; held that if a new trial was granted in such case, it would restore the case to that position where it stood before any proceedings in it were taken subsequent to the finding of the bill of indictment. *State* v. *Commissioners*, Riley 273.

13. Where no exceptions were taken in the court below, to the refusal to grant a new trial, the Supreme Court of Arkansas held, on appeal, that no notice of the case could be taken in that Court. *Robinson* v. *the State*, 5 Ark. 659.

14. In the trial of a capital case, the original venire ought to be first drawn and tendered; but if the judge should, where there are only eleven of the original panel, direct tales-jurors to be drawn with them, the prisoner has no right to a venire de novo on this account, if he has had an opportunity of accepting or rejecting all of the original venire. *State* v. *Lytle*, 5 Iredell 58.

15. Where one of the venire, being called, was challenged by the State and directed to retire till the panel was gone through with, and was not afterwards recalled, the prisoner making no motion to that effect, and it being known that the juror was a witness for the prisoner; held that this was no ground for a venire de novo, on the part of the prisoner. *Ib.*

16. A new trial never has been, and, it may safely be predicted, never will be granted, upon the reported observations of jurors as to their conduct during the trial. Hearsay evidence of misconduct in jurors cannot, therefore, be received to set aside a verdict. *Stone* v. *State*, 4 Humph. 27.

17. In a case of murder, where, on the jury's coming into Court, one of them said, upon their being polled, "that when he first went out he was not for finding the prisoner guilty, but that a majority of the jury was against him, and that he then agreed to the verdict as delivered in by the foreman," and when again asked, what is your verdict now? he answered, "I find the prisoner guilty;" held that the verdict was not liable to be set aside for this irregularity. *State* v. *Godwin*, 5 Iredell 401.

18. Where a defendant was indicted for stealing fifteen hogs, and the statute affixed a penalty of five dollars for each hog taken, and on the trial it was only shown that the defendant stole three hogs. On a motion for a new trial, on the ground that the charges in the indictment were not proved as laid; held that the defendant was entitled to a new trial, although the Attorney-General offered to obtain a remission of all the penalties but for the three hogs proved to have been stolen. *State* v. *Herring*, 1 Brevard 159.

19. The Municipal Court of the city

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of Boston has the power, in criminal cases, on the petition or motion in writing of the defendant, to grant a new trial for any cause for which, by law, a new trial may be granted, or when it shall appear to the Court that justice has not been done. *Com.* v. *Benesh*, Thacher's Crim. Cas. 684.

20. Where a witness, subpœnaed by the State, but not examined, voluntarily leaves the Court, this is no ground for a new trial on behalf of defendant. If the testimony of the witness was material to the defence, it was the defendant's duty to have subpœnaed him. *State* v. *Blennerhassett*, Walker 7.

21. Where it is the jury's duty in a criminal case to assess the fine according to the nature and aggravation of the offence, the Court will not in such case interfere and grant a new trial, unless the fine is so excessive as to evince partiality or corruption in the jury. *Ib.*

22. Where a defendant was convicted of stealing cattle, and it appeared that the accused took the cattle alleged to have been stolen, under a color of title, a new trial was ordered on defendant's motion. *State* v. *Simons*, Dudley Ga. 27.

23. Where the Court at the trial considered the prisoner's guilt doubtful, a new trial was ordered upon the consent of the prosecuting attorney. *Dilby* v. *State*, Riley 302.

24. In criminal trials, the presumption is in favor of the verdict; unless the record affirmatively overthrows this presumption, the Court will not disturb the verdict; and it must do this in such manner as to show that manifest injustice and wrong have been done in the premises. *Waller* v. *State*, 4 Ark. 87.

25. Where a defendant is tried, and no issue is joined, the Court will award a venire de novo, either to the defendant or to the State. *State* v. *Hardie*, 3 Murph. 232.

26. If a case be presented to the Court in such a defective manner that the points cannot be distinguished by the Court, a new trial will be granted. *State* v. *Upton*, 1 Dev. 268.

27. Where it appears from the certificate of the judge, that a case was intended to be made by him, but none comes up with the record, the Supreme Court of North Carolina will grant a new trial. *State* v. *Powers*, 3 Hawks 376.

28. A person indicted for a capital offence may waive his right to a copy of the indictment, and if he pleads and goes to the trial without making objection for want of such copy, the objection cannot be taken after verdict. *Lisle* v. *State*, 6 Mo. 426.

29. *Quere*—Whether in criminal cases any other questions can be revised, than those of law, contradistinguished from those of fact. *Herber* v. *State*, 7 Texas 69.

30. Where it is the duty of the jury, on the trial for grand larceny, and upon conviction of the accused, to ascertain the terms of imprisonment, which they failed to do before they were discharged by the Court, they having been called back before leaving the court-room, except one, who had gone, in company with the deputy sheriff, a short distance; held that the verdict was bad, and must be set aside. *Mills' case*, 7 Leigh 751.

31. Where the defendant was indicted and convicted for stealing a note of hand for $547 14c., and it appeared on the trial that the fact of a certain assignment of a judgment to the accused became material, while the attorney for the prosecution denies that any such judgment existed; but such denial not being known to the Court and counsel for the accused, the defendant having offered to prove by parol testimony that the judgment was his property, but the Court refused to allow it; it was held on a motion for a new trial, that a new trial would be granted; where it appeared that had the counsel for the defendant known that the attorney for the prosecution denied the existence of the judgment, time would have been given by the Court to produce the judgment. *Commonwealth* v. *Randall*, Thacher's Crim. Cases 500.

32. He who desires a new trial, must receive it as to the whole case. *Morris* v. *the State*, 1 Blackf. 37.

33. A petition for a new trial is addressed to the discretion of the Court, and will not be granted but upon sub-

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stantial, and not upon merely formal grounds; nor where the Court can see that strict justice has been done. *Lester* v. *State*, 11 Conn. 415.

34. If the clerk, in calling over the names of the jury, calls them in the order in which they were impanelled, instead of following the order contained in the venire, this will not entitle the prisoner to a new trial on the indictment. *State* v. *Slack*, 1 Bailey 330.

35. A non-compliance of the clerk to put the names of all the persons returned as jurors into a box, from which juries for the trial of issues are to be drawn according to the statute, is not sufficient ground for setting aside a verdict, either in a criminal or civil case, where the Court are satisfied that the party complaining has not or could not have sustained any injury from the omission. *People* v. *Ransom*, 7 Wend. 417.

36. In a case of conviction for a misdemeanor, a new trial was granted, although the motion was not made until the second term after the said verdict was rendered. *Commonwealth* v. *Crump*, 1 Virg. Cas. 172.

37. Where a letter is omitted in a prisoner's name on the back of the indictment, but the true name is inserted in the body of the indictment; held that such omission was no cause for granting the prisoner a new trial. *State* v. *Duestoe*, 1 Bay 377.

38. Where a prisoner was tried at a Court of Oyer and Terminer and jail delivery for murder, and convicted without a venire returned and filed, it was held to be error, and the judgment was arrested, and a new trial awarded. *People* v. *McKay*, 18 John. 212.

39. Whether the Court will exercise the power of granting a new trial, where no error appears on the record, is in the discretion of the Court, and depends on the circumstances of the case. *Commonwealth* v. *Green*, 17 Mass. 515.

40. For offences greater than misdemeanor, a new trial cannot be granted, whether the accused be acquitted or convicted. *People* v. *Comstock*, 8 Wend. 549.

41. It seems, in misdemeanors, a new trial may be granted where the defendant has been improperly convicted, but not where he has been acquitted. *Ib.*

42. In criminal cases, where a verdict is imperfect, and for that reason set aside, a venire facias de novo may be awarded, and a new trial had of the prisoner. *Commonwealth* v. *Gibson*, 2 Virg. Cas. 70.

43. Where a prisoner becomes entitled to a new trial, he can only be tried upon those counts in the indictment on which he was convicted, and not upon those of which he stands acquitted. *Lithgow* v. *Commonwealth*, 2 Virg. Cas. 297.

44. Courts of Oyer and Terminer have authority to grant new trials on the merits. *People* v. *Stone*, 8 Wend. 39; vide *People* v. *Townsend*, 1 Johnson's cases 104.

45. Where a material witness had declared before the trial that he would hang the prisoner by his testimony, if he could, of which declaration the prisoner had no knowledge until after the trial; held that this was no cause for staying sentence. *Commonwealth* v. *Drew*, 4 Mass. 391.

46. Where the government in a criminal trial had a witness sworn who had been convicted of an infamous crime, whose testimony was not objected to on the trial; held that a new trial could not be granted the defendant upon discovering the incompetency of the witness after the trial. *Commonwealth* v. *Green*, 17 Mass. 515.

47. But it seemed to be a matter of discretion, where there were other circumstances of the case in favor of the prisoner, to grant or refuse a new trial in such cases. *Ib.*

48. A new trial will not be granted, even in a criminal case, because the district attorney, by mistake, withholds in his hands papers important to the defendant, unless the latter uses due diligence to obtain them. *The People* v. *Vermilyea*, 7 Cowen 368.

49. Where the Court refused to have the order in which the prisoners were placed at the bar changed before the introduction of each of the witnesses for the government who were excluded from the court-room, after the first of these witnesses had been examined

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and had retired; held that the Court did not err in so refusing. *United States* v. *Gilbert*, 2 Sumner 19.

50. The Supreme Judicial Court of Massachusetts has power to grant a new trial, on the motion of one convicted of a capital offence, sufficient cause being shown therefor. *Commonwealth* v. *Green*, 17 Mass. 515.

51. Where it is in the discretion of a Court to grant or refuse a motion, a refusal cannot be made ground to set aside the verdict. *Com.* v. *Childs*, 10 Pick. 252.

52. On the trial of an indictment for murder, the prisoner offered a witness, who was so much intoxicated as to be incapable of understanding the obligations of an oath, the Court refused to permit him to be sworn, but told the prisoner he might recall him when he was sober; the prisoner examined other witnesses, but did not recall this one; held that this was no cause in law for a new trial; granting or refusing a new trial on this ground was a matter of discretion for the judge. *State* v. *Underwood*, 6 Iredell 96.

53. The Supreme Court of Georgia will rarely, if ever, interfere to control the discretion of the Circuit Court in the applications for new trials, where there has been a finding on the merits, and especially in criminal cases. *Hodgins* v. *State*, 2 Kelly 173; vide *McWirt's case*, 3 Gratt. 594.

54. Where the statute gives the jury the power of fixing the time of imprisonment, the Court will not assume the power to control the decision of the jury in such case. *Ib.*

55. It must be a very clear case of error in law, or a very naked, bald case as to the facts, which will authorize the Supreme Court of Georgia to control the Court below, where it has a discretion to grant or refuse a motion for a new trial in criminal cases. *Jones* v. *the State*, 1 Kelly 610.

56. Where the question as to granting a new trial depends only upon the credibility of a witness, a refusal of the Circuit Court to grant it will not be regarded as erroneous. *Weinzorpflin* v. *the State*, 7 Blackf. 186.

57. A new trial will not be granted on a motion in behalf of the State, on an indictment where there has been a verdict in favor of the defendant. *State* v. *De Hart*, 2 Halsted 172.

58. In any criminal case, the Circuit Court of the United States, on good cause shown, may grant a new trial. *United States* v. *Conner*, 3 McLean 573.

59. In criminal cases, motions for new trials rest in the discretion of the Circuit Court where they are made, and the propriety of their decisions in refusing them cannot be reviewed. *Pate* v. *the People*, 3 Gilman 644.

60. A new trial may be granted in any criminal case. *Weinzorpflin* v. *the State*, 7 Blackf. 186.

61. Where, in a criminal case, the Superior Court has refused a new trial, the Supreme Court of Georgia will not interfere with the decision of that Court, but in cases that are strong and unequivocal. *Roberts* v. *State*, 3 Kelly 310.

62. Where a female is convicted of a penitentiary offence, her pregnancy is no cause for a new trial. *Coleman* v. *State*, 8 Eng. 105.

63. A new trial was moved for on the ground that the grand jury had been drawn by a boy of 13 years of age, and that such illegal drawing might have affected the composition of the petit jury; held that this objection, if a valid one at any time, came too late. It should have been made before the petit jury was sworn, in the form of a challenge to the array. *State* v. *Underwood*, 6 Iredell 96.

64. A retrial was had in a criminal case at the same term, the first jury having been discharged by the Court. *State* v. *Updike*, 4 Harrington 581.

65. Being clearly of opinion that the 18th section of the act of 1751, ordering, &c., of negroes and other slaves, &c., is still in force, the Court held the ignorance of that fact, on the part of the freeholders of a magistrate's court, to be sufficient ground for a new trial. *State* v. *Nicholas*, 2 Strob. 279.

66. In a criminal case, the disclosure of the verdict by the jury by order of the Court, can be no ground for setting aside the verdict, as it might be, if disclosed without the inquiry of the Court. *State* v. *Bryant*, 21 Vt. 479

67. After a verdict of guilty and

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judgment reversed on account of error in the proceedings, the prisoner is not protected from a second trial before a jury, by the provision in the bill of rights, that the accused shall not be twice put in jeopardy for the same offence. *Sutcliffe* v. *State*, 18 Ohio 469.

68. Applications for new trials are founded upon the supposition that some injustice has been done; and without proof to that effect, the applications are invariably denied. *State* v. *Camp*, 23 Vermont 551.

69. Where the defendant was indicted for obstructing the highway, and on conviction, moved for a new trial on the ground that he was surprised on the trial, by supposing that the point of obstruction was at a certain place on the highway, while it was shown to be at another point, for which he was unprepared to defend; held that this was no cause for a new trial. *Wholford* v. *Commonwealth*, 4 Gratt. 553.

70. It being necessary to insert upon an indictment the names of the witnesses in support of the indictment, to enable the defendant to know who are the authors of the prosecution, and to enable him to prepare for his defence; held that when the names were omitted, and no objection was taken by the defendant on this account on the trial, there was no ground for a new trial. *Ray* v. *State*, 1 Iowa 316.

71. Where one of the several defendants to a criminal prosecution is acquitted on the trial, it is competent for the Court to grant a new trial to the other defendants without setting aside the verdict as to the one acquitted, in order that they may have the benefit of his testimony upon such new trial, provided that they show a case of so much merit and so much diligence on their part as to entitle them to a new trial. *State* v. *Ayer*, 3 Foster 321.

72. Where persons are made defendants to a criminal prosecution, to prevent their being used as witnesses for the defence, the proper course for the party desiring their testimony is, to move for a separate trial, which the Court will grant or not, in their discretion, or if there be no testimony against one of several defendants at the trial, motion should be made for a separate verdict, which being accorded, he would become a competent witness for the defence, and semble, that the neglect or omission, in such case, to move for a separate trial or separate verdict, would be a ground for refusing a new trial for the purpose of giving the parties convicted the benefit of the testimony of the acquitted. *Ib.*

73. The statute authorizing the refusal to grant new trials to be assigned for error, does not apply to criminal cases. *Martin* v. *the People*, 13 Ill. 341.

74. A subordinate Court has not power to grant a new trial to one who has been convicted of embezzlement. *People* v. *Dalton*, 15 Wend. 581.

75. Where the prosecutor acknowledged that he did not know the defendant, but that two persons with whom he was gaming called him by a particular name, to which he answered, and he pleads to the indictment by that name, and is found guilty, the Court will not grant a new trial on the ground that he has not been sufficiently identified. *State* v. *Rawles*, 2 Nott & McCord 331.

76. Where the prisoner was permitted to file a plea in abatement, to which the attorney for the Commonwealth replied generally; and that the issue thus joined was decided by the Court against the prisoner; held that the issue so joined, not being an issue in law, but of fact, ought to be submitted to a jury for trial, and it was the unanimous opinion of the Court that for this error the judgment must be reversed, and the case remanded for a new trial. *Day* v. *the Commonwealth*, 2 Gratt. 562.

77. Where a defendant is acquitted on a criminal prosecution by the State, no new trial can be granted. *State* v. *Taylor*, 1 Hawks 462. *State* v. *Martin*, 3 Hawks 381.

78. No one shall be tried twice for the same offence, or his life or person brought again into jeopardy when there has once been an acquittal, and upon this principle no new trial can be granted after acquittal. *State* v. *Wright*, 3 Brevard 421; vide *State* v. *Riley*, 2 Brevard 444.

79. It is well settled, that where several defendants are tried at the same time, and some are acquitted and some convicted, the Court may grant a new

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trial as to those convicted, without being under the necessity of setting aside the entire verdict. *Campbell* v. *the State*, 9 Yerg. 333.

80. In England, when a new trial is granted in favor of two defendants who have been convicted, while others have been acquitted, in order to prevent the revival of proceedings against the latter, there are two methods which may be adopted, the first of which is to alter the original venire so as to make it embrace those only who are convicted, and the other is to make an entry on the record, that the verdict was improperly taken against those who were convicted, and then to award a new trial as far as they are concerned. *Ib.*

81. Where on the trial of an indictment for larceny the plea was not guilty, and the verdict and judgment for the State, and it appeared by the transcript that the cause had been tried by only eleven jurors; the Court held the trial to be a nullity, set aside the judgment and verdict, and remanded the cause for another trial. *Brown* v. *State*, 8 Blackf. 561.

82. On a trial for murder, where it appeared that a material witness was absent, but whose attendance the defence said they would be able to procure on the following day, and the trial proceeded, and it appearing that the absent witness was not obtained, though nearly everything was proved by other witnesses which the defence expected to prove by the absent witness; held that there was no ground in this for a new trial. *Young* v. *Commonwealth*, 4 Gratt. 550.

83. And where it appeared in such case that a witness, who was present at the commencement of the trial, and being a material witness for the defence, was taken sick before the evidence for the State was closed, and did not attend and testify on the trial; but it also appeared that what the absent witness was expected to testify to, was testified to by other witnesses; held that the absence of such witness, and the want of his testimony, was no ground for a new trial. *Ib.*

84. Upon the conviction of a prisoner for murder, there being proof on the trial that there was blood on the prisoner's clothes, the prisoner after the trial filed his affidavit, stating that he was surprised by this proof; that he did not know that it would be produced against him, nor did he know that he could explain it until after the trial; held not to be ground for arresting the sentence of the Court, and granting a new trial. *Gilbert* v. *the State*, 7 Humph. 524.

85. If it be found on polling the jury in a criminal case, that four of them dissent from the verdict, the defendant will be entitled to a new trial on the indictment. *State* v. *Hardin*, 1 Bailey 3.

86. Where there are two distinct charges in an indictment of different offences, differently punishable, a new trial will be granted on a general verdict of guilty. *State* v. *Montague*, 2 McCord 257.

87. On the trial of an indictment for receiving stolen goods, which set forth the record of a former conviction, the jury found a general verdict, nothing having been said to the jury as to the former conviction; held that the verdict must be set aside. *Com.* v. *Briggs*, 5 Pick. 429; vide *Com.* v. *Briggs*, 7 Pick. 177.

88. In a criminal trial for an assault with intent to commit murder, if the record does not show that the prisoner was present in Court when the verdict was delivered, a new trial will be granted for this reason. *Cole* v. *State*, 5 Eng. 318.

89. If, however, the verdict was delivered in the presence of the defendant, and the irregularity consists simply in pronouncing sentence in his absence, the consequence would not necessarily be the awarding of a new trial, but only a reversal of the judgment, and a remanding of the cause, with instructions to proceed to pronounce judgment in accordance with the verdict, and according to law. *Ib.*

90. It is the right of an accused person to be present during the trial of his case, and at the return of the verdict, and when deprived of these privileges by being imprisoned in a jail, or in any other improper manner, the verdict returned against him should not be followed by judgment or sentence of the

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Court, but a new trial should be ordered, if requested. *Rose* v. *the State*, 20 Ohio 31.

91. And the fact that his counsel are present in Court during the trial, and at the return of the verdict, and do not raise any objection on account of his absence, does not amount to a waiver. *Ib.*

92. Where the object of a new trial is to obtain an opportunity to impeach a witness who testified on the trial, it will not be granted. *State* v. *Henry*, R. M. Charlton 505.

93. A new trial may be granted on the ground of surprise, but a party, after he has submitted his case, cannot, on finding that the verdict is against him, become surprised and ask the Court to relieve him from an error, mistake, or omission, by granting him a new trial. *People* v. *Mack*, 2 Parker's Crim. R. 673.

94. Where a defendant was tried at a Court of Oyer and Terminer and jail delivery, for murder, and convicted, there being no venire returned and filed, it was held to be error, and the judgment was arrested, and a new trial granted. *People* v. *McKay*, 18 John. 212.

II. Newly-discovered Evidence.

95. Where the newly-discovered evidence is merely cumulative in a criminal case, a new trial will be denied. *Roberts* v. *State*, 3 Kelly 310.

96. In criminal cases, where a new trial is sought on the ground of newly-discovered evidence, it must appear, first, that the evidence is new, such as was not used on the former trial, such as either had no existence at the former trial, or the party did not at the time of the trial know was in existence; and the party's ignorance must be made to appear beyond a doubt. Second, it must be material to the issue joined, material to the point to be decided by the verdict, and not collateral; it must go to the merits of the case, and not to discredit or impeach a former witness. Third, it must appear that the party has used all diligence; that he has been vigilant in seeking both to discover and to procure the evidence. Fourth, it must not be cumulative. *State* v. *Carr*, 1 Foster 166.

97. It is a general rule that the discovery of such new evidence as would only impeach the evidence of a witness on the former trial, is not a sufficient reason for a new trial. *Bland* v. *State*, 2 Carter 608.

98. A new trial will not be granted on the ground of newly-discovered evidence, if that evidence might have been procured on the former trial, by the use of due diligence, nor to let the accused into a defence of which he was apprized at the former trial. *Lester* v. *the State*, 11 Conn. 415; vide *Roberts* v. *State*, 3 Kelly 310.

99. Therefore, where A. & B. having been bound over to the Superior Court, on a charge of burglary, and having failed to procure bonds, were committed to prison by virtue of a mittimus, from which it appeared that they were ordered to become jointly bound, with sureties for their appearance; and during their imprisonment they assaulted the jailer and his assistant, with a deadly weapon, and maliciously attempted to take their lives; being subsequently indicted for this offence, they were tried and convicted; on a petition for a new trial, on the ground that the mittimus, by which they were committed to prison was irregular and void, and that their counsel, not being informed of the contents of such mittimus, but supposing it to be a valid warrant, in order to avoid the prejudice which might have been excited in the minds of the jury by the statement and the proof of the cause of the commitment, admitted the legality of the imprisonment, by reason of which admission the petitioners were found guilty; it was held that they were not entitled to a new trial. *Ib.*

100. The defendant in a criminal case is not entitled to a new trial on account of having discovered since the trial, that the witnesses for the State, who had been a long time subpœnaed, could be impeached by showing their reputation for veracity to be bad. *Herber* v. *the State*, 7 Texas 69.

101. Upon a conviction for man-

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slaughter, a new trial cannot be granted on the ground of newly-discovered evidence, to the effect that the deceased bought a pistol, declaring it to be for the purpose of killing the accused; this being some weeks before the killing, and there being no evidence of notice to the accused of the threats, it cannot be presumed that he acted under their influence in killing the deceased. *Carr* v. *the State*, 14 Geo. 358

102. Where, with the newly-discovered evidence considered, the case is still in law what the jury found it, a new trial will not be granted. *Ib.*

103. A new trial will not be granted on the ground of newly-discovered testimony, where it appears that the testimony was known to the party long before the trial, and no excuse is shown for not procuring it, or where it appears that the evidence would be incompetent if produced. *Holeman* v. *State*, 8 Eng. 105.

104. A new trial will not be granted on the ground of newly-discovered testimony, if the only object of the evidence be to impeach the credit or character of a witness. *Leving* v. *State*, 13 Geo. 513.

105. If it be true that an innocent man has been convicted upon false testimony, and witnesses have since been discovered, who can prove that testimony false, the victim is not without a remedy, potent to break his bonds, and free his character from stain. *Ib.*

106. Such a case presented to the executive, will, without doubt, successfully appeal to the power with which the constitution clothes that officer, and speedily invoke that pardoning clemency for the sufferer, which, whilst it carries with it a remedy for his wrongs, will insure justice to his character and memory. *Ib.*

107. As a general rule, new trials are not granted for the impeachment of witnesses, nor for the admission of cumulative testimony. *Porter* v. *State*, 2 Carter 435.

108. Applications for new trials on the ground of newly-discovered evidence, are to be received with caution, and this in proportion to the magnitude of the offence. The application should be corroborated by the affidavits of other persons than the accused, and if possible, those of the newly-discovered witnesses themselves. And it is not sufficient for the applicant to state that he did not know of the existence of the testimony in time to have brought it forward on the trial, but it must appear that he could not have ascertained it by reasonable diligence. *Pleasant* v. *the State*, 8 Eng. 360.

109. In criminal cases as well as in civil cases, it is no ground for a new trial, if newly-discovered evidence be merely cumulative. *Com.* v. *Flanagan*, 7 Watts & Serg. 415; *Com.* v. *Murray*, 2 Ashmead 41; *Com.* v. *Williams*, 2 Ashmead 69.

110. Where a new trial is sought on the ground of surprise, with a view of producing testimony which the party might have introduced on the trial, but neglected to do so; held that no new trial could be granted. *Ditto* v. *Com.*, 2 Bibb. 17.

111. In South Carolina, it was held that the discovery of new evidence in a capital case was no ground for a new trial. *State* v. *Harding*, 2 Bay 267; contra in case of conviction for passing counterfeit money. *Scott* v. *State*, 1 Root 155; *State* v. *Lockin*, 2 Root 84.

112. Where the newly-discovered evidence was a confession of the prisoner's wife to third persons, during the trial, that she was the guilty party, and that her husband knew nothing about it, the Court refused a new trial on such ground. *State* v. *J. W.*, 1 Tyler 417.

113. If newly-discovered evidence be known before the case has been submitted, the prisoner must use due diligence to place it before the jury, or a new trial will not be granted on the ground of such evidence. *People* v. *Vermilyea*, 7 Cowen 368; vide *U. States* v. *Gibert*, 2 Sumner 19.

114. A new trial will not be granted in order to give time to the defendant to scrutinize a neighborhood, and discover some one who may testify to the bad character of a witness, whose character had been discredited on the trial. *Com.* v. *Waite*, 5 Mass. 261.

115. No new trial will be granted on the ground of newly-discovered evidence where such evidence only goes

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to discredit a witness on the former trial. *Deer* v. *State*, 14 Mo. 348.

116. It is well settled, upon reason and authority, in both criminal and civil cases, that after-discovered evidence, in order to afford proper ground for a new trial, must be such as reasonable diligence on the part of the party offering it could not have been secured at the former trial; must be material in its object, and not merely cumulative and corroborative, or collateral; and must be such as ought to be decisive, and productive, on another trial, of an opposite result on the merits. *Thompson's case*, 8 Gratt. 637.

117. Where the sole object and purpose of the new evidence is to discredit a witness on the opposite side, the general rule is, subject to rare exceptions, to refuse a new trial. *Ib.*

118. As a general rule, new trials are not granted for the impeachment of witnesses, nor for the admission of cumulative testimony. *Porter* v. *State*, 2 Carter 435.

119. To entitle a party to a new trial on the ground of newly-discovered evidence, it must appear that the evidence is material to the issue, and not cumulative, and that it would, if offered, be likely to produce a result different from that of the former trial. *Giles* v. *State*, 6 Geo. 276.

120. And where a party discovers new evidence through the information of others, in order to obtain a new trial on this account he must produce the affidavits of those giving the information. *Ib.*

121. The propriety of granting a new trial, where the offence of a misdemeanor has been positively proved, with a view of letting in the defence of an alibi, depends so much upon attending circumstances, which can be under the view of the Circuit Court only, that it is almost impossible for a Court of Error to act with safety upon it. *Thompson* v. *State*, 5 Humph. 138.

III. The Admission of Improper Evidence.

122. In a criminal case, if one of the jurors, after the jury have retired, state to the jury that the defendant had stolen a hog in the country, which was not in evidence on the trial, but which was regarded as evidence by the jury; held that a new trial ought to be granted in such case. *Booby* v. *State*, 4 Yerger 111.

123. It is a rule of law well settled, that if a jury, after retiring to consider of their verdict, hear other testimony, it will form a ground for a new trial. *Hudson* v. *the State*, 9 Yerger 408.

124. On the trial of an indictment for burglary and larceny, when the jury came into Court after they had retired, and wished an explanation from a witness, whereupon the witness stated a fact which he had not stated before, but the jury were instructed by the Court not to regard the additional testimony; held, on a motion for a new trial, on the ground that the jury had heard additional testimony — that, where one of the jurors made an affidavit that his verdict was founded upon the additional testimony,—this was not ground to authorize a new trial. *Ib.*

125. If in the course of a trial for murder, improper testimony is submitted to the jury, without objection on the part of the prisoner, the illegality of the testimony is thereby waived, and its admission will not be cause for a new trial. *Stone* v. *the State*, 4 Humph. 27.

126. A new trial will be granted in a case where it appears that important testimony on behalf of the prisoner has been excluded, by reason of the form in which the indictment is drawn, and where it appears from the circumstances of the case that the defendant was justly entitled to the benefit of such testimony. *Commonwealth* v. *Manson*, 2 Ashmead 31.

127. Where, in a criminal case, improper testimony has been admitted, and there is any reason to suppose that it has had an influence on the minds of the jurors, a new trial will be granted. *Commonwealth* v. *Bosworth*, 22 Pick. 397.

128. Although sufficient legal evidence be before the jury to justify the verdict, yet if improper testimony be admitted, after objection, a new trial

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will be ordered, because it cannot be known on which the jury relied. *State* v. *Allen*, 1 Hawks 6.

129. Where there was no issue of the violent temper of the prisoner, and the government introduced proof of such temper; held that it was ground for a new trial. *State* v. *Merrill*, 2 Dev. 269.

130. If illegal testimony be admitted against a prisoner on his trial, after objection by his counsel, it will be cause for granting a new trial. *Commonwealth* v. *Green*, 17 Mass. 515.

131. Where one of the jurors on a criminal case stated to the jury after they had retired, and without having been examined in Court, that he had heard the material witness in the case examined before the grand jury that found the bill of indictment, and that the witness then made the same statements that he made before the traverse jury, and it appearing that such declaration of the juror had a powerful influence on them in finding the prisoner guilty; held, that for this reason the verdict of the jury must be set aside. *Donston* v. *State*, 6 Humph. 275.

132. Where illegal testimony is suffered to go to the jury, and the record shows that it was submitted without objection, either on its introduction or in the argument of the case, the illegality is thereby waived, and a new trial will not be granted in consequence of its admission. *Bishop* v. *State*, 9 Ga. 121.

133. Where upon the trial of an indictment for an assault, the Court permitted evidence to go to the jury of two different and distinct assaults, when there was but one charged in the indictment, but it not being objected to on the trial, by the defendant—it was held, on a motion for a new trial, that this was no cause for reversing the judgment and granting a new trial. *Drake* v. *Commonwealth*, 10 B. Munroe 225.

134. On the trial of an indictment for murder, where objectionable testimony is allowed by the Court to pass to the jury, without objection on the part of the accused at the time of its admission; held that such testimony could not be objected to after verdict, and made a ground for a new trial. *State* v. *Gordon*, 1 R. I. 179.

135. To remedy errors committed in the Circuit Court, either in admitting testimony or rejecting it, or in giving proper instruction to the jury, an application must be made for a new trial. *Pogue* v. *State*, 13 Mo. 444.

136. In order to obtain a venire de novo, for the admission of improper evidence, it is not sufficient to state matter rendering it probable that such evidence may have been received, but it is indispensable to state the evidence itself. Otherwise the Court cannot see that the evidence was illegal, and judgment will be affirmed. *State* v. *Clark*, 12 Iredell 151.

137. On the trial of an information for a misdemeanor, no exceptions were taken, but after the verdict was rendered, and during the term, the defendant filed his motion to have the verdict set aside, and for a new trial, for the reason that at the trial the prosecuting officer, in support of the prosecution, introduced, without objection, a witness, who, without being sworn, testified to material facts in support of the prosecution, which was submitted to the jury; held that this irregularity was no ground for setting aside the verdict and granting a new trial, as it did not appear but that the defendant and his counsel knew the fact that the witness was not sworn at the time he testified on the trial; nor did it appear that the defendant had sustained any injury, or that the statements of the witness were untrue. *State* v. *Camp*, 23 Vt. 551.

138. A verdict will not be set aside because illegal testimony has been admitted, if it appears clearly to the Court that the verdict is right, irrespective of such illegal testimony. *State* v. *Engle*, 1 Zabris. 347.

139. According to a well-settled rule in criminal cases, if a prisoner's guilt be clearly made out by proper evidence, in such a way as to leave no doubt in the mind of a reasonable man, his conviction ought not to be set aside because some other evidence was received which ought not to have been. *State* v. *Ford*, 3 Strobhart 517, Note.

140. A new trial was granted in a

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case where proof of the violent temper of the prisoner was introduced by the government, which had not been put in issue by him. *The State* v. *Merrill*, 2 Dev. 269.

141. On the trial of an indictment for libel, the question of malice having been properly submitted to the jury, and they having found malice, a new trial will not be granted, for the reason that the alleged libel was not malicious. *Taylor* v. *State of Georgia*, 4 Ga. 14.

142. On the trial of an indictment for libel, as a matter of practice it is more regular that the libel should not be read to the jury until the defendant has cross-examined the witness who is called to prove the publication; but the fact that it is so read is not a good cause for a new trial. *Ib.*

143. A voluntary defect of preparation, or a mistake in conducting the cause, or the want of such evidence or defence as it was in the party's power to have produced at the former trial, or a discovery of the incompetence of the witnesses examined, are not substantial reasons for setting aside a verdict. *Com.* v. *Benesh*, Thacher's Crim. 684.

144. Where a defendant was indicted, under the 32d sec. of the 126th ch. of the Rev. Sts. of Mass., for obtaining goods under false pretences, and on the trial a book was offered in evidence by the prosecution, in which the complainant stated he had made an entry of the false statements of the defendant at the time of obtaining the goods; but after the trial and conviction of the defendant it was ascertained that the entry in the book was made some time after the obtaining of the goods: on a motion for a new trial, on the ground that the erroneous statement of the complainant had an improper influence on the jurors; held that it was no ground for a new trial. *Ib.*

145. In a criminal case where, after the jury had retired to consult on their verdict, and the Court had adjourned, they sent to the judge a note in writing, requesting advice on two points relating to the case, and the judge returned to them the paper without any reply to the questions, and directed the officer to request the foreman of the jury to read to them the sentence from 1 Pick. 342, showing them that no communication whatever ought to take place between the judge and the jury after the cause had been submitted to them, unless in open Court, and in the presence of the counsel in the cause; held that such act on the part of the judge was no ground for a new trial. *Commonwealth* v. *Jenkins*, Thacher's Criminal Cases 118.

146. Where a motion to set aside the verdict is founded upon the evidence that a witness for the prosecution had made statements in the presence of a juror, prejudicial to the prisoner's character, and showing that he believed him to be guilty of the offence charged, but when he saw the juror he ceased speaking, and he states that he did not know that any juror was present, and that the juror told him afterwards that he did not take any notice of the conversation; held no ground for a new trial. *The State* v. *Ayer*, 3 Foster's R. 321.

IV. Separation of Jurors during Trial—Tampering with the Jurors, and Misconduct of Jurors—Separation from the Officer in charge of them.

147. Held, that the separation of one of the jurors from the panel, in a criminal case, for a short time, is no ground for a new trial, where the State shows by the affidavit of the juror, that he withdrew from his fellows in consequence of indisposition, and that while absent from them, he conversed with no one about the case, and was subject to no improper influences. *People* v. *Reynolds*, 2 Michigan 422.

148. The mere separation of a jury, though impanelled to try a capital case, and although they separate contrary to the directions of the Court, will not of itself be sufficient cause for setting aside the verdict; but if there be the least suspicion of abuse, the verdict should be set aside. *Ib.* Vide *People* v. *Douglass*, 4 Cowen 26.

149. Where there has been an improper separation of the jury during the trial, if the verdict is against the

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prisoner, he is entitled to the benefit of a presumption that the irregularity has been prejudicial to him; and that it is incumbent upon the government to show, and that beyond a reasonable doubt, that the prisoner has suffered no injury by the departure from the forms ordinarily pursued in the administration of justice. *State* v. *Prescott*, 7 N. Hamp. 287.

150. Where, after the jury had retired from court with an officer who had been sworn to attend upon the jury, and before the court adjourned another officer was sworn in court to attend upon the jury, and after the court had adjourned still another officer was sworn by the clerk for the same service; held that such proceeding was no ground for a new trial. *Com.* v. *Jenkins*, Thacher's Crim. Cas. 118.

151. Where, on a criminal trial for passing a counterfeit bank-note, the jury after they retired to consult on their verdict, found in the room where they retired a placard stuck on the wall, which contained allegations to the effect that one of their own number was a counterfeiter, and that he had purposely got on the jury, and it appeared that all of the jurors read the placard: on a motion for a new trial on this account, it was held that there was no cause for a new trial, unless it appeared that the juror by reason of the placard was prevented from giving a proper exercise of his judgment, or that the jurors were influenced by reason of the placard in giving their verdict. *Hall's case*, 6 Leigh 615.

152. Where a communication is made to a jury while deliberating, by a party in whose favor the verdict is rendered, it will avoid the verdict; but a verdict will not be set aside because of such communication where it is made by the losing party, or by a stranger to the controversy. *People* v. *Carnal*, 1 Parker's Crim. R. 256.

153. On a trial for murder, where a person not sworn to take charge of the jury, was allowed to go into the jury-room in the absence of the proper officer, and take charge of the jury; this was held a good ground for a new trial. *Hare* v. *State*, 4 Howard (Miss. R.) 187.

154. The law appears to be well settled, that if a jury take refreshments before they are agreed, at the charge of the party for whom they find a verdict, it shall be set aside; but it must be shown that the refreshments were at the charge of the prosecution, or a verdict against the prisoner will not be disturbed on this ground. *State* v. *Sparrow*, 3 Murphy 487.

155. On an indictment for murder, it is not sufficient, in order to obtain a new trial, simply to show that the jury, during the progress of the trial, drank ardent spirits; it must appear that the jury were so intoxicated as to disqualify them from giving proper attention to their verdict. *Stone* v. *State*, 4 Humph. 27.

156. In cases of indictment for murder, to decide what separation of the jurors or discharge of a juror, shall not be a ground for a new trial, see the *cases of McCarter* and *Tooel*, 11 Leigh 633 and 714.

157. Where, on the trial of an indictment for manslaughter, the jury were allowed to separate, and several persons were allowed to enter the jurors' room and converse with them freely; held to be cause for granting a new trial. *State* v. *Sherbourne*, Dudley 28.

158. In order that the accused may have the full benefit of a judgment of his peers, it is absolutely necessary that the minds of the jurors should not have prejudged his case—that no impressions should be made except what are drawn from the testimony given in court, to operate on them; and that to secure this, they must not be permitted to separate and mingle with the balance of the community, without explanation showing that they had not been tampered with, and that it was not necessary for the prisoner to prove that they had not been. *Stone* v. *State*, 4 Humph. 27.

159. And where jurors are allowed to separate, and the sheriff is allowed to take charge of them without being sworn to do so, if it is shown satisfactorily that, whatever little separation took place, was casual and of no importance, and that there was no tampering, or opportunity of tampering

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furnished by it, and that the sheriff expressly swears that he did not speak to the jury about the case; held that there was no cause for a new trial. *Ib.*

160. The only reason for setting aside a verdict where a separation of the jury has taken place, is that the jury have been tampered with; but where the record precludes any such supposition, the verdict will not be set aside merely because one of the jury, without the permission of the Court, absented himself from the other jurors for a short time. *Whitney* v. *State*, 8 Mo. 165.

161. But where the absence of a part of the jury, after their separation, without the permission of the Court, is for a considerable length of time, it will raise a presumption that they have been tampered with. *State* v. *Fox*, Ga. Decis. (Part 1) 35; *State* v. *Peter*, Ga. Decis. (Part 1) 46.

162. On a trial for murder, it appeared that, after the jury were sworn, and during the continuance of the trial, which lasted several days, a part of the jury did, very frequently of a night, after they had retired from the court, absent themselves from the balance of the jury, without being under the charge of an officer, and remain absent for the space of fifteen and twenty minutes; held that such conduct on the part of the jury was ground for a new trial. *McLain* v. *the State*, 10 Yerg. 241.

163. It is not necessary for the prisoner to prove that they were, during their absence, subjected to improper influence from others; it is sufficient if they might have been. *Ib.*

164. Where, in a criminal case, the jury retired to consider of their verdict into a room of the building in which the court was held, unaccompanied by an officer, and it did not appear that the jury improperly separated, or that any communication, of any sort, was had with them by persons not of their body; held that there was no cause for a new trial on the ground of such irregularity. *Jarnagin* v. *State*, 10 Yerg. 529.

165. A short absence of one of the jurors impanelled, for necessary purposes, and without any imputation of improper motives, does not vitiate the verdict of the jury. *State* v. *Lytle*, 5 Iredell 58.

166. A jury impanelled to try a prisoner upon an indictment for murder, were allowed to leave the court-house during the trial, under the charge of two sworn constables, and having left the court-house, two of them separated from their fellows, went to their lodgings, a distance of thirty rods, ate cakes, took some with them on their return, and drank spirituous liquors, though not enough to affect them in the least, and one of them conversed on the subject of the trial; they returned, heard the trial through, and joined in a verdict of guilty; held that the verdict should be set aside, and a new trial granted. *People* v. *Douglass*, 4 Cowen 26; vide *Com.* v. *McCaul*, 1 Virg. Cas. 271.

167. Where there is an irregularity which may affect the impartiality of the proceedings, as where meat and drink, or other refreshments, have been furnished by a party, or where the jury have been exposed to the effect of such influence, as where they have improperly separated themselves, or have had communication not authorized, then, inasmuch as there can be no certainty that the verdict has not been improperly influenced, the proper and appropriate mode of correction or relief is by undoing what is thus improperly and may have been corruptly done. *Com* v. *Roby*, 12 Pick. 496.

168. And where refreshments were given to a jury in a capital trial, by the officer in charge of them and another person; but it appearing that neither the officer nor the other person had any conversation with the jury, it was held that such irregularity furnished no ground for a new trial. *Ib.*

169. After the charge was given in a criminal case, to the jury by the Court, one of the jurors, in open court, stated that he had been unwell for several days, and was still so, and that it was impossible for him, under the circumstances, to confine himself to water, without danger to his health, and he wished permission for such spirits as might be required for his health; to which request the counsel for the

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prisoner there consented in open court, and the indulgence was granted; held that such indulgence, if not abused, was no ground for setting aside the verdict. *United States* v. *Gilbert*, 2 Sumner 19.

170. The fact of the separation of some of the jurors from the others having been established by the prisoner, the possibility that the juror has been tampered with, and has received other impressions than those derived from the testimony in court, exists, and prima facie the verdict is vicious; but this separation may be explained by the prosecution showing that the juror had no communication with other persons on the subject of the trial; and in the absence of such explanation, the mere fact of separation is sufficient ground for a new trial. *Hines* v. *State*, 8 Humph. 597.

171. On a trial for murder, where it appeared from the affidavits of several of the jurors who tried the case, that two of the officers who had them in charge spoke of the enormity of the offence, by saying that it was a worse case than D.'s, and one of them said public opinion was against the accused; held, on motion for a new trial, that such conversation by the officers, in the presence of the jury, was sufficient cause for a new trial. *Nelms* v. *State*, 13 Smedes & Marsh. 500.

172. On the trial of an indictment for murder, where one of the jurors was examined on his voir dire, and stated that he had not formed or expressed an opinion as to the guilt or innocence of the accused, and entertained no conscientious scruples as to the punishment of death for murder, and stated, in addition, that his wife was confined to her bed by sickness, and a physician had been called in to attend her, for which reason he desired to be excused, and the Court, against the consent of the prisoner and the district-attorney, excused the juror; held that the prisoner, after conviction, was entitled to a new trial for this unwarrantable excuse by the Court. *Bales* v. *State*, 13 Smedes & Marsh. 398.

173. By the agreement of the prisoner, the jury were taken by the officer in charge of them, to a hotel, where they could get refreshments, and there to be kept until they could agree. At the hotel they were taken to the table, where they ate with the boarders, seated at one end of the table, with the officer between them and the guests. Rooms were prepared for them at the hotel, and at their request a barber was sent for to shave some of them and cut their hair. The barber was in the room more than an hour, and while there, another deputy-sheriff called the officer having charge of the jury, out of the room. The jury were left alone with the barber for a few minutes. Held that, although there was no evidence that the jury had been tampered with by the barber, or the guests at the table, still the prisoner was entitled to a new trial. *Ib.*

174. A separation of the jury before their verdict is found, though an irregularity for which the jurors may be punished, does not vitiate the verdict unless the separation occasions some injury; and this is not to be presumed, but the burden of proof is on the party who seeks to set aside the verdict. *State* v. *Camp*, 23 Vt. 551.

175. If the jury, pending the trial of a felony, disperse, though with the consent of the prisoner, a new trial will be awarded. *Wiley* v. *State*, 1 Swan 256.

176. Where, on the trial of an indictment for rape, one of the jurors left the box while the court was in session, walked out of the court-house, passed through the group of spectators standing about, and after a moment's stay, returned to the box; this fact furnished no ground for a new trial. *Porter* v. *State*, 2 Carter 435.

177. In a prosecution for felony, if if there be apparently conflicting evidence in reference to a material point necessary to be established, submitted to the jury upon the trial, the proper effect and weight of which it is their province to determine, and if, after leaving the bar to consult and determine on their verdict, and while in the act of doing so, they receive statements from one of their body which were not disclosed before, and which will conduce, in some degree, to the decision of the controverted point against the pris-

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oner, the verdict rendered under such circumstances will not be permitted to stand. *Sam* v. *State*, 1 Swan 61.

178. To vitiate the verdict in such case, the onus is not upon the prisoner to show affirmatively that he was prejudiced by the improper conduct of the jury; it is enough that he may have been prejudiced, and the law will so presume. *Ib.*

179. The verdict of a jury in minor offences will not be set aside on the ground that the jury separated, without the permission of the Court, before they brought in their verdict; and the Court will deny all applications for new trials on such grounds, unless it is manifest that injury has been done by such separation of the jury. *Com.* v. *State*, 3 Texas 31.

180. Upon the trial of an indictment for murder, where it appeared from the affidavits of two of the jurors, that, while the case was on trial, and while the jury were impanelled, they saw newspaper accounts of the testimony, but stated that such accounts had no influence on their minds in finding the verdict; this was held not to be a sufficient ground for a new trial. *United States* v. *Reid*, 12 Howard U. S. Rep. 361.

181. The affidavits of jurors impeaching their verdict may be received in some cases. *Ib.*

182. A separation of the jury, or a conversation unexplained, has been held a good cause for a new trial, because in such case it cannot be known that the juror thus separating himself, or thus conversing, was not tampered with; but it is the settled law of the Supreme Court of Tennessee, that such separation or conversation may be explained, and it may be shown that no influence unfavorable to the prisoner could by possibility have existed; and in such case there would be no cause for a new trial. *Riley* v. *State*, 9 Humph. 646.

183. Where, on a trial, the circumstances are such as merely to put suspicion on the verdict by showing, not that there was, but that there might have been undue influence brought to bear on the jury, because there was opportunity and a chance for it, it is matter within the discretion of the presiding judge; but if the fact be, that undue influence was brought to bear on the jury, as if they were fed at the charge of the prosecutor or the prisoner, or if they be solicited and advised how their verdict should be, or if they hear other evidence than that which was offered on the trial; in all such cases there has been, in contemplation of law, no trial, and the Supreme Court of North Corolina, as a matter of law, will direct a trial to be had, whether the former proceeding purports to have been an acquittal or conviction of the prisoner. *State* v. *Tilgman*, 11 Iredell 513.

184. Where the facts in relation to the jury on a trial for murder, were, that the jury were placed in charge of an officer and confined in the ordinary way in the jury-room; that they retired from the Court, on Thursday, at 6 o'clock P. M., and rendered their verdict on Saturday, at 10 A. M.; that while out, the members of the jury separated at various times to obey calls of nature; that each one separated himself from the others more than once for this purpose and one of them as often as six times; that when they did this, they went one at time, under charge of an officer, and during such absence the other jurors remained together in the jury-room with the door locked; that they went about fifty yards from the court-house, and returned as soon as practicable, holding no intercourse with any one; that one of the jurors separated himself from his fellows and visited a drug-store, about 150 yards from the jury-room, for the purpose of procuring medicine, being sick; that he went under the charge of an officer, and held no conversation except with the keeper of the drug-store, who asked him if they had agreed on their verdict, to which he replied they had not; that this store was in the most public place in the town of Newbern; that another juror separated himself from his fellows, and stood on the outside of the jury-room, near the door closed, and conversed privately for ten or fifteen minutes with a third person, but what was said does not appear; that the jurors also ate and

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drank, while out, but not to excess; that a part of the time they did so with the permission of the Court; but when enjoined by the Court not to eat or drink, they violated this injunction, contrary to the wishes of the officer who had them in charge; that several jurors wrote notes and dropped them from the windows of the jury-room, and also received notes from persons not of the jury, but neither the contents of the notes, nor the names of the persons to whom sent, or from whom received, appeared; that some of the jurors conversed from the windows with persons in the street, on various subjects, and about the case, but what was said did not appear, and that some servants and small children had access to the jury-room, the servants for the purpose of carrying food and clothing to the jurors, and the children to see their fathers; held that those facts might, in the discretion of the presiding judge, have been a good cause for granting a new trial, but they could not justify the Court in declaring, as a matter of law, that there was a mistrial. *Ib.*

185. Where the sheriff conducts the jury to the house of another, and there leaves them, in the parlor, in company with three other men; held that this was sufficient to vitiate the verdict of the jury; and a new trial was awarded, although it appeared from the affidavits of the three persons, that no conversation had been had with the jury during the sheriff's absence, in relation to the trial. *Commonwealth* v. *Wormley*, 8 Gratt. 712.

186. Where the jury, on a trial for murder, a portion of the time during the trial, and after their retirement, were not under the care of proper and sworn officers of the Court, or bailiffs sworn for that purpose; held to be ground for a new trial. *McCann* v. *the State*, 9 Smedes & Marsh. 465.

187. Where on a trial for murder one of the jurors rose, dressed himself, and went down stairs to the pavement before the door of the hotel, for the purpose of meeting a passer-by to send a message to his family; and after remaining there about five minutes and seeing no one passing, returned to the rest of the jury; such separation being proved only by the evidence of the absenting juror, and he proving that he saw and conversed with no one, and by his oath positively negativing all abuse, tampering, or improper influence, was held not to be sufficient to vitiate the verdict, and therefore no ground for a new trial. *Thompson* v. *Commonwealth*, 8 Gratt. 637.

188. Where the jury lodged apart, distributed in five different rooms in the third story of a hotel, opening on a common passage, which communicated with the street below by flights of stairs, the doors of their chambers being unlocked during the night, and there being no doors or other fastenings at either end of the passage or at both ends; held that this did not amount to a separation in contemplation of law, and was no ground for awarding a new trial. *Ib.*

189. Where the jury, one morning, before the meeting of the court, went in company with the sheriff, for innocent relaxation and exercise, across a river to a county adjoining the one in which the trial was proceeding, and it was not pretended that it was attended with any irregularity, such as actual separation, conversation or communication with any one; held not to be such a separation of the jury as to warrant granting a new trial. *Ib.*

190. On a trial for murder, there being no question among the jury as to the guilt of the prisoner, and the only question being the degree of guilt and the quantum of punishment. It was proposed that it should be ascertained by each juror setting down the number of years he thought the offence merited, adding these numbers, dividing the aggregate by twelve, and adopting the quotient for their verdict; held that, where a verdict is found in this manner, and the jury consent to it with a perfect knowledge of the character and effect of the verdict, it is no ground for setting the verdict aside and granting a new trial. *Ib.*

191. The mere fact that the jury, during a capital trial, have partaken of ardent spirits, does not constitute such misbehavior on the part of the jury as to affect the purity of their

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verdict, unless it has been used immoderately. *Ib.*

192. Where it appeared that one of the witnesses on the part of the State met the jury at the hotel where they lodged, and invited them in the presence of the officer in charge of them, as an act of civility, to take a drink with him; held that this act, though one for which the jurors were liable to a fine, was not such an irregularity as would call for the interference of the Court to set aside the verdict and grant a new trial. *Ib.*

193. In capital felonies, no separation of the jurors is allowed; and if it should occur, with the consent of the Circuit Court, and the consent of the prisoner and the attorney for the State, and the defendant be found guilty, it would be a good cause for a new trial. *Wesley* v. *State*, 11 Humph. 502.

194. On the trial of an indictment for malicious stabbing, it appeared that while the jury were placed in a room in charge of an officer, the officer left the room for wood and water; and in his absence, another person walked into the room, and on being told by one of the jury to take a seat, he did so, taking a seat on a bed apart from the jury, there being no conversation between this person and the jury till the officer came back, when the intruder was removed by the officer; held there was no ground in this for a new trial, as it did not appear that the intruder had any improper motive, or made any efforts to tamper with any of the jurors. *Luster* v. *State*, 11 Humph. 169.

195. One of the jurors on the trial of an indictment for murder, spoke to a person not of the jury, but it was made to appear that it was in the presence of the Court, and related to the health of the juror's family; held that this was no ground for a new trial. *Rowe* v. *State*, 11 Humph. 491.

196. On this trial there was a separation of the jury, but the jurors separated to obey the calls of nature, and were in sight and in care of their officer; held to be no cause for a new trial. *Ib.*

197. In this case, the officer at one time left the jury in the charge of the sheriff for a short time, but the Court regarded it as a slight irregularity, which would not vitiate the verdict and afford ground for a new trial. *Ib.*

198. In this case spirituous liquors were introduced into the room of the jury, of which they drank, but the Court held that it is allowable for the jury to eat and drink, and unless this is done to excess, so as to disqualify the jury from deliberating and considering the case properly, it would not be a ground for a new trial. *Ib.*

199. And where the jury, in such case, were seen to mingle with other persons; and this occurred only in passing from the court-house to the hotel, and in passing through the public room of the hotel, in which situation they were necessarily somewhat intermingled with the crowds of persons, but kept near each other and constantly under the supervision of the officer; held that such irregularity was no cause for a new trial. *Ib.*

200. Where defendant shows that after the cause was submitted to the jury, part of them separated from their fellows without consent of the parties, or order of Court, and were exposed to undue influences, it will be ground of new trial unless the State affirmatively show that no improper influences were exerted upon them. *Cornelius* v. *State*, 7 Eng. 782.

201. An affidavit that some of the jurors were seen passing about the streets, without naming them, is not sufficient; the names of the jurors should be stated, to give the State an opportunity of showing that no improper influences were exerted upon them, &c. *Ib.*

202. The mere separation of a jury, though impanelled to try a capital case, and though they separate contrary to the directions of a Court, will not of itself be a sufficient cause for setting aside the verdict; but if there be the least suspicion of abuse, the verdict should be set aside. *People* v. *Douglass*, 4 Cowen 26.

203. On the trial of an indictment for manslaughter, where the jurors, in all cases where they separated from each other, were attended by a sworn officer, and did so by the permission of the Court, for innocent purposes, and where it appeared that there had not been any communication with the

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jurors so separated, and other persons, it was held that there was no cause for setting aside the verdict, for such separation. *Thomas* v. *the Commonwealth*, 2 Virg. Cas. 479.

204. A bare possibility of corrupt influence during a temporary separation of jurors, is not of itself a sufficient cause to set aside a verdict. *Ib.*

205. On the trial of an indictment for perjury, where it appeared that certain papers calculated to make an unfavorable impression upon the jury, were exhibited by the prosecutor at several public places, and read in the hearing of the jurors during the term, and before the trial, a new trial was ordered on this ground. *State* v. *Hascall*, 6 N. Hamp. 352.

206. On a motion for a new trial, it appearing that a statement of the prisoner's former trial had been published in a paper in the county in which his second trial took place, making severe comments on the prisoner's character and conduct, and being published by the judge before whom the trial took place, but it appearing that the jury on their voir dire denied that they had formed any opinion, and it also appearing that the writer of the statement was not known till after the second trial, and therefore not having any influence with the jury, and no prejudice on the minds of the jury being shown; held that no new trial could be granted. *Vance* v. *Commonwealth*, 2 Virg. Cas. 162.

207. While the jury in a capital case were kept together, they were allowed by the officers of the Court attending them to read the public newspapers; this officer first inspecting them and cutting out everything that in any manner related to the trial; held that this was no cause to set the verdict aside, as it appeared from the affidavits of the officers and jurymen that they never saw anything in the newspapers relating to the trial. *United States* v. *Gibert*, 2 Sumner 19.

208. If the jury have been discharged in a capital case from giving a verdict for any cause, then a new trial will be granted; because the accused has not been put in jeopardy of his life. *Ib.*

209. Where on the trial of an indictment for murder, the jury after being impanelled and sworn, were, with the consent of the prisoner's counsel, allowed to separate, the judgment of conviction was reversed on this ground, and the prisoner was remitted to answer another indictment. *Peiffer* v. *the Com.*, 15 Penn. State R. (3 Harris) 468.

210. Where the jury for a portion of the time during the trial, and after their retirement, were not under the care and charge of proper and sworn officers of the court, or bailiffs sworn for that purpose; held ground for a new trial. *McCann* v. *State*, 9 Smedes & Marsh. 465.

211. A sheriff to whom a jury is committed in the progress of a criminal trial, walks with them to a neighboring house, and whilst there withdraws from the room where they are, leaving them in the company of three other persons, although these other persons swear that there was no allusion by them to the trial during such absence of the sheriff, yet the verdict of the jury against the prisoner is to be set aside, and a new trial directed. *Commonwealth* v. *Wormley*, 8 Gratt. 712.

V. When the Verdict is against the Weight of Evidence.

212. Where a prisoner is indicted for murder, and the jury find a verdict of manslaughter, the verdict will not be disturbed on the ground that it is against the evidence, though that would justify a verdict for either. *Carr* v. *the State*, 13 Ga. 328.

213. If incompetent evidence has been received, that might have influenced the jury, a new trial will be awarded, even though there be evidence enough without the incompetent evidence, to sustain the verdict; for it cannot be seen how far such incompetent evidence did influence the jury. *Peck* v. *the State*, 2 Humph. 78.

214. Courts will reluctantly interfere to set aside a verdict and grant a new trial, where the proceedings have been regular, and no misconduct has happened in the jurors, merely because the

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jury may be supposed to have mistaken the law of the case, or may have judged mistakenly with regard to the weight of the evidence. *Wickersham* v. *the People*, 1 Scam. 130.

215. In criminal cases, new trials are granted by the Supreme Court of Tennessee, upon its conviction that the verdicts were not warranted by the proof. *Davis* v. *the State*, 2 Humph. 439.

216. A motion for a new trial, after conviction, in criminal cases, will be granted, where the jury have rendered a verdict manifestly contrary to law and evidence. *The State* v. *Sims*, Dudley Ga. 213.

217. In a case where conviction is had on mere circumstantial evidence, and the Court before whom the prisoner was tried refused to grant a new trial; held, on a hearing at the General Court of Virginia, that the verdict could not be set aside, although the evidence did not appear to be sufficiently strong and clear to have warranted the verdict. *McCune's case*, 2 Robinson 771; *Cottrell's case*, 2 Robinson 771; *Parsons' case*, 2 Robinson 771.

218. In criminal cases, what the evidence proves is peculiarly the province of the jury to determine; the Court has nothing to do with it, nor can the Court grant a new trial because the jury have found contrary to evidence. *State* v. *Jeffrey*, 3 Murphy 480; contra, *State* v. *Powers*, Ga. Decis. (Part 1) 150.

219. Should the proof on both sides be conflicting, then the Court will not interfere to grant a new trial. *State* v. *Sims*, 2 Bailey 29; *State* v. *Hooper*, Ib. 37; *State* v. *Anderson*, Ib. 565.

220. In a criminal case, if the jury render a verdict against the prisoner, without and against the evidence, and against the charge of the Court, a new trial will be granted. *State* v. *Jones*, 2 Bay 520.

221. On a trial of murder, the General Court of Virginia will not set aside the verdict because it views the weight of evidence differently from what the Court did before whom the prisoner was tried, while the Court below and the jury agreed as to the weight and influence to be given to the evidence. *Hill's case*, 2 Gratt. 594.

222. If a verdict be contrary to evidence, the General Court will only interfere when the jury have decided clearly and manifestly against evidence, or without any evidence. *Ib.*

223. The High Court of Error and Appeals of Mississippi may grant new trials in criminal cases, when there is a great preponderance of evidence against the verdict. *Keithler* v. *the State*, 10 Smedes & Marsh. 192.

224. The testimony of an accomplice should be weighed with great jealousy and distrust by the jury; but the question of credibility is one which belongs so exclusively to the jury, that it would be a delicate point for the Court to interfere, and hence a new trial will not be granted on the testimony of an accomplice, though it be the only testimony to support a conviction. *Ib.*

225. The Supreme Court of Tennessee, in criminal cases, affecting the life and liberty of a citizen, will scrutinize and weigh the testimony adduced on the trial, and grant a new trial, if it preponderate against the conviction. *Cochran* v. *State*, 7 Humph. 544.

226. An application for a new trial in a criminal case, on the ground that the verdict was contrary to the evidence, cannot be reviewed by the Supreme Court of Illinois, after having been addressed to the discretion of the Circuit Court, and decided upon by that Court. *Halliday* v. *the People*, 4 Gilman 111.

227. On the trial of an indictment, where the evidence introduced by the State justly warrants the verdict found by the Court, sitting as a jury, and there being no palpable injustice in the finding and judgment, the Court will not reverse the judgment, and grant a new trial. *Robinson* v. *State*, 2 Eng. 122.

228. The Supreme Court of Arkansas will not interfere and reverse a judgment of the Circuit Court in a criminal case, for refusing a new trial on the mere weight of evidence. *Mayers* v. *State*, 2 Eng. 174.

229. In a criminal case, where the evidence satisfies the jury, the Court will not, unless there was manifest error, interfere with the finding of the jury. *State* v. *Sartor*, 2 Strobh. 60.

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230. On an indictment for arson, where the testimony was conflicting as to the character of the house, and the Court below refused to grant a new trial; held that in such case the appellate Court could not review the decision of the Court below. *McLane* v. *State*, 4 Ga. 335.

231. The verdict in criminal cases, as well as in civil cases, in order to warrant the interference of the Supreme Court of Arkansas, on the ground of its being against the weight of evidence, must not only be against the weight of evidence, but so much so as at first blush to shock the sense of justice and right; and a slight dissatisfaction of the verdict on this ground will not warrant the Court to set aside the verdict, and grant a new trial. *Bivens* v. *State*, 6 Eng. 455.

232. Where, on a trial for murder, a witness swears as to the intention of the deceased, and the effect of the testimony being against the prisoner; held to be good cause for a new trial. *Ib.*

233. In criminal cases, the Court will weigh the evidence, and if it preponderate against the verdict, will grant a new trial. *Leake* v. *State*, 10 Humph. 144.

234. A conviction on an indictment for stealing slaves having been obtained, the prisoner moved for a new trial, on the ground that the verdict was contrary to the evidence; but it appeared that the evidence, though slight, was not contradicted, and the Court refused to grant a new trial. *Blevin's case*, 5 Grattan 703.

235. Circumstantial evidence is legally competent, which, although not conclusive, yet when no explanation appears, warrants the finding of the jury, by the force of inferences (which, when wholly unrebutted, are sometimes irresistible), especially in cases of illicit trading and retailing of spirits, in which ingenious devices are so common. *State* v. *Scates*, 3 Strobh. 106.

236. Where there has been evidence on both sides, and no rule of law violated, nor manifest injustice done, although there may appear to have been a preponderance of evidence against the verdict, the verdict of the jury will not be set aside as against evidence. *Giles* v. *State*, 6 Ga. 276.

237. A verdict clearly and manifestly against law, will be set aside, on a motion for a new trial. *U. States* v. *Duval*, Gilpin 356.

238. Unless a verdict in a criminal case is clearly and manifestly against evidence, or wholly without evidence, the Court will not set it aside. *State* v. *Fisher*, 2 Nott & McCord 261.

239. The jury having found the defendant guilty of murder in the first degree, and the Court below having refused to grant a new trial, it being a question of weight of evidence, this Court refuses to set aside the verdict. *Glory* v. *State*, 8 Eng. 236.

240. A new trial was granted to a prisoner who had been convicted of arson, where it appeared on the trial that two counts were laid in the indictment, the first charging him with burning a barn, being a parcel of the mansion-house, and the second with burning a barn, not being a parcel of the mansion-house, and where the evidence sustained the second count, and the jury notwithstanding had found the prisoner guilty under the first count, and acquitted him as to the second *State* v. *Stewart*, 6 Conn. 47.

241. Where two persons were indicted for grand larceny, and the evidence against both was the same, and the jury found one guilty of grand and the other of petit larceny, a new trial was granted. *State* v. *Lorumbo*, Harper 183.

VI. Error in the Charge of the Court.

242. A new trial will not be awarded in either a civil or criminal case, on the ground that the Court refused to charge the jury that they must receive the evidence of verbal confessions with extreme caution. *The State* v. *Clump*, 16 Mo. (1 Bennett) 385.

243. Where the charge of the Court contains an abstract proposition of law, having no particular reference to the evidence submitted, it will be presumed, although the language is general,

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that the jury properly applied it to the case before them. *People* v. *Reynolds*, 2 Michigan R. 422.

244. A Court or judge has no right to communicate with the jury respecting the charge of the Court, after the jury have retired, except publicly, and in the presence of the accused ; and if done it is good cause for a new trial. *Kirk* v. *State*, 14 Ohio 511.

245. The fact that a judge, in his charge to a jury in a criminal case, after alluding to the influence of proof of good character in a doubtful case, called the attention of the jury to the want of such proof in the case before them, is no cause for granting a new trial, where, in other respects, the charge is unexceptionable. *The People* v. *White*, 22 Wendell 167 ; contra, *People* v. *White*, 24 Wend. 520.

246. If a question of law be left to the jury to decide, and they give a correct decision in regard to it, it will not be cause for a new trial. *State* v. *Jackson*, 2 Dev. 568.

247. A defendant in an indictment for keeping a gaming table, is not entitled to a new trial because the Court, on a previous day of the term, and in another case, expressed the opinion that a person convicted under the gaming act might be discharged by taking the oath of an insolvent debtor. *Montee* v. *the Com.*, 3 J. J. Marsh. 132.

248. A new trial was refused in a criminal case, where the complaint was that the judge, although requested, declined to charge the jury, there being no dispute as to the law of the case ; the trial closing so late on Saturday night that, had the jury been charged, they must either have been dismissed, or kept over the Sabbath, and the verdict being fully supported by the evidence. *People* v. *Gray*, 5 Wend. 289.

249. In no case is a judge required to report a charge in extenso ; he must report those parts especially to which exceptions are taken. *Com.* v. *Child*, 10 Pick. 252.

250. On the trial of an indictment for libel, the judge charged the jury anew after they first returned into Court, and reported that they could not agree, although they expressed no request to have further instruction ; this was held not to be a sufficient ground for a new trial. *Com.* v. *Snelling*, 5 Pick. 321.

251. Where the Court left the evidence to the jury, without any instructions as to the degree of evidence necessary to convict of the crime of perjury, the course of the trial not being such as to call for such an instruction; held that there was no ground in such omission for a new trial. *State* v. *Hascall*, 6 N. Hamp. 352.

252. In a criminal case, the fact that a judge reasons upon the facts and intimates to the jury his own opinion of the evidence, shall not be cause for setting aside the verdict. *Com.* v. *Child*, 10 Pick. 252.

253. Upon the trial of an indictment for an affray, after the jury had returned into Court and intimated an intention to acquit one of the defendants, but had not announced their verdict, the Court told them that if they believed the evidence both of the defendants were guilty, whereupon the Solicitor for the State directed the clerk to enter a verdict of guilty as to both, which was done, and the jury being asked if that was their verdict, made no direct assent but by a nod from each of them; held that this proceeding was so irregular and contrary to the established mode, that the judgment should be set aside. *State* v. *Shule*, 10 Iredell 153.

254. On a criminal prosecution for an assault and battery, the Court charged the jury as follows : "I am not a little surprised, gentlemen of the jury, that there should be an attempt made to acquit this defendant, but it is nevertheless your duty to find according to the evidence," and then proceeded to define the offence of assault and battery, and instructed the jury to acquit or convict, as the evidence might bring the defendant within the definition. Taking the whole charge together, the Court would not authorize a reversal of the finding of the jury on account of such charge, though a part of it was held objectionable. *Keaton* v. *State*, 7 Ga. 189.

255. Where, on the trial of an indictment for receiving stolen goods, which

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misdescribed a part of the goods, but contained a sufficient description of the residue, the jury were instructed by the Court that there was no misdescription whatever, and a general verdict of guilty was rendered; held that the erroneous instruction was no ground for a new trial, inasmuch as it appeared by the bill of exceptions, that the question of the accused's guilt was identical in respect to the whole of the goods, he having received them, if at all, from the same person by a single act. *People* v. *Wiley*, 3 Hill 194.

256. Where an indictment for nuisance charged the defendants with causing an obstruction in a public highway, and also with occasioning the atmosphere in the same locality to be infected with offensive smells, by means of their business, and in the progress of the trial the Court excluded competent evidence offered by the defendants to repel the charge relating to the alleged smells, and the defendants excepted, but before the cause was submitted to the jury the public prosecutor abandoned everything charged in the indictment except the alleged obstruction to the highway; held that the defendants were not entitled to a new trial on account of the erroneous ruling of the Court, as under the circumstances they could not have been injured thereby. *The People* v. *Cunningham*, 1 Denio 524.

257. Where a prisoner was tried and convicted in the Circuit Court, of murder in the first degree; on appeal to the Supreme Court, the judgment was reversed, and the judges intimated in their opinions, that the facts would authorize a conviction for murder in the second degree; on the trial of such prisoner a second time, the jury, with the intimation of the Court before them, found him again guilty of murder in the first degree, upon which the Court refused to grant him a new trial; held under these circumstances, the Supreme Court would not grant a new trial. *Mitchell* v. *State*, 8 Yerg. 514.

258. Where, on a trial for murder, while the jury were consulting together upon their verdict, one of them sent the officer who had charge of them to the Court, to request that the statute or some book of law containing the law of manslaughter should be sent to them, the officer returned and told the jury that "Judge Edmonds said they had nothing to do with manslaughter," and they found the accused guilty of murder; on motion before the Court of Oyer and Terminer for a new trial, on the ground of such communication to the jury, a new trial was denied. *People* v. *Carnal*, 1 Parker's Crim. Cas. 256.

VII. When the Evidence is Doubtful and Insufficient.

259. The testimony leaving it doubtful whether one of the prisoners was present when the murder was committed, a new trial was ordered as to him. *State* v. *Rabon*, 4 Rich. 260.

260. The defendant was indicted for breaking the Sabbath by retailing goods; the testimony on the trial, that the witness came into defendant's store by the back door, on Sunday, and applied to him for goods, which the defendant refused to sell him on account of its being Sunday, the witness then helped himself to the goods, without being prohibited or permitted by the defendant, who did not charge them in his account against the witness, nor did he at any time demand pay, but on a subsequent day received pay from the witness for the goods; defendant was convicted, and the Court refused him a new trial; held that it was the province of the jury to determine the fact whether the defendant intended the transaction to be a sale, and they having found against him, and there not being a total want or failure of evidence to sustain the verdict, this Court affirms the judgment of the court below, refusing a new trial. *Bennett* v. *the State*, 8 Eng. 694.

261. Where the statements of witnesses are contradictory, it is the province of the jury to determine which of them is entitled to credit, and to find accordingly; and this Court will not review the evidence for the purpose of passing upon the correctness of their conclusion as to the weight of evidence. It is sufficient that there is not a total

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want of evidence to support the verdict. *Mains* v. *State*, 8 Eng. 285.

262. This Court will not award a new trial, in a criminal case, notwithstanding the statement of witnesses be contradictory, if there is nevertheless enough testimony to support the verdict, so that it cannot be said to be without evidence in any essential ingredient of the finding, as held in *Bevans* v. *State*, 6 Eng. 455.

263. Where an indictment for gaming was found during the March term of the year 1839, and the evidence showed the offence to have been committed some time during the year previous to the 1st of January, 1839 (the statute of limitation being one year from the time the offence was committed), and the evidence further showed that the defendant was sitting behind a table commonly called a faro-table, that he was dealing or drawing cards from a box, and used pieces of bone for the purpose of carrying on the game, but did not show that any money was played for, or that any game was actually being carried on at the time; held that the Court would not set aside a verdict found on such evidence. *Stevens* v. *the State*, 3 Ark. 66.

264. Although upon a mere doubt, such as would justify a jury in a verdict of not guilty, a new trial will not be granted; yet, where the evidence is not sufficient to warrant the verdict, a new trial will be granted in criminal cases, although it may not be such a case of rashness as would induce a like judgment in a civil case. *Bedford* v. *the State*, 5 Humph. 552.

265. A verdict, in all cases, must have great weight with the Court, and a new trial will not always be granted, if upon the evidence certified in the bill of exceptions, the Court is not convinced beyond a reasonable doubt of the guilt of the accused. *Kirby* v. *the State*, 3 Humph. 289.

266. In a case of felony, after conviction, it was held in Virginia that the Court had the power to grant a new trial, where it appeared that the evidence was not sufficient to warrant the conviction. *Ball's case*, 8 Leigh 726.

267. If there is no evidence to establish the guilt of the prisoner, the Court will order a new trial, although the jury have found the prisoner guilty. *State* v. *Spenlove*, Riley 269.

268. Where a prisoner is indicted for feloniously taking several books, and the proof shows that he stole only a part of the books alleged to have been stolen, though the jury find a general verdict; held that although the punishment be the same whether the prisoner be found guilty of stealing a part only, or the whole of the goods alleged to have been stolen, yet his rights in other respects, as well as the rights of others, may be affected by the finding of a general verdict, and that therefore a new trial ought to be awarded in such case. *State* v. *Somerville*, 21 Maine 20.

269. In capital cases, where a motion for a new trial is made, on the ground that the evidence does not warrant the verdict, it is not necessary that the Court should re-examine the witnesses or state anything more than the material facts proved from the minutes of the judge who held the Court, under the directions and assistance of the counsel on both sides. *Jones' case*, 1 Leigh 598.

270. A new trial may be granted in a criminal case when the verdict is without evidence, or manifestly against the weight of evidence. *The State* v. *Lyon*, 12 Conn. 487; vide *the State* v. *Fisher*, 2 Nott & McCord 261; *the State* v. *Bird*, 1 Mo. 585.

271. Where a prisoner had been twice tried, and convicted each time of murder, the Court being of opinion that the testimony was not only not sufficient to prove the guilt of the accused, but that it was hardly sufficient to raise a suspicion against the prisoner; held that the prisoner was entitled to a new trial. *Grayson* v. *Commonwealth*, 7 Gratt. 613.

272. The humane maxim of the Criminal Law being that all doubts are to be solved in favor of the prisoner. If the jury withheld from the prisoner the benefit of this merciful maxim, it is the duty of the Court to give him the benefit of it by granting him a new trial. *The State* v. *Hammond*, 5 Strobh. 91.

273. Where the testimony in a capital case is not very clear and satisfactory, and there is reason to suppose

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that the jury have been misled from the manner in which the Court has charged them in reference to the testimony, though the charge may have been legally correct, the Court will interfere to set aside the verdict. *Foxdale* v. *the State*, 9 Humph. 411.

274. New trials are grantable at the instance of the accused, in all criminal cases. *Grayson's case*, 6 Gratt. 712.

275. Motions for new trials are governed by the same rules in criminal cases as in civil cases. *Ib.*

276. A new trial will be granted where the verdict is against law, where the verdict is contrary to the evidence, and where the verdict is without evidence to support it. *Ib.*

277. Where some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances and presumptions, a new trial will not be granted merely because the Court, if upon the jury, would have given a different verdict. To warrant a new trial in such cases, the evidence should be plainly insufficient to warrant the finding of the jury; and this restriction applies à fortiori to an appellate court. *Ib.*

278. Where the evidence is contradictory, and the verdict is against the weight of evidence, a new trial may be granted by the Court which presides at the trial; but its decision is not the subject of a writ of error or supersedeas, or examinable by an appellate court. *Ib.*

279. Nor can the inferior court be required to state, in a bill of exceptions, either the evidence or the facts proved by the witness' testimony. It is enough to state that the evidence was contradictory. *Ib.*

280. Where a slave has been found guilty of an assault, with intent to commit a rape, and a new trial is sought because the evidence was not sufficient to authorize the jury to have found the slave guilty of the offence with which he was charged; but it was held that as there was some evidence of which the jury were the exclusive judges, the Court would not interfere with the verdict and grant a new trial. *Alfred* v. *the State*, 6 Ga. 483.

281. If the evidence is contradictory as to whether or not the declaration was made with the consciousness that the declarant was in articulo mortis, the Court will not disturb the verdict of the jury and grant a new trial, especially where it is satisfied that the finding was warranted by the proof. *Campbell* v. *the State*, 11 Ga. 353.

282. The defendants were indicted for stealing the corn of the prosecutor, and were convicted. The evidence was that they came in the night to one of his negroes and inquired of him if he could let them have some bacon; they then separated, and after some hours the negro returned and spoke to them; he then went to the prosecutor's cornhouse, unlocked the door, and brought out a basket of corn to the defendants; the witness, who had been watching them, then advanced and spoke, upon which the defendants ran off, leaving the negro still holding the corn. The Court granted a new trial, as there was not sufficient evidence of asportation, or that the taking by the negro was by their counsel, command, or procurement. *The State* v. *Hardy*, Dud. R. 236.

283. A conviction of larceny on the oath of only one witness, and the testimony shaken by circumstances, set aside, and new trial granted. *The State* v. *Wood*, 1 Mills' R. 9.

284. New trial granted a prisoner convicted of larceny, the evidence, on which he was convicted, being suspicious. *The State* v. *Smart*, 4 Rich. 356.

285. The plaintiff in error having been convicted of larceny, this Court awards a new trial on the grounds that the testimony utterly failed to identify the property charged to have been stolen, or to establish the venue as laid in the indictment. *Holeman* v. *the State*, 8 Eng. 105.

VII. Objection to Jurors.

286. The Supreme Court of Georgia has sanctioned the following positions: 1. That the formation and expression of an opinion, from rumor, is good cause for challenge for favor. 2. That

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where the objection to a juror would constitute sufficient cause of challenge to the favor, if discovered before trial it will present a ground for new trial if not discovered until after verdict. 3. The juror will be heard in his own vindication. *Anderson* v. *the State*, 14 Ga. 709.

287. Where a juror says before trial, if the testimony was as he had heard it, the prisoner was guilty, and would be hung; held no ground for a new trial. *Mitchum* v. *the State*, 11 Ga. 615.

288. Where a prisoner demands a new trial, on the ground that one of the jurors was withdrawn, who was supposed to be incompetent at the time, but who was found, after the trial had proceeded by the substitution of another juror, to be perfectly competent to serve; held that, where such juror was withdrawn, and the prisoner not objecting, and a new juror substituted in his place, this was not good cause for a new trial. *Commonwealth* v. *Stowell*, 9 Metc. 572.

289. The expression of opinion as to the guilt or innocence of the prisoner, before being impanelled, is a good cause of challenge to a juror, but is not ground for setting aside a verdict, and granting a new trial. *Commonwealth* v. *Flanagan*, 7 Watts & Serg. 415.

290. In case the insanity of a juror, in a criminal case, is alleged as a ground for a new trial (it being a disqualification so easily perceived from its nature), it must be shown by clear and full evidence. *The State* v. *Scott*, 1 Hawks 24.

291. On the trial of a prisoner for murder, where a juror, before the trial, had declared that the prisoner ought to be hung, that there was nothing that could save him, &c., and a short time before the trial told the prisoner that if he served on the jury, he (the prisoner) would not be hung, and, when sworn as a juror on the trial, said that he had formed no opinion; held that a verdict against the prisoner found by the jury, of whom said juror was one, should be set aside, and a new trial granted. *Sellers* v. *the People*, 3 Scam. 412.

292. It has always been held that if a juror prejudge a case, and it is unknown to the failing party, it is good ground for challenge, and a new trial may be granted when such fact can be satisfactorily made to appear. *Ib.*

293. At Common Law the Court cannot interfere after the juror has been sworn; and the statute of 1807, of Mass., did not intend to make any alteration as to the time of inquiring into the juror's impartiality. The objection to him must be made as well by the State as by the prisoner before the juror is sworn; or, at least, before the jury are impanelled. *Commonwealth* v. *Knapp*, 10 Pick. 477.

294. It seems that when a juror has passed upon a case in his own mind, before trial, without leaving his mind open to conviction on the evidence, it is good ground for granting a new trial after conviction. *Commonwealth* v. *Flanagan*, 7 Watts & Serg. 415.

295. If one is called as a juror in a capital case, and says on oath that he has not formed nor expressed an opinion respecting the guilt or innocence of the prisoner, and after the verdict it was proved that he had declared a few minutes before, to another person, that he could not serve because he had made up his opinion, which was unknown to the prisoner at the time he accepted the juror; held that there should not be a new trial, first, because such declaration by the juror was not on oath, and secondly, because it was contradicted by the juror on oath. *The State* v *Scott*, 1 Hawks 24.

296. The loose impressions and conversations of a juror, founded upon rumor, would not, if disclosed by him or others to the Court, have the effect to set him aside as incompetent; nor, if disclosed after verdict, would they be grounds for setting aside the verdict and granting a new trial. *Howerton* v. *the State*, 1 Meigs 262.

297. The objection to a juror, to be good for a new trial, should be such as affects his moral fitness or his impartiality. *Presbury* v. *the Commonwealth*, 9 Dana 203.

298. Alienage, though cause of challenge, is not a ground for a new trial, though it was unknown to the party

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moving for it and his counsel until after the verdict was rendered. *Ib.*

299. The incompetency of a juror is no ground for a new trial when such incompetency was known to the party before the juror was sworn in chief, and no objection was then made. *Lisle* v. *the State*, 6 Mo. 426.

300. Where, in a criminal trial, one of the jurors has made a bet on the result, and there is no other proof of the defendant's ignorance of the bet being made than that the juror himself swears that he believed that the defendant did not know it; held that the juror's incompetency in such case was no ground for a new trial. *Booby* v. *the State*, 4 Yerg. 111.

301. A motion for a new trial, on an indictment for sending a challenge, on the ground that one of the jurymen had made up an opinion of the defendant's guilt before the trial, and admitted it afterwards in a conversation with some other persons, was overruled; and it was held, on a writ of error, that the motion for a new trial was properly overruled. *Brown* v. *the Commonwealth*, 2 Virg. Cas. 516.

302. On a trial for treason, a new trial was granted where it appeared that one of the jurors had made declarations, as well in relation to the prisoner personally, as to the general question of the insurrection, which manifested a bias or predetermination that ought never to be felt by a juror. *United States* v. *Fries*, 3 Dallas 515.

303. In a criminal case, where it appeared that a short time before the Court sat, one of the jurors said that the prisoner was doomed for the penitentiary; that he would go to the penitentiary if he ever attempted to commit a rape; held not to be sufficient cause to grant a writ of error. *Kennedy* v. *Commonwealth*, 2 Virg. Cas. 510.

304. Where a juror, on a trial for rape, in the presence of the sheriff, at a time when he was separated from the other members of the jury, directed a neighbor, who was passing on a horse at some distance, to inform his family of the cause of his not coming home; this was decided not to be sufficient to set aside the verdict. *Ib.*

305. Where, on a capital trial, spectators in the court-room were summoned as jurors, and at the prisoner's request were sworn as jurors in his case, after the usual examination on their voir dire. After the trial and conviction of the prisoner, certain objections to the jurors taken from among the bystanders, were raised, which had not been discovered before. A new trial being sought on this ground, it was held that the Court could not interfere and set aside the verdict, because it appeared that the objections were not at variance with the statements made by the jurors themselves on their examination on their voir dire. *Jones' case*, 1 Leigh 598.

306. On an indictment for murder, where the prisoner, after conviction of murder in the second degree, moved for a new trial on the ground that one of the jurors, before the trial, had made some unfavorable remarks about the accused, in the hearing of another person, to the effect that he ought to be hung; the Court held that, as the declaration on the part of the juror did not appear to have been a fixed opinion, as also the verdict showed, the prisoner was not entitled to a new trial. *Smith* v. *the Commonwealth*, 2 Virg. Cas. 6.

307. Where a declaration, on the part of one of the jurors on a capital case, was made before he was impanelled, and was hypothetical to the effect that if the prisoner killed the man he ought to be hung; such declaration was held not to be an opinion of the prisoner's guilt, and, therefore, no cause for a new trial. *Commonwealth* v. *Hughes*, 5 Rand. 655.

308. Where the prisoner has reason to believe, from the declarations made by one of the jurors before trial, that the juror has been prejudiced against him; this will not warrant the Court to set aside the verdict. *Poore* v. *the Commonwealth*, 2 Virg. Cas. 474.

309. And if the juror had made declarations before the trial, so as to lead the prisoner to believe that the juror was in his favor, and for which reason the accused did not exercise his right of challenge for cause, which he would have done had the deceptive conduct of the juror not misled him; this was

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held not to be sufficient cause to grant a writ of error. *Ib.*

310. Where, after a conviction for murder, one of the jurors is alleged to have said that he did not agree to find the prisoner guilty of murder, but only of manslaughter, and through mistake of his duty he believed he must assent to the major part of the jury; held that the allegation, if proved, could not avail the prisoner, towards setting the verdict aside. *Commonwealth* v. *Drew*, 4 Mass. 391.

311. That which is a cause of challenge to a juror, shall not be made the cause of a new trial. *State* v. *Fisher*, 2 Nott & McCord 261.

312. On a trial for perjury, where one of the jurors who tried the case was drawn more than twenty days before the term, when the venire was made returnable; held that this would have been a sufficient exception to warrant a new trial, if it had been taken before the trial. *State* v. *Hascall*, 6 N. Hamp. 352.

313. On a trial for murder, where one of the jurors was an alien, and that fact known to the prisoner, who could have challenged the juror for that reason, but did not; held that no new trial could be granted on a ground which was good cause for challenge before trial. *State* v. *Quarrel*, 2 Bay 150.

314. Where a prisoner has had an opportunity of challenging one of the jurors on his trial, on the ground that such juror was a member of the grand jurors who presented the indictment, but omitted to do so; held that the accused could not take advantage of it, on a motion for a new trial. *State* v. *O'Driscoll*, 2 Bay 153.

315. On an indictment for murder, it appeared that one of the jurors, who was sworn on his voir dire, and found qualified, afterwards told the clerk that he was not 21 years old, and therefore the Court ordered the juror to stand aside; held that the Court did not err in so doing, and that the prisoner was not entitled to a new trial on this ground. *Hines* v. *State*, 8 Humph. 597.

316. In a criminal case, whenever the objection to a juror would be good cause of challenge for favor if discovered in time, it will be ground for a new trial, if not found out till after verdict. *Monroe* v. *State*, 5 Ga. 85.

317. The Court in such case will not receive an affidavit of the fact from the jury themselves; though they will be heard in their own vindication. *Ib.*

318. On the trial of an indictment for murder, one of the jurors stated, when examined on his voir dire, that he had not formed or expressed an opinion as to the prisoner's guilt or innocence. On a motion for a new trial, it then appeared by affidavit, that some months before the session of the court at which the case was tried, the juror told the person making the affidavit, that from the best information he could get, he was of opinion that the defendants ought all to be hung for the offence with which they were charged; held to be cause for a new trial. *Troxdale* v. *State*, 9 Humph. 411.

319. On a criminal prosecution for gaming, where it appeared that one of the jurors who tried the case was an alien, and on motion for a new trial on this ground, the affidavit of the juror to that effect was read to the Court, but there was no affidavit of the defendant that he was ignorant of the fact when the juror was sworn; held that the defendant was not entitled to a new trial, for the reason, that if he knew of the juror's want of qualification at the time he was sworn, he waived all objection by failing to challenge him at that time, and if he did not know it, then he should have made an affidavit of that fact. *Seal* v. *State*, 13 Smed. & Marsh. 286.

320. On the trial of an indictment for the killing of one S., where it appeared by the affidavits of several persons, that one of the jurors who tried the case, before he was impanelled, declared that if he were on the jury he would hang the prisoner, &c., and it further appeared, that this opinion was expressed with reference to the inculpating testimony to be adduced on the part of the prosecution, and not a hypothetical opinion; held that a new trial must be granted, on account of the juror's incompetency. *Bishop* v. *State*, 9 Ga. 121.

321. When the qualification of the veniremen is brought in question, the

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objection comes too late, when taken for the first time after the jury is sworn to try the issue. *Thompson's case*, 8 Gratt. 637.

322. Where a juror on the trial of an indictment for arson, before the jury were impanelled, expressed an opinion unfavorable to the accused, but, being afterwards examined on oath, affirmed his perfect impartiality; it was held that there was no ground for setting the verdict aside. *Curran's case*, 7 Gratt. 619.

323. In case a juror becomes unable to go on with the trial, the Court, on ascertaining the fact, will either suspend the trial, or discharge him altogether, and impanel another in his place, and commence the trial again; but to establish the rule that because some one of the jurors did not hear and comprehend everything which was said to them, the verdict shall be set aside, would endanger altogether too many verdicts, and would introduce an inquiry which would be embarrassing in its consequences. *Baxter* v. *People*, 3 Gilman's Rep. 368.

324. Whenever the juror evinces a predetermination to condemn, an adjudication before trial or verdict, without regard to the evidence, it is a mistrial per se; and the fact, when disclosed, should entitle the party to a rehearing. *Monroe* v. *State*, 5 Ga. 85.

325. Where a party, after a verdict, proves that one of the jurors had said before the trial that his mind was made up against him, and the party also makes affidavit that he knew nothing of the fact before the trial, this is a cause for a new trial. *Ib.*

326. A motion was made for a new trial, on the ground that one of the jurymen had made up an opinion of the guilt of the defendant before the trial, and admitted it afterwards in a conversation with some young gentlemen who were questioning him as to the propriety of the verdict. The motion was overruled, for the reason that the conversation was not of a serious character, and was had in consequence of the verdict being questioned rather improperly, and was therefore entitled to little weight. *Ib.*

327. Where a prisoner was convicted of murder, and after conviction he discovered, and had proof to show, that two of the jurors, who at the trial had declared that they had neither formed, nor expressed an opinion as to the prisoner's guilt or innocence, had actually said before the trial, that the prisoner was guilty and ought to be hung, and it appearing that such declarations were made without the prisoner's knowledge, before the trial. Upon these facts the prisoner moved the General Court of Virginia for a new trial; but that Court held, the proof of such declarations conflicting with the oaths of the jurors on the trial, it was for the Court before whom the prisoner was tried to consider the evidence, and decide whether, under all the circumstances, the prisoner was entitled to a new trial. *Heath's case*, 1 Rob. 735.

328. A new trial will be granted in a criminal case, where it appears that one of the jurors, after he was summoned, and before trial, declared that if he served on the jury, he would have to find the prisoner guilty. *Cody* v. *State*, 3 Howard's Miss. R. 27.

329. Where two of the traverse jury constituted a part also of the grand jury by whom the bill of indictment was found; it was held to be an error for which the defendant was entitled to a new trial. *Commonwealth* v. *Hussey*, 13 Mass. 221.

330. A juror having declared before the trial that he never would give a verdict against the party who afterwards obtained the verdict, is good ground for a new trial, if the objection was not known to the other party at the time of the trial. 2 Chapan 45. *Monroe* v. *State*, 5 Ga. 85.

331. A juror on a trial for arson, swears upon his voir dire that he has not formed an opinion as to the prisoner's guilt or innocence, and is challenged peremptorily by the prisoner, whereupon he remarks, "It was well I was rejected, for if I were on the jury I would send her the other side Boston." Afterwards the prisoner elects this person as a juror, not then being informed of his remark; held no ground for a new trial. *Commonwealth* v. *Hailstock*, 2 Gratt. 564.

332. Where an objection to a juror

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is known to the defendant before trial, and he neglects to challenge him, he cannot afterwards assign it as a cause for a new trial. *Givens* v. *the State*, 6 Texas 344.

333. If a juror, when interrogated, says he has formed no opinion respecting the guilt or innocence of the accused, and after verdict it appears that before the trial he had said, if he (the prisoner) is not hung, there is no use of laws; a new trial should be granted. *Busick* v. *State*, 19 Ohio 198.

VIII. Motions for New Trials—Affidavits on, Admissible.

334. Where a motion for a new trial was submitted, and sustained by affidavits, on the ground that one of the jury who had tried the case, and returned a verdict against the prisoner, had, before the trial, declared that the community ought to have taken up and hung him without a trial, and that if the said juror was on a jury to try him, he would sit there and perish to death, or hang him; and that this information had not come to the knowledge of the prisoner until after the trial; held that before such motion could be sustained, it ought to appear by the affidavit of the prisoner's counsel, that he, too, had no knowledge, before verdict, of the declarations made by the juror: this motion was refused. *Anderson* v. *State*, 14 Ga. 709.

335. In a criminal case, where the exceptions and the motion for a new trial are to be considered and decided by the same Court, there seems to be no good reason why both should not be heard together, or the one or the other considered first, according to the circumstances of the case. *Commonwealth* v. *Peck*, 1 Met. 428.

336. On the trial of an indictment, a motion for a new trial, or in arrest of judgment, will not be sustained on the ground that the Court ordered one of the venire, who on his voir dire stated that he had formed an opinion from having conversed with the defendant, but that he felt himself then in a state of mind to do justice between the parties, to stand aside. *Stoner* v. *State*, 4 Mo. 368.

337. Where a conviction is manifestly right on the facts and the law applicable thereto, it would be a perversion of justice to allow a defendant to avoid sentence by interposing a mere matter of form of which he might have availed himself at the proper time. *Com.* v. *Churchill*, 2 Met. 118.

338. And a motion for a new trial in such case, founded upon the fact that the defendant had a good defence, but that he, at the time of the trial, had omitted to produce the papers necessary to such defence, could not be entertained. *Ib.*

339. On an indictment for receiving stolen goods, after the prisoner had been convicted (he having been previously bailed before trial), as soon as he heard the verdict he slipped out of the court-room and hid himself; held that the Court would not hear a motion for a new trial, unless the defendant himself was present and in charge of the sheriff. *State* v. *Rippon*, 2 Bay 99.

340. It is held too late to make a motion for a new trial subsequent to a motion made in arrest of judgment, because the latter assumes that the verdict is correct. *McComas* v. *State*, 11 Mo. 116.

341. After a conviction on an indictment for murder, where the Court becomes vacant by death, pending a motion for a new trial, and new judges are commissioned to fill the vacancies; held that the new Court would not pass sentence on the prisoners on the verdict, but that it would allow those of the prisoners who desired it a new trial; and the Court refused to listen to any evidence showing what opinion the former Court had entertained in regard to the motion for a new trial. *United States* v. *Harding*, Wallace, Jr. 127.

342. To give the Supreme Court jurisdiction of a cause on writ of error, the basis of the error being the decision of the Court upon a motion for a new trial, it must appear affirmatively upon the record that the motion was based and decided upon some legal point contained in the motion for a new trial; and if the defendants had been entitled

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by law to a new trial, and upon their application the Court had refused it; then, upon the matter coming before the Court, the error of the Court below could have been corrected. *Cook* v. *United States*, 1 Iowa 56.

343. A motion for a new trial based upon facts, is a motion addressed to the sound discretion of the Court; and if the Court, in the exercise of its sound discretion, think that the verdict of the jury is contrary to law, the Court will interfere and grant a new trial. *Ib.*

344. It seems that the Court will hear the affidavits of jurors in support of their verdict, but will not receive such affidavits for the purpose of impeaching the verdict. *Cannon* v. *State*, 3 Texas 31.

345. While the jury will be heard in their own vindication, their affidavits will not be received to impeach their own verdict. *Bishop* v. *State*, 9 Ga. 121.

346. The unsupported affidavit of a prisoner, that the evidence of a material witness was false, that he was surprised thereby, and that he felt certain he could prove it false upon another trial, was held insufficient to obtain a new trial. *Riley* v. *State*, 9 Humph. 646.

347. The law seems settled that jurors will not be heard in impeachment of their verdict; and where a juror offers an affidavit to show what was his view of the testimony, it was held inadmissible on a motion for a new trial. *Ward* v. *State*, 8 Blackf. 101.

348. On a motion for a new trial in a criminal case, the affidavits of jurors to show that the jury misunderstood the instructions of the Court, are admissible; and where the Court is satisfied that there was a misapprehension of the instructions of the Court, a new trial will be granted. *Packard* v. *U. States*, 1 Iowa 225.

349. On a motion for a new trial, on the ground of the improper conduct of the jury, it is held that the affidavits of the jurors are not admissible to prove such improper conduct. *The People* v. *Carnal*, 1 Parker's Crim. Rep. 256.

350. Upon an indictment for negro-stealing, where after conviction it appeared by the affidavit of a third person, that the prosecutor told him that there was a bill of sale to the prisoner for the negro he was charged with stealing, that the bill of sale was mailed and directed to affiant with the view of getting him, affiant, to establish the verity of it, and that he further inquired of affiant whether he had received it, to which he answered he had not; this was not held to be good ground for a new trial, because the affidavit did not state that this fact was not known to the prisoner before trial. *Friar* v. *the State*, 3 Howard Miss. 422.

351. Motions for new trials are to be received with caution, and for the reason assigned, because there are few cases tried, especially those involving life, in which something new may not be hunted up, and because it leads very much to perjury to admit new evidence after the party who has lost the verdict has had an opportunity of discovering his adversary's strength and his own weakness. *Monroe* v. *State*, 5 Ga. 85.

352. The testimony of a juror will not be received to defeat his own verdict; thus, in a criminal case, the affidavit of a juror, which was made after verdict, that he had formed and expressed an opinion before the trial, will not be heard on a motion for a new trial. *The People* v. *Baker*, 1 Cal. 403.

353. Upon a conviction on an indictment for nuisance, a motion for a new trial was not sustained on the affidavits alone of the jurors who tried the case. *State* v. *Doon*, R. M. Charlton 1; vide *Stone* v. *State*, 4 Humph. 27.

354. But, in Tennessee, it was held that the affidavits of jurors were legally receivable, to exhibit to the Court matter for setting aside the verdict. *Crawford* v. *the State*, 2 Yerger 60; vide *Booby* v. *State*, 4 Yerger 111.

355. On a motion for a new trial upon a conviction for stealing; held that the affidavits of jurors, stating that they had misunderstood the charge of the Court, could not be received and heard on the motion. *Norris* v. *the State*, 3 Humph. 333.

356. Where, on the trial of a criminal, one of the jurors who tried the case files his affidavit, in which he states that he believed the prisoner was not

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guilty; that he was induced by some of the jurors to believe that there were fatal defects in some part of the proceedings that would prevent the prisoner from being sent to the penitentiary; that they would find a verdict of guilty and recommend him to the mercy of the Court, and that that recommendation, being sent to the Governor, would procure his pardon; held to be sufficient cause to set the verdict aside. *Cochran* v. *State*, 7 Humph. 544.

357. Where there is evidence that one of the jurors made statements before the trial, showing that he was prejudiced against the prisoner; held that the affidavit of the juror is admissible in exculpation of himself and to sustain the verdict. *State* v. *Ayer*, 3 Foster 321.

358. The statements of a minor as to what took place after the jury had retired, if offered to impeach the verdict, are incompetent; but for the purpose of rebutting a charge made against him, his affidavit may be read. *Ib.*

359. An affidavit, stating the declarations of jurors after verdict, is not a ground for new trial. *Anderson* v. *State*, 5 Ark. 445.

360. The affidavits of jurors are not admissible on the motion for a new trial to impeach the verdict. *State* v. *Doon*, Charlton's R. 1.

361. On an indictment for forgery, where it was shown by the affidavit of a third person, after the prisoner had been convicted, that the foreman of the jury on the morning of the day of trial, had had a conversation with such third person about the prisoner, in which he declared that he had come from home to hang every damned counterfeiting rascal, and that he was determined to hang the defendant at all events, or words to that effect; held that the accused was entitled to a new trial under such circumstances. *State* v. *Hopkins*, 1 Bay 373.

362. But such affidavits, calling in question the verdict of a jury, can only be received after carefully weighing the credibility of the affiant. *State* v. *Duestoe*, 1 Bay 377.

NOLLE PROSEQUI.

1. By the 326th section of the 14th division of the Penal Code of Georgia, it is enacted that no nolle prosequi shall be entered on any bill of indictment after the case has been submitted to the jury, except by the consent of the defendant. Under this act, a case is held to be submitted to the jury when the prisoner is arraigned, and has put in his plea of not guilty, and the jury are sworn and impanelled. *Newsom* v. *State*, 2 Kelly 60; vide *Com.* v. *Goodenough*, Thach. Crim. Cas. 132.

2. Before a jury is impanelled in criminal cases, a nolle prosequi may be entered at the pleasure of the prosecuting officer; but, when a jury is impanelled for the trial of an indictment, in this stage of the proceedings a nolle prosequi cannot be entered without the consent of the defendant; and if it be entered without the defendant's consent, the effect of it is the acquittal of the prisoner and a bar to a subsequent prosecution for the same offence. *Reynolds* v. *State*, 3 Kelly 53.

3. After conviction the Governor may pardon; but before conviction, the attorney-general and the Court are the only power that can discharge without acquittal, and this by nolle prosequi. *State* v. *Fleming*, 7 Humph. 152.

4. Where there is but one count in an indictment, and that for a felonious assault, a nolle prosequi entered as to the felony, discharges the defendant altogether from the accusation. *Brittain* v. *State*, 7 Humph. 159.

5. Where a defendant was complained of before a justice of the peace for selling spirituous liquor without license, in the open air, &c., against the provisions of the Revised Statutes, c. 143, § 5, and six counts were laid in the complaint, upon all of which the justice found the defendant guilty; on an appeal to the Court of Common Pleas, the jury found the defendant guilty of the charge contained in one of the counts, and declared that they had not agreed as to the other five counts; the attorney for the prosecution then entered a nolle prosequi as to the counts on which the jury did not find; held that

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the nolle prosequi was properly entered. *Com.* v. *Stedman*, 12 Metc. 444.

6. A nolle prosequi is not considered a sufficient bar to a future indictment for the same offence. *Com.* v. *Wheeler*, 2 Mass. 172.

7. A nolle prosequi does not amount to an acquittal or bar, even when it goes to the whole indictment. *Ib.*

8. Where the defendant is charged with the crime of receiving, knowingly, stolen goods; and in the same indictment it is alleged that he had before been convicted of the like offence; held, that if the jury bring in a general verdict on such indictment, that a nolle prosequi as to the aggravation laid to the offence charged by the allegation that there had been a former conviction for the like offence, was proper, and might be entered in relation to the circumstance of aggravation, after conviction. *Com.* v. *Briggs*, 7 Pick. 177.

9. In a capital felony, the attorney for the prosecution has the right to enter a nolle prosequi before the jury are sworn and charged with the case. *State* v. *McKee*, 1 Bailey 651.

10. And where, in such a case, the attorney for the prosecution does enter a nolle prosequi after the case has been given in charge of the jury, and the jury are discharged without any lawful cause, whereupon the defendant might be remanded for a second trial; it was held that the entering of the nolle prosequi was equivalent to an acquittal. *Ib.*

11. The General Court of Virginia held that the District Court attorney had no right to enter a nolle prosequi in any case without the Court consent first. *Anonymous*, 1 Virg. Cas. 139.

12. The attorney for the prosecution has no right, at the trial, to enter a nolle prosequi against the wish of the defendant. *State* v. *J. L. S.*, 1 Tyler 178.

13. The 11th section of the 8th chapter of the Penal Code of Alabama, which authorizes the entry of a nolle prosequi where the accused will not assent to the amendment of the indictment, and the variance between the allegations and the proof adduced is such as will authorize his acquittal, cannot be extended by construction so as to permit a nolle prosequi to be entered, and a new indictment, with allegations materially dissimilar, to be preferred; such second indictment will not come within the saving of the section in respect to the Statute of Limitations. *State* v. *Dunham*, 9 Ala. 76.

14. Where an indictment contained two counts, upon both of which the defendant was found guilty; it was held that the prosecuting attorney could properly enter a nolle prosequi as to the second count. *State* v. *Bruce*, 11 Shepley 71.

15. The right of the government attorney to enter a nolle prosequi, is suspended when trial commences to the jury; after that the power is to be exercised only by permission of the Court. *State* v. *Roe*, 12 Vt. 93.

16. The defendant, having been indicted for setting fire to the barn of N. & G., and upon the trial it appearing to the Court that the allegation of ownership was not proved as laid in the indictment, which was held to be a material allegation; the attorney for the Commonwealth then moved to enter a nolle prosequi; but the Court held that the defendant was entitled to a verdict of acquittal, and that the attorney-general could not enter a nolle prosequi. *Com.* v. *Wade*, 17 Pick. 395.

17. There are three periods of the prosecution in which a nolle prosequi may be entered—before a jury is impanelled, while the case is before the jury, and after verdict. *Com.* v. *Tuck*, 20 Pick. 356.

18. If the attorney-general may enter a nolle prosequi as to the whole of an indictment, or of a count, so he may do it as to any distinct and substantive part of it. *Ib.*

19. The Court have no power to order the entry of a nolle prosequi upon an indictment. *People* v. *McLeod*, 1 Hill 377.

20. This power, at Common Law, could only be exercised by the attorney-general; and there is no statute in the State of New York depriving him of it. *Ib.*

21. But a district attorney cannot enter a nolle prosequi without leave from the proper Court. *Ib.*

22. A bill of indictment having been

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found against the defendant in the County Court, is no defence to an indictment found in the Superior Court for the same offence, where it appears by the pleading that a nolle prosequi had been entered on the indictment in the County Court; that as the effect of a nolle prosequi is to put the defendant without day, upon that indictment he becomes, while he is so, amenable on another indictment in any court having jurisdiction of the offence. *State* v. *McNeill*, 3 Hawks 183.

23. The attorney-general has a discretionary power to enter a nolle prosequi, for the proper exercise of which he is responsible, and the Court will not interfere unless it be oppressively used. *State* v. *Thompson*, 3 Hawks 613.

24. The attorney-general may enter a nolle prosequi on one indictment, and still offer another, without giving the defendant a right to his discharge. *State* v. *Haskett*, Riley 97.

25. In Georgia it is the right of the State to enter a nolle prosequi upon the first or any subsequent indictment that may be found against the defendant for the same offence, either for defects in the pleadings, want of proof, or any other cause, if the case has not been submitted to the jury. *Durham* v. *State*, 9 Ga. 306.

26. On criminal trials, where a nolle prosequi is entered, is does not follow that the prisoner is thereby acquitted; for it is at the option of the prosecution to prosecute him anew for the same offence, or to issue new process on the same indictment. *State* v. *Thornton*, 13 Iredell 256.

27. But when a nolle prosequi is entered, the defendant need not give bail for his appearance at any other time. *Ib.*

28. When a nolle prosequi is entered, a writ of capias cannot be issued at the pleasure of the prosecuting attorney; this can only be done by the permission of the Court first obtained. *Ib.*

NUISANCE.

I. What constitutes a Nuisance.
II. Who is liable to Indictment for a Nuisance. Evidence in excuse on the Trial. Abating a Nuisance.
III. Indictment for Nuisance.

I. What Constitutes a Nuisance.

1. The defendants being the proprietors of a distillery in the city of Brooklyn, were in the habit of delivering their grains remaining after distillation, called slops, to those who came for them, by passing them through pipes to the public street opposite their distillery, where they were received into casks, standing in wagons and carts; and the teams and carriages of the purchaser were accustomed to collect there in great numbers, to receive and take away the article; and in consequence of their remaining there to await their turns, and of the strife among the drivers for priority, and of their disorderly conduct, the street was obstructed and rendered inconvenient to those passing thereon; held that the defendants were guilty of nuisance, and liable to indictment therefor. *People* v. *Cunningham*, 1 Denio 524.

2. The consideration that the teams and carriages were not owned by the defendants, or under their control, does not excuse them, they having, in effect, by the manner of conducting their business, invited those assemblages at the point where the article was delivered. *Ib.*

3. Proof of strife and collision among the drivers while awaiting their turns, is competent evidence toward establishing the fact of obstruction. *Ib.*

4. Where the defendant is indicted for a nuisance in building a wharf into the channel of the south harbor of the port of Boston, it does not necessarily follow, because the defendant builds his wharf beyond the line of low water and into the channel, that it is a common nuisance; the presumption is that it is a detriment to the public; but the presumption may be repelled by showing, that so far from having created a

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detriment to the public, he has increased the accommodation of the public. *Com.* v. *Wright*, Thach. Crim. Cas. 211.

5. But if the erection of such wharf has the effect of causing the channel to be filled up, or diverting the course of the current, it will be a nuisance. *Ib.*

6. In Massachusetts, by the statutes of 1786, c. 67, § 7; and 1786, c. 81, §6, incumbrances on town ways are regarded as nuisances, and indictadle. *Com.* v. *Gowen*, 7 Mass. 378.

7. And in such case it is not necessary to allege the continuance of the nuisance vi et armis. *Ib.*

8. If a road be established as a highway by an erroneous judgment of the county court, it will be a nuisance to obstruct it until the judgment be reversed; it is enough that the way obstructed is a public road de facto, to constitute the obstruction of it a public nuisance. *State* v. *Spainhour*, 2 Dev. & Batt. 547.

9. To render an act indictable as a nuisance, it is necessary that it should be an offence so inconvenient and troublesome as to annoy the whole community, and not merely particular persons; and an indictment, before it can be sustained as one for a common nuisance, ought to contain a specification of such facts and circumstances as will warrant the averment of an annoyance to the community. *State* v. *Baldwin*, 1 Dev. & Batt. 195.

10. Where the defendants are charged with assembling at a public place, and profanely and with a loud voice, cursing, swearing and quarrelling, in the hearing of divers persons; and it is alleged that by reason thereof a certain singing-school, then and there kept and held, was broken up and disturbed; held not to be a nuisance. *Ib.*

11. Where the place upon which the nuisance is alleged to have been erected, was laid out by a certain town in the year 1658, as a common landing place, and it did not appear to have been laid out for the particular benefit of the town; held that the place must be considered as laid out for the public convenience, and that the encroachment upon that place by any inhabitants of a new town, was a nuisance. for which they are liable to indictment. *Com.* v. *Tucker*, 2 Pick. 44.

12. In Virginia, to make out a case of public prosecution for a nuisance, in damming up the water in a stream, so as to make it stagnant, it must be proved and alleged that the dam was placed in the creek so near the highway, or some public place, as that the stagnant water will affect the public who have to pass that place, or transact business in such public place. *Com.* v. *Webb*, 6 Rand. 726.

13. Where the charter of a certain company allowed them to build a dam between the foot of T. falls in B., and M. falls in E.; held that they could erect no dam above the foot of the latter falls; and any obstruction placed above, that obstructed the navigation, was held to be a nuisance. *State* v. *Godfrey*, 3 Fairf. 361.

14. The ancient provincial statute of 8 Anne, c. 3, prohibiting the setting, erecting, or making on or across any river, any weares or disturbances or incumbrances, and enacting that all such incumbrances which obstruct the passage of fish, are nuisances, is still held to be in force in Massachusetts, and that the remedy by the statute is cumulative, and attaches to it all the remedies which the Common Law provided for in such cases. *Com.* v. *Ruggles*, 10 Mass. 391. A seine or net thrown into the river and withdrawn at pleasure, is not such an obstruction as contemplated by the statute; it seems to refer to some obstruction which is permanent. *Ib.*

15. A road used as a common highway since the year 1777, but not recorded as such, is not a public highway within the meaning of the act relative to highways (Sess. 36, ch. 33, § 24), so as to render an obstruction of it a nuisance. *The People* v. *Lawson*, 17 John. 276.

16. A common tippling-house, in and about which idle and dissolute persons are encouraged to assemble, and are permitted to drink, swear, quarrel and shout, by night as well as by day, is a public nuisance; and the keeper thereof is liable to indictment for nuisance. *State* v. *Bertheol*, 6 Blackf. 474.

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17. It is a misdemeanor at Common Law to give to any person unwholesome food, not fit for man to eat, lucri causa, or from malice or deceit. *State* v. *Smith*, 3 Hawks 378.

18. The question as to what constitutes a public nuisance, was discussed in the case of *State* v. *the Commissioners*, Riley 146.

19. All roads laid out by public authority must be regarded as public roads, in the obstruction of which a nuisance may be committed. *State* v. *Mobley*, 1 McMullan 44.

20. A house in which a faro table is kept, for the purposes of common gambling, is necessarily, or per se, a nuisance. *State* v. *Doon*, R. M. Charl ton 1.

21. The use of a faro table for the purpose of gambling, that is, for the purpose of winning and losing money, is not rendered lawful by the tax imposed on the instrument. *Ib.*

22. A temporary occupation of part of a street or highway, by persons engaged in building, or in receiving or delivering goods from stores or warehouses, or the like, is allowed, from the necessity of the case; but a systematic and continued encroachment upon a street, though for the purpose of carrying on a lawful business, is unjustifiable. *People* v. *Cunningham*, 1 Denio 524.

23. In Connecticut, the offence prohibited by the 1st sec. of the statute relating to nuisances, consists in the erection of a building or other obstruction in the highway, in contradistinction to the continuance of one previously erected by another person. *State* v. *Brown*, 16 Conn. 54.

24. Therefore, where the proof offered in support of an information against B., for erecting a store in the highway, by which the passage of travellers was obstructed, showed only that the store had been erected there by A., and that B. thirty years afterwards purchased it of A., and occupied it where it was originally placed, and neglected to remove it, when notified to do so by a committee of the town,—it was held that these facts did not constitute the offence charged in the information. *Ib.*

25. Where a public highway, established by public authority, was discontinued for a period of time, and a new road was used by the public in the meantime, by permission of the owners of the land; held that any obstruction placed across the old road was a nuisance, and the State could prosecute for the nuisance; although it might be asserted that there was a new right of way, still it would be no bar to an indictment for placing an obstruction across the old road. *Elkins* v. *the State*, 2 Humph. 543.

26. Where a turnpike company neglect to repair their road, and thereby forfeit under their charter their right to toll,—it was held that the State could prosecute the company by indictment as for a nuisance, and that the fact of their toll being forfeited would not prevent such prosecution on the part of the State. *Simpson* v. *the State*, 10 Yerger 525.

27. In Alabama, the act of 1836 contemplates that before any one can become obnoxious to its provisions, he must act, and not remain passive, by suffering the obstruction to remain after the passage of the act, which he had erected before its passage. If instead of merely suffering the obstruction to remain, the proof is that, after the passage of the act, and within twelve months before the finding of the indictment, he, by himself or his agent, did some act showing an intention to preserve the nuisance—such, for example, as making the fence, or laying on rails, etc., such an act would subject the offender to the penalties of the act. *Freeman* v. *the State*, 6 Porter 372.

28. Where an act of the Legislature authorized a proprietor of lands lying on the East River, which is an arm of the sea, to construct wharves and bulkheads in the river in front of his land, and there was at that time a public highway through said land, terminating at the river; held that such proprietor could not, by filling up the land between the shore and the bulkhead, obstruct the public right of passage from the land to the water, but that the track was, by operation of law, extended from the former terminus, over the newly-made land to the water, and it

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was held that the obstruction under these circumstances was a nuisance, and that the person who made it is liable to indictment for nuisance. *People* v. *Lambier*, 5 Denio 9.

29. The making of a fence across a highway is embraced in the Rev. Sts. of Indiana of 1843, p. 974, as being a public nuisance and indictable. *State* v. *Miskimmons*, 2 Carter 440.

30. Where public property, as a public square, was illegally sold by city authorities, and private houses erected thereon,—it was held that the private buildings were a nuisance, and that the owners were indictable for erecting such houses. *Commonwealth* v. *Rush*, 14 Penn. State R. 186.

31. The keeping of a bowling-alley, for gain and common use, as an inducement for persons to play on it in the day and night-time, was held to be a common nuisance. *State* v. *Haines*, 30 Maine 65.

32. Erections of every kind adapted to sports and amusements, having no useful end, and notoriously fitted up and continued with a view to make a profit to the owner, are considered as nuisances. *Ib.*

33. When a statute legalizes an existing nuisance for the time being, it is in the power of the Legislature afterwards to repeal such statute. *Reading* v. *the Commonwealth*, 11 Penn. State R. 196.

II. Who is liable to Indictment for a Nuisance—Evidence in excuse on the Trial—Abating a Nuisance.

34. Where county buildings for court-rooms and public offices were erected on part of a public square, previous to the year 1800, and used for such purposes until the year 1829, when new buildings for the same purposes were erected on another part of the same square, and the old buildings rented for other purposes than those for which the county commissioners intended them at first; held that the county commissioners were liable to be indicted for a nuisance in so letting such buildings, and that those who occupied the buildings for purposes different from what they were at first intended, were likewise liable to an indictment for a public nuisance. *Commonwealth* v. *Bowman*, 3 Barr 202.

35. An indictment will lie against a corporation aggregate for a nuisance. *The State* v. *Morris and Essex Railroad Company*, 3 Zabris. 360.

36. An incorporated railroad company is indictable for a nuisance in erecting and continuing a building, and placing and leaving their cars in the public highway. *Ib.*

37. A corporation is liable civiliter for torts committed by its servants or agents precisely as a natural person; and it is liable for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal, or a vote of the corporation, constituting the agency or authorizing the act; (per Green, Chief Jus.) *Ib.*

38. Where constables hold sales in the public highway, and thereby render the highway less commodious to the people, they are liable to be indicted as committing a nuisance. *Commonwealth* v. *Millimam*, 13 Serg. & Rawle 403.

39. Where an indictment for a nuisance was found for erecting a dam across a river not navigable, whereby fish were prevented from ascending the river; held that an indictment as at Common Law for a nuisance could not be maintained; but that if the dam should be continued without opening through it, at the proper place, a passageway for fish, the proprietors would be subject to the penalty provided by the statute. *Commonwealth* v. *Chapin*, 5 Pick. 199.

40. When a gate has been unlawfully erected across a public road, and the proprietor of the land through which the road passes, and on which the gate has been placed, afterwards sells the land to A., who never actually entered into the land, but leased it to others who kept up the gate, A. is not indictable for the continuance of the nuisance. *State* v. *Pollok*, 4 Iredell 303.

41. When a person who occupies a tract of land over which a public road runs, keeps up a fence across the road, although he did not originally erect it,

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he is liable to an indictment for a nuisance. *State* v. *Hunter*, 5 Iredell 369.

42. A square on Charleston Neck had been dedicated by the owners of the land to the public use, as an open square. The defendants, as commissioners of roads on the Neck, erected a railing round the square, leaving gates at convenient distances, and for this they were indicted as for a nuisance. It was held that it was incumbent on the prosecution to show that the act of the defendants violated the public uses of the square, which, not having been done, the verdict against the defendants was set aside and a new trial granted. *State* v. *the Commissioners, &c.*, 3 Hill's S. C. 149.

43. It is only where a regulation of a board of health has been made and published, that one can be convicted, under the 4th section of the Act, of a misdemeanor, for its violation. *Reed* v. *the People*, 1 Parker's Crim. Rep. 481.

44. An infant only a year or two old, upon whose land a nuisance is erected, cannot be made criminally answerable for it. *People* v. *Townsend*, 3 Hill 479.

45. Where, on the trial of an indictment for a nuisance upon the defendant's land, they admitted the title in fee to be in a third person as trustee for them, and that they were cestuis que trust, &c ; held not an admission of their being owners of the land, or that they had any estate in it. *Ib.*

46. A proprietor of a mill, who cuts a canal across a public road, whereby the passage along the highway is obstructed, and those who are in possession of the mill claiming under him and using the canal, are liable to an indictment for such obstruction, the one for creating and the other for continuing the nuisance. But if a bridge is erected over the canal, neither is indictable simply for suffering the bridge to be out of repair. *State* v. *Yarrell*, 12 Iredell 130.

47. An owner of a bowling-alley, who had not used it or authorized its use for gain and common use, or in such a manner as to occasion noise or disorder, would not be liable for such unauthorized use of it by another. *State* v. *Haines*, 30 Me. 65.

48. One who should obtain possession of property by trespass or disseisin, and use it in such a manner as to occasion it to be a common nuisance, could not interpose the unlawful acts by which he obtained and held possession, as an excuse or justification of his subsequent unlawful conduct. *Ib.*

49. A tenant is liable to indictment and conviction for such a use of property. *Ib.*

50. An indictment lies as for a nuisance, when one obstructs a passageway from one highway to another; such passage being considered a highway. *State* v. *Duncan*, 1 McCord 404.

51. The obstruction of a highway is an offence at Common Law, which the Pennsylvania Act of 1802 did not extinguish, but inflicted an additional punishment for a distinct offence, viz., for not removing the nuisance on notice from the supervisors ; and hence a defendant might be convicted for an obstruction of a highway without any notice from the supervisors to remove, being given before the commencement of the prosecution. *Kelly* v. *Commonwealth*, 11 Serg. & R. 345.

52. When an order of a board of health is made ex parte, adjudging certain premises to be a common nuisance, and directing the cleansing and purification of the same within three days after the service of notice of such order, it is not such a regulation as is contemplated by the fourth section of the statute ; and a failure to comply with such order, does not render the person offending liable to punishment for a misdemeanor, under the section aforesaid. *Reed* v. *People*, 1 Parker's Crim. R. 481.

53. On the trial of an indictment for the violation of an order made by a board of health, it is not competent for the prosecution to prove affirmative offensive acts on the part of the defendant, while engaged in removing the cause of the nuisance ; but it is competent for the defendant on such trial to show a bona fide attempt on his part to obey the order in question. *Ib.*

54. On such trial it is a defence to such indictment to prove that, at the time of the making and service of the order, the accused lived beyond the bounds of the village corporation, in

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which such board of health was organized. *Ib.*

55. Where the defendant was indicted for erecting a nuisance near to the dwelling-houses of divers citizens, and offered to prove in bar of the prosecution that the dwelling-houses had been erected since the erection of the alleged nuisance; it was held that such proof was admissible. *Ellis* v. *the State*, 7 Blackf. 534.

56. On an indictment for a nuisance, the defendant cannot be permitted to excuse himself for an infraction of the criminal laws of the State against nuisances, because he was acting as the agent or servant of another. *State* v. *Bell*, 5 Porter 365.

57. And in such case it would be no bar against the legality of the defendant's conviction, that the buildings erected and alleged to be a nuisance were the property of another person. *Ib.*

58. Such facts might be introduced and shown as circumstances to mitigate or reduce a fine, or other punishment, when discretionary. *Ib.*

59. A party cannot defend an indictment for nuisance by showing its continued existence for such length of time as would establish a prescription against individuals. *People* v. *Cunningham*, 1 Denio 524.

60. Regularly a part of the judgment upon conviction for a nuisance is, that the nuisance be abated (per Green, Chief Jus.) *State* v. *Morris and Essex R. R., &c.*, 3 Zabris. 360.

61. The right of abating or indicting a public nuisance, is not affected by a statute imposing a penalty for the offence, unless negative words are added evincing an intent to exclude Common Law remedies. *Renwick* v. *Morris*, 7 Hill 575.

62. At Common Law a person has a right to abate a nuisance; but no more injury to the property of another must be inflicted than is absolutely necessary to accomplish the object, or an indictment will lie for such injury, if excessive. *State* v. *Moffett*, 1 Iowa 247.

63. The summary abatement of a dam, as a nuisance, is not necessarily attended with malicious or wilful motives; it may be an act necessary for the protection and enjoyment of property. *Ib.*

64. A judgment upon an indictment for a nuisance, that the nuisance be abated forthwith at the cost of the defendant, and the sheriff is charged with the execution of this order, is, in effect, a command to the sheriff to abate the nuisance, and to that extent erroneous; but will be amended in the Appellate Court, so as to command the defendant to abate the same, if it has not been already done. *Campbell* v. *State*, 16 Ala. 144.

III. Indictment for Nuisance.

65. Where a river, up to a certain point, had been actually and frequently used by the public as a navigable river, and was, by virtue of an act of the legislature, under the charge of public functionaries, and worked upon by the labor of the public, these circumstances rendered the river, as like circumstances would have rendered a road, a public highway, for the obstruction of which an indictment lies at Common Law. *State* v. *Thompson*, 2 Strobh. 12.

66. An indictment lies, as for a public nuisance, against one for keeping a house wherein offences are committed that are punishable by fine. *Smith* v. *Com.*, 6 B. Mon. 21.

67. Where liquor is habitually sold to slaves, and a house is kept for the purpose of such selling; held that keeping such house was an indictable offence. *Ib.*

68. In an indictment for a nuisance, concluding, "to the common nuisance of divers of the Commonwealth citizens;" it was held, in Virginia, that such indictment was insufficient. It ought to have been alleged a common nuisance to all citizens of the Commonwealth who resided in that place, or had to pass in that place. *Com.* v. *Faris*, 5 Rand. 691.

69. Where a prosecution is begun as for a nuisance, on the ground that a house is negligently kept and in a filthy condition, the indictment must specially allege these facts and circumstances. *State* v. *Purse*, 4 McCord 472.

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70. If it appear from the purposes for which a house is intended, that it may become a nuisance, and by its location it is already so, an indictment will lie; but it is necessary that these facts should be set forth in the indictment. *Ib.*

71. On an indictment for a nuisance in keeping 50 barrels of gunpowder in a certain house near the dwelling-house of divers good citizens, and near a certain public street; it was held that the fact so charged does not amount to a nuisance; aliter, if it had been alleged to have been negligently and improvidently kept. *The People* v. *Sands*, 1 John. 78.

72. It will not be presumed from lapse of time, that a public square or street has been granted, so as to prevent an indictment for a nuisance. *Com.* v. *Elburger*, 1 Whart. 469.

73. Granting that a town has a right of way, it will still be technically a private way, and any person other than an inhabitant of the town passing upon it, will be a trespasser; and if obstructed, no indictment will lie for the obstruction, nor will the town be liable to punishment for neglecting to repair it. *Com.* v. *Low*, 3 Pick. 408.

74. An indictment will lie at Common Law, against one who so drives his carriage through the streets of a crowded city, as to endanger the lives and safety of the citizens. *U. States* v. *Hart*, Pet. C. C. 390.

75. One may be guilty of erecting or causing a nuisance, which he does not continue; and hence it is not necessary to allege in an indictment for nuisance under the Rev. Stat. of Maine, ch. 164, § 7, that it is a continuing nuisance. *State* v. *Hull*, 21 Maine (8 Shep.) 84.

76. In an information for the continuance of a nuisance previously erected by other persons, the facts ought to be set forth circumstantially. *State* v. *Brown*, 16 Conn. 154.

77. An indictment for a nuisance in erecting and maintaining a dam upon the defendant's land, alleged that, by reason of the dam, the animal and vegetable substances brought down the stream were collected and accumulated in large quantities, and became offensive, and corrupted the water; held that though the proof showed the injury to have resulted from the alternate rise and fall of water in the pond, or from the action of the sun upon the vegetables growing on the margin, &c., the substance of the issue was maintained, and this notwithstanding the stream on which the dam stood was not a public highway. *The People* v. *Townsend*, 3 Hill 479.

78. To maintain an indictment against one for a nuisance, it is not enough merely to show him to be the owner of the land on which it exists, but it must appear that he either erected or continued it, or in some way sanctioned its erection or continuance. *Ib.*

79. Where an indictment for nuisance charges the defendant with fixing, putting, and setting in the harbor, "a certain part of a wharf, it being a part of a wharf owned by the defendant, and known by the name of Week's wharf; held that the indictment was defective as to description of the wharf. *State* v. *Sturdivant*, 21 Maine (8 Shep.) 9.

80. The place where a nuisance is alleged to be erected, must be described in a manner that shall be certain to a common intent, and be averred to be within the county. *Ib.*

81. In a prosecution for a public nuisance, where the indictment charged the defendant with keeping in a public place, "a certain common, ill-governed and disorderly room, in which, for lucre, the defendant procured and suffered disorderly persons to meet, by night and day, and to remain there drinking, tippling, cursing, swearing, quarrelling, making great noises, rolling bowls in and at a game commonly called ten-pins;" it was held that the offence charged in the indictment was a public nuisance, and indictable. *Bloomhuff* v. *State*, 8 Blackf. 205.

82. And where an order was made, upon the conviction on such indictment, for the abatement of the ball-alley, it was held that such order was unauthorized. *Ib.*

83. Though the fee of premises may be vested in a town, or be private property even, yet if the use and occupancy be given to the public as a highway, public square, or common, and it has

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been for a long time used for passing and repassing, and has been common to all the people, any obstruction thereof, or nuisance erected thereon, may be prosecuted by indictment. *State* v. *Atkinson*, 24 Vt. 448.

84. And the premises, in such case, may be described in an indictment as a public highway. *Ib.*

85. The keeping of a disorderly house is indictable at Common Law, as a nuisance, and it is not necessary to allege that the house was kept for gain or lucre. *State* v. *Bailey*, 1 Foster 343.

86. Where an indictment for keeping a disorderly house, alleges that it was so kept on the first day of, &c., and on divers other days and times between that day and the day of taking the inquisition; it was held that the allegation of the time, and the manner of the stating the offence, were sufficient. *Ib.*

87. In an indictment for nuisance, the defendant cannot claim that the indictment being for exercising a noxious trade, is unsustainable, unless some place for the exercise of it had been previously assigned by the selectmen, under the statute of Maine, ch. 164, § 2. *State* v. *Hart*, 34 Maine 36.

88. The offence is not made to depend upon the exercise of the power given the selectmen under that statute, but rather the contrary. *Ib.*

89. And when an indictment in such case alleges particular facts, and that those facts constituted an offence, the government is to prove the facts, and is entitled to prove them all. Whether the facts are properly alleged, or, if proved, would constitute a crime, cannot be raised on the examination of testimony. Those points would be properly presented on motion in arrest of judgment. *Ib.*

90. Where an indictment, in such case, charges that the shop was erected and maintained for the purpose of the trade described; that the defendants did therein carry on that trade, and in the exercise of that trade collected and kept certain offensive matters, &c.; held that the charge was but one proceeding on the part of the defendants. *Ib.*

91. Where an indictment for nuisance charged that the defendant, "near to a public street and common highway there, and also near to the dwelling-houses of divers citizens there situate and being, did unlawfully erect, build, and maintain a certain building for the purpose of making and manufacturing neat's-foot oil therein, and did unlawfully and injuriously make and set up, place and maintain in the said building, divers furnaces, stoves, caldrons, five coppers and five boilers, for the purpose of boiling and trying putrid meat, bone, heads, feet, &c., by reason of which said premises, noisome and unwholesome smoke and vapors were emitted and issued, to the great damage and common nuisance," &c.; and it appearing in evidence that the defendant kept hogs in a yard at the west end and south side of his oil works, and that the bones after being used in the factory were thrown into the hog-yard, and it also appearing in evidence that the emptying of the kettles and the carting away of the bones created a stench; it was held that the nuisance arising from the hog-yard, and the carting away the heaps of bones, not being charged in the indictment, could not be offered in evidence. *Com.* v. *Brown*, 13 Metc. 365.

92. In an indictment for a nuisance in not keeping a ferry in repair, where the only question was as to the present ownership of the land to which the ferry had always been appurtenant, and evidence was offered tending to show that the defendant had purchased the same; held it was no error in the court below to charge the jury that if the defendant was the purchaser of the former owner's estate in the land, they might find that he was the propietor, and therefore guilty. *State* v. *Willis*, Busbee's N. Car. Rep. 223.

93. In an indictment for obstructing a public highway, where the question was whether the same had been used as a public highway or not, and there was a conflict of testimony between the witnesses for the State and the defendant as to that fact, and the judge below charged the jury that if the evidence offered in the case satisfied them that the road had been used as a public highway for twenty years, they were at liberty to presume that the said road had been established as a public high-

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way, and in that case the defendant was guilty, and he declined to charge as asked for by the defendant, that if the road had been used in no other manner than as described by the defendant's witnesses (not as a public road), the jury were not at liberty to infer its establishment as a public road; held that such charge was a violation of the act of 1796 (Rev. Stat. ch. 31, § 136). *State* v. *Cardwell*, Busbee's N. C. R. 245.

94. It seems that the establishment of a public highway may be inferred by the jury, from the use of it as such for twenty years, although the time and manner of the user is shown to have been under imperfect and irregular proceedings. *Ib.*

95. In a case where a nuisance was caused by a mill and dam near a highway, and an indictment was laid for such nuisance, without specifically describing the mill, or stating that it was in the county where the indictment was laid, the indictment, though insufficient before, was held good after verdict. *Stephens' case*, 2 Leigh 759.

96. Where a nuisance is alleged in an indictment, as being committed in B., but a part of the nuisance being in fact in another town, although both towns are in the same county, it was held that the offence was sufficiently charged in the indictment, since the description in the indictment only fixed the venue, and had no reference to the description of the offence. *State* v. *Godfrey*, 3 Fairf. 361.

97. Where the offence charged, against three persons, is a public nuisance, and indictable, it is competent for the jury on an indictment to find one of the defendants guilty, and the others not guilty. *Bloomhuff* v. *State*, 8 Blackf. 205.

98. What averments in an indictment are sufficient to charge a Common Law nuisance, considered. *Reed* v. *People*, 1 Parker's Crim. R. 481.

99. Where an indictment was found against C. for keeping a public nuisance, and the offence was charged as follows: that said E., late, &c., in, &c., at, &c., in and upon a public street, within the limits of the town of R. in said county, did then and there, unlawfully, on said street, erect, continue and maintain on other days and times thenceforward, for the space of three months then next following, by then and there in the public street aforesaid, in the limits of the town aforesaid, in the county aforesaid, on the days and times aforesaid, in the public view of the inhabitants of said town, and other citizens of the state of Indiana, who were wont and accustomed to pass and repass on, in, and through said street, erecting, keeping, and letting to mares a certain stallion, which he, the said C., did then and there unlawfully keep, and let to mares, &c.; held that the indictment sufficiently alleged that C. had not provided an enclosure in which a stallion was let to mares, and though negligently drawn, substantially described the offence. *Crane* v. *State*, 3 Indiana 193.

100. Where the defendant is charged with breaking into the house of another, and making a great noise; on account of which noise, and the breaking into the house, the wife of the latter miscarries, an indictment lies for this offence as for a misdemeanor. *Commonwealth* v. *Taylor*, 5 Binn. 277.

101. Where a complaint charges that the defendants, with force and arms, were disturbers and breakers of the peace, &c., to the great disturbance of divers citizens; held that no offence was technically charged in this complaint; it should have alleged that the defendants were disturbers, &c., to the great damage and common nuisance of all the citizens of the Commonwealth then inhabiting, being, and residing, &c. *Commonwealth* v. *Smith*, 6 Cush. 80.

OUTLAWRY.

1. In a judgment of outlawry an exigent should not be awarded before a pluries has been returned "not found." *Commonwealth* v. *Hagerman*, 2 Virg. Cas. 244.

2. So as a sufficient number of county courts should not intervene, where to enable the sheriff to exact the defendant five times, a new writ of exigent should issue, stating the first writ with

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the return of its partial execution, and requiring a party to be exacted from county court, to county court, in order that with the first he be exacted five times. *Ib.*

3. When a party has been indicted for a trespass with force and arms, he may be prosecuted to outlawry in Virginia. *Commonwealth* v. *Hale*, 2 Virg. Cas. 241.

4. And the coroner ought to pronounce the judgment of outlawry, and his name ought to be recited by the sheriff in his return to the exigent. Ib., and *Commonwealth* v. *Anderson*, 2 Virg. Cas. 245.

5. When the return of the exigent indicates that the judgment of outlawry has been pronounced by the coroner, by name, the Court will, on motion, award the writ of capias utlagatum, without referring to the record, to see whether there are errors or not in the preceding process. *Ib.*

6. In a process of outlawry in Pennsylvania, the township of which the defendant was inhabitant, must be stated; but if he is shown to have been there, it is sufficient, though not his place of residence. *Respublica* v. *Steele*, 2 Dall. 92.

PARDON.

1. Where power is conferred upon the executive, by the constitution, to grant pardons, it includes the power of granting a conditional pardon. *The People* v. *Potter*, 1 Parker's Crim. Rep. 47.

2. Such condition may extend to banishment from the United States; and where there is a breach of the condition, the pardon becomes void, and the criminal may be remanded on his original sentence. *Ib.*

3. The power of remanding in such cases can be exercised by the Court in which he was convicted, or by any Court of superior criminal jurisdiction. *Ib.*

4. Where one is convicted of perjury, he is an incompetent witness, though he has been pardoned by the Governor, and the pardon purports to restore him to all his civil rights, the legislature having provided that such convict shall not be allowed to testify till such judgment be reversed; such is the law, though the exclusive power of pardon be vested in the Governor. *Houghtaling* v. *Kelderhouse*, 1 Parker's Crim. Rep. 241.

5. The Governor has the constitutional power to pardon convicts, upon such conditions as he may choose to impose, or upon the terms specified in sec. 245, ch. 52, Digest, and if the pardon follow not the specific conditions of this section, it must be construed to be given under the general power. *Hunt, Ex parte*, 5 Eng. 284.

6. Pardons are to be considered favorably to the convict; they take effect from the delivery, and not only relieve from punishment, but clear the pardoned from the guilt of the offence. *Ib.*

7. A convict pardoned by the Governor under the general power, upon condition that he shall leave the State, if he complies with such condition, but afterwards returns to the State, is not liable to be retaken and imprisoned under the former conviction. *Ib.*

8. Where a person was convicted of a criminal offence and sentenced to imprisonment for a specified time, and to pay a fine of one hundred dollars, afterwards was pardoned for the " crime of which he stands convicted;" after this an execution was issued against him for the amount of the fine, and the costs of prosecution, and also a fee-bill for the costs made by him; held that the pardon discharged him from the fine, but not from the costs. *Halliday* v. *People*, 5 Gilman 214.

9. Where a pardon is granted to one convicted and sentenced for an infamous offence, it restores his competency as a witness; but a remission merely of his punishment does not restore his competency. *Perkins* v. *Stevens*, 24 Pick. 277.

10. It seems that a person sentenced to the State prison for life, and afterwards pardoned, is restored to his rights and duties as a parent, and becomes entitled to the custody of his infant children, who had been placed under the care of a guardian appointed during his

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civil death; the effect of the pardon is to acquit the offender of the penalties annexed to the conviction, and to give him a new credit and capacity, but it does not affect or annul the second marriage of his wife, nor the sale of his property by persons appointed to administer on his estate, nor divest his heirs of the interest acquired in his estate, in consequence of his civil death. *Matter of Deming*, 10 John. 232.

11. The Governor cannot constitutionally add to, or commute a punishment, but under the power of pardoning, he may remit part of a fine. *State* v. *Twitty*, 4 Hawks 193.

12. An averment in an information that the prisoner was discharged in consequence of a pardon, is equivalent to an averment that he was discharged "in due course of law," and that it is not necessary to use the words. The information avers a specific means of discharge; and that such a discharge is in due course of law, is a matter of legal inference. *Evans* v. *Commonwealth*, 3 Met. 453.

13. A pardon for a particularly specified offence, shall not operate as a pardon for a prior felony not mentioned in such pardon. *State* v. *McCarty*, 1 Bay 334.

14. A man who is indicted for horse stealing, cannot legally plead in defence of the charge that the crime was committed, if at all, prior to a conviction against him for negro-stealing, for which he had received a pardon. *Hawkins* v. *State*, 1 Porter 475.

15. Neither a conviction, nor pardon for a particular offence, can, in this State, operate as a discharge of any other distinct offence. *Ib.*

16. The Governor's pardon will not discharge the moiety of a fine for negro-killing, which goes to the informer, although he may remit the moiety which goes to the State. *Rowe* v. *State*, 2 Bay 565.

17. A prisoner can derive no advantage from pardon without bringing the same judicially before the Court. *United States* v. *Wilson*, 7 Peters 150.

18. Where it appears from the record, and the pardon itself, that the Governor was misinformed, and granted the pardon under the impression that there was a subsisting judgment, when in fact there was no judgment, the pardon is void; an appeal to the Supreme Court annuls the judgment; and if that Court decides in favor of the State, it is the duty of the judge presiding at the next term to pass sentence, this a new judgment unconnected with that appealed from. *State* v. *McIntire*, 1 Jones' N. Car. R. 1.

19. Where, upon the face of the pardon, it appears that the Governor supposed the defendant had been fined as well as imprisoned, and the imprisonment is remitted provided the fine be first paid, this mistake as to fact renders the pardon void. *Ib.*

20. The Governor may pardon a portion of the punishment after it is fixed by judgment, whether he has power to pardon a portion of the supposed punishment (when it is discretionary) before it is fixed by judgment—*Quere.* *Ib.*

21. Though the pardoning power is general, if the punishment be at the discretion of the presiding judge, it is presumed that the pardoning power will only be exercised in extreme cases. *Ib.*

22. The repeal of a penal statute operates as a pardon of all offences which were committed previous to such repeal. *Roberts* v. *State*, 2 Overt. 423.

23. Where a pardon is granted by a Governor of a State, under its great seal, it is evidence per se without further proof. *Ib.* 1 Bald. 78.

24. A pardon granted by the President of the United States, after condemnation, as to all the interest of the United States in the penalty incurred by a violation of the embargo laws, and directing all further proceedings on behalf of the United States to be stayed, will not remit the interest of the custom-house officers in a moiety. *U. States* v. *Lancaster*, 4 Wash. C. C. 64.

25. A pardon makes one sentenced to the States prison for forgery, competent as a witness, although there is a clause in the pardon declaring that nothing contained therein is intended to relieve the prisoner from the legal disabilities arising from his conviction and sentence, but solely from impris-

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onment; such clause will be considered repugnant, and will be treated as surplusage. *People* v. *Pease*, 3 Johns. 333.

26. In South Carolina, the Governor may grant a pardon on the condition that the offender shall leave the State and never return. *State* v. *Smith*, 1 Bailey 283.

27. And when this condition is violated, the original sentence may be enforced in a court of law. *Ib.*

28. In South Carolina, the 4th section of the act of 1827, which directs fines and forfeitures incurred or imposed in any Court of Sessions, to be paid to the commissioners of public buildings for public purposes, does not deprive the Governor of the power given him by the Constitution, to remit so much of any fine or forfeiture as is not by law given to the informer, or other private persons for private purposes. *State* v. *Simpson*, 1 Bailey 378.

29. A condition being annexed to a pardon, that the offender shall suffer a specific punishment, will not do away with the performance of the other part of the condition; but if the offender fails to perform it within a reasonable time, the pardon is forfeited, and the execution of the original sentence may be enforced. *State* v. *Addington*, 2 Bailey 516.

30. In South Carolina, the Governor has the power of granting reprieves and pardons, in all cases (except of impeachment), after conviction, either with or without terms or restrictions. *State* v. *Fuller*, 1 McCord 178.

31. In South Carolina, where the Governor pardoned a feme covert, upon condition that she would leave the State within two weeks, and she failed to go, the Constitutional Court will consider the pardon as void, and will proceed to pass sentence. *Ib.*

32. In South Carolina, the Governor may remit the half of the penalty for retailing spirituous liquors (under the act of 1801) that is given by that act to the commissioners of roads, but not the half which goes to the informer. *State* v. *Williams*, 1 N. & M. 26.

33. In Virginia, the House of Delegates cannot, without the concurrence of the Senate, pardon persons which have been condemned under the treason law of 1776, by the General Court. *Commonwealth* v. *Caton*, 4 Call. 5.

34. In Virginia, where a condition was annexed to a pardon by the Governor, it was held that the executive had no power to pardon upon condition, and that such pardon was absolute. *Commonwealth* v. *Fowler*, 4 Call. 35.

35. In Virginia, where a justice of the peace forfeited his office, and became disqualified from acting under his commission, on account of a judgment and conviction against him for a felony; it was held that a pardon did not dispense with the forfeiture, or restore his capacity. *Fugate's case*, 2 Leigh 724.

36. In Pennsylvania, the power of the Governor to grant pardons, does not embrace remitting the costs to which the prisoner may have been sentenced upon conviction. *Ex parte McDonald*, 2 Whart. 440.

PEDDLERS.

1. Books were sent up from Charleston to Columbia, and consigned to Pollock, Solomon & Co., merchants and auctioneers in Columbia, by whom the freight from Charleston was paid, and sold by them and the defendant at auction and private sale, for the use and benefit of the defendant; held not to come within the purview of the act of Assembly for hawking and peddling. *State* v. *Belcher*, 1 McMullan 40.

2. A hawker and peddler is one who travels from town to town, or from plantation to plantation, carrying to sell, or exposing to sale, goods, wares, and merchandise; but a single shipment of goods, regularly consigned to Pollock, Solomon & Co., by the defendant, and sold by himself or them for his use and benefit, is not hawking and peddling, within the meaning of the act. *Ib.*

3. The defendant, a non-resident of this State, did sell goods, wares, and merchandise in a house in the town of

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Columbia, and is therefore, when properly indicted and convicted, liable to the penalties of the act of the Assembly of 1835, page 6 (per O'Neall, J.) *Ib.*

4. An indictment for vending clocks, without license, must allege a sale or some other disposition of a clock, in the way of trade; but it is not necessary to allege to whom the clock was sold, or the price that was given. *Page* v. *State*, 6 Mo. R. 205.

5. The 12th section of the act concerning peddlers (R. C. 1835, p. 429), requires a license to peddle clocks, whether manufactured in the State or not. *Ib.*

6. The first and 2d sections of the act of 1837, relative to the licensing of peddlers, and the penalty for peddling without a license, being inconsistent with, is repealed by the act of 1848. *Hirschfelder* v. *State*, 18 Ala. 112.

7. Where an indictment was found under a statute against peddling certain enumerated articles, it was held that plain gold rings and ear-knobs were comprehended in the signification of the term "jewelry." *Com.* v. *Stephens*, 14 Pick. 370.

8. An indictment against a peddler, which does not allege that the person charged with peddling had not first obtained a license therefor, is bad, and a judgment founded on such an indictment will be reversed. *May* v. *State*, 9 Ala. Rep. 167.

PERJURY.

I. What Constitutes Perjury. Subornation of Perjury. Miscellaneous.
II. Indictment for Perjury.
III. Proof on the Trial.

I. What Constitutes Perjury—Subornation of Perjury—Miscellaneous.

1. Where it is alleged that three or more persons were jointly concerned in an assault, and it was contended to be immaterial if all participated in it, by which of them certain acts were done; it was held to be material, and that evidence as to the acts of either, if wilfully and falsely given, constituted perjury. *State* v. *Norris*, 9 N. Hamp. R. 96.

2. In cases of perjury, the matter sworn to must be material, for if it be of no importance, though false, it is not perjury. *Ib.*

3. Though a man swear falsely, yet if it be in a matter immaterial to the issue, it will not amount to corrupt perjury, for the reason that perjury is so high a crime, in respect to the injury it does to man; but if it is not material to the issue, it cannot by any means induce the jury to give their verdict one way or the other, and consequently cannot injure the party against whom the verdict is given. *Ib.*

4. To constitute perjury, it is not necessary that the particular fact sworn to should be immediately material to the issue, but it must have such a direct and immediate conection with a material fact as to give weight to the testimony on that point; and it has been holden that a false answer, where a question was put to the witness merely with a design to impair his credit as to parts of the case immediately material to the issue, would be perjury, particularly if the witness be cautioned as to his answer. *Ib.*

5. Testimony tending to affect the verdict of the jury, or extenuating or increasing the damage, and thus influencing the judgment of the Court, is material. *Ib.*

6. It is not necessary that the testimony should of itself be sufficient to sustain the issue in the case in which the witness is called, or that it should change the mode of punishment, if in a criminal case; if it is pertinent to the issue, or enhances the damage, it is sufficient. *Ib.*.

7. Where R. was sued before a justice of the peace, on a note for payment of money, and offered an affidavit as a plea, which described the note, and stated that said R. did not sign said note, nor make his mark thereto, nor authorize any person to do so for him, and that said note was wholly

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unjust and forged; held that this affidavit was a sufficient plea of non est factum before a justice of the peace, in the sense of the acts of 1817, ch. 86, and of 1819, ch. 27, and that a valid assignment of perjury might be made thereupon. *State* v. *Roberts*, 11 Humph. 539.

8. It is true, indeed, that a man, careful of conscience and character, when interrogated, would not place himself within the narrow and painful limits of mere literal truth; still, if this be done, it does not constitute a proper case for the assignment of perjury. *Lamden* v. *State*, 5 Humph. 83.

9. A bankrupt is bound to exhibit a true schedule of all his property, and if he fail to do this, wilfully and fraudulently, he is guilty of perjury. *State* v. *Conner*, 3 McLean 573.

10. But if he, being unacquainted with the requirements of the law, shall be advised by his counsel, after the facts have been fully stated to him, that certain items of property are not required to be stated on his schedule, and he omits them, he is not guilty of perjury. *Ib.*

11. The words "corporal oath," and "solemn oath," are held to be synonymous, and an oath taken with the uplifted hand may be properly described by either of these words. *Jackson* v. *State*, 1 Carter's R. 184.

12. Where the false swearing was in the course of a judicial proceeding, it is not essential to the commission of the offence of perjury that all the proceedings on the trial should be strictly regular. *State* v. *Hall*, 7 Blackf. 25.

13. It is essential, however, that the Court have jurisdiction of the subject-matter, and power to administer an oath to a witness. *Ib.*

14. Where a defendant made a false affidavit to procure a search-warrant, and charged that the felony had been committed, it was held that the affidavit need not charge the offence on any particular individual, in order to constitute the crime of wilful perjury. *Carpenter* v. *State*, 4 Howard's R. 163.

15. In Indiana, the statute declares that any person who shall take a lawful oath in any matter in which by law an oath may be required, and shall under such oath, swear wilfully, corruptly, and falsely, touching a matter material to the point in question, shall be deemed guilty of perjury. *State* v. *Johnson*, 7 Blackf. 49.

16. It is perjury to swear falsely in an affidavit to hold to bail. *Ib.*

17. It is perjury to swear falsely to a material point in an affidavit for the continuance of a cause. *Ib.*

18. Where an estate was conveyed by A. to B., which had been previously mortgaged to C., and a judgment was received by C., under the mortgage, for the possession of the estate, and a petition for a review was afterwards filled by B., setting forth the discovery of new evidence, showing a technical payment of the debt secured by the mortgage, and swore, at the hearing of the petition, that he notified B. when the conveyance was made of the existence of the mortgage, and A. was afterwards indicted for perjury in so swearing, and a motion made, before plea, to quash the indictment, by reason of the immaterality of such evidence to the main issue at the hearing; held that such evidence was pertinent if not material, and the motion was denied. *Com.* v. *Farley*, Thacher's Crim. Cas. 654.

19. Where one is summoned as a trustee, he may discharge himself by disclosing that he has appropriated the funds of the principal defendant in his hands, to the payment of money due him by such defendant, though the same be in fact due on a contract which is usurious; and if such trustee, after having discharged himself by a statement of such appropriation, in his answer, without disclosing that the debt was due him on a usurious contract, is indicted for perjury in such statement, and the principal defendant being examined as a witness in support of the charge, deny the existence of any contract between him and the trustee, for the payment by him to the latter of any more than lawful interest, such person, if his testimony be false, may be indicted for perjury. *Ib.*

20. On an indictment for perjury under the Rev. St. c. 36, § 65, regulating the returns to be made by the officers of the banks, where the cashier swears

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that the return made by him "is, according to his best knowledge and belief, true," knowing at the time that it was false, and taking the oath deliberately; held he is guilty of perjury, under Rev. St. c. 128, § 2. *Com.* v. *Dunham, Jr.*, Thacher's Crim Cas. 519.

21. A false oath taken before the Commissioners of Bankruptcy, was declared to be perjury, and subjected the offender to punishment; but, the moment the law was repealed, it remained a false oath, but ceased to be an offence punishable by municipal law. *Anonymous*, 1 Washington C. C. 84.

22. One of the essential ingredients necessary to constitute legal perjury is, that the tribunal, or body before whom false swearing is alleged to have been committed, must have legal authority and power to inquire into the cause or matter investigated. *Pankey* v. *People*, 1 Scam. 80.

23. An affidavit administered by a justice of the peace, as a foundation for obtaining the writ of habeas corpus, is within the scope of the powers of a justice of the peace; and if the matter alleged to have been falsely sworn is material to the obtainment of the writ of habeas corpus, the defendant may with propriety be convicted. *White* v. *State*, 1 Smed. and Marsh. 149.

24. It is sufficient for one in custody to make oath that he is illegally so detained, and he is entitled, as a matter of right, to issue a writ of habeas corpus; whatever else he may state in his affidavit by way of inducement, though it may be false, cannot be made the foundation of a conviction for perjury. *Ib.*

25. Where the oath is taken before a state or national magistrate, authorized to administer oaths, in pursuance of any regulations prescribed by the Treasury department, or in conformity with the practice and usage of the Treasury department, so that the affidavit would be admissible evidence at the department in support of any claim against the United States, and the party swears falsely, the case is within the purview of the act of 1823, chap. 165. *State* v. *Bailey*, 9 Peters' R. 238.

26. A justice of the peace of the Commonwealth of Kentucky, authorized by the laws of that State to administer oaths, has authority and jurisdiction to administer an oath and take an affidavit, and, if the facts stated therein are falsely sworn to, the case is within the act of Congress of the 1st day of March, 1823. *Ib.*

27. Where a person, on the trial of a suit, presents himself as a witness in support of the charges against the adverse party, on his account-book, and voluntarily takes the general oath, to tell the truth, the whole truth, and nothing but the truth, legally administered, instead of the more restricted oath, to make just and true answers to such questions as he shall be asked by the Court, or by the order thereof, and testifies untruly, wittingly and willingly, to matters material, and legitimately derivable from him, he will be guilty of perjury within the purview of the Rev. Stat. c. 58, § 1, and may be convicted. *State* v. *Keene*, 26 Me. 33.

28. Where G. F. F. was summoned as a trustee of J. P., stated in his answer, among other things, that from the proceeds of property placed in his hands by J. P., as security for the indebtedness of S. P., he had received a sum of money, which, in pursuance of a previous agreement between him and S. P., he had appropriated in part discharge of his demands against S. P., and that he had appropriated, paid over and accounted to S. P. for all the money so received by him; and after being discharged as such trustee, S. P. entered a complaint against him before the grand jury, for perjury in the above statement contained in his answer; on the investigation of this complaint S. P. appeared, and was examined as a witness, and, after having given a statement in detail of the transactions between him and G. F. F., testified in answer to a question put to him by the district attorney, that there never was any contract or agreement between him and G. F. F., for the payment by him to the latter of any more than lawful interest on any of the transactions in evidence between them, in any shape or any form; held that S. P., being indicted for perjury for so doing, the evidence

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given by him was material to the inquiry before the grand jury. *Com.* v *Parker*, 2 Cush. 212.

29. Perjury may be committed on an oath taken before a Court of competent jurisdiction, although the witness was erroneously sworn. *The State* v. *Molier*, 1 Dev. 263.

30. Perjury may be committed where one gives evidence before a grand jury. *The State* v. *Offutt*, 4 Blackf. 355.

31. Where an incompetent witness is permitted to testify falsely, it will be perjury. *Montgomery* v. *the State*, 10 Ohio 220.

32. Under the Revised Statutes of Massachusetts, chap. 128, the offence of perjury at Common Law has not been changed, and in every case of perjury materiality is still an element of the offence. *Com.* v. *Farley* Thacher's Crim. Cas. 654.

33. One cannot commit perjury before a justice who has no jurisdiction of the offence, in the trial of which the perjury is alleged to have been committed. *Boling* v. *Luther*, 2 Tayl. 202.

34. Perjury may be committed where a defendant in debt on a bond, makes an affidavit before the justice before whom the case is, that he did not sign the bond sued on. *Com.* v. *Litton*, 6 Gratt. 691.

35. Where a person takes a false oath under the insolvent debtors' act, it is perjury at Common Law. *Commonwealth* v. *Calvert*, 1 Virg. Cas. 181.

36. Perjury is swearing falsely and corruptly, contrary to the belief of the witness, and not swearing rashly and inconsiderately according to his belief. *U. States* v. *Shelburne*, 1 Bald. 350.

37. Perjury may be committed on an oath administered by a justice of the peace on the investigation of a matter submitted to arbitration, by a rule of Court, where the parties do not consent. *State* v. *Stephenson*, 4 McCord 165.

38. Where a bankrupt, under the bankrupt law of 1841, swears falsely to his schedule, it is no perjury. *United States* v. *Dickey*, 1 Morris 412.

39. But where one makes false statements in regard to it, in answer to interrogatories proposed to him in his examination, it will be perjury. *Ib.*

40. Where an oath which is required to be administered by a collector of customs, is falsely made before a legal deputy of the collector, acting under the provisions of, and in cases required by the act of 2d March, 1799; held that it may be sufficient ground for an indictment for perjury. *United States* v. *Barton*, Gilpin 439.

41. The crime of perjury is, the taking of a wilful false oath by one who being lawfully required to depose the truth in any judicial proceeding, swears absolutely in a matter material to the point in question. *Com.* v. *Pollard*, 12 Met. 225.

42. The oath must not only be wilfully false, but it must be material to the issue; for if it be of no importance, and immaterial though false, it is not perjury, because it does not affect the issue, and it lies on the prosecutor to prove that it is thus material. *Ib.*

43. When a clerk of a Circuit Court administers an oath as to the travel of a witness, which is not required by law, nor by a rule of Court; it is held not to be false swearing, under the act of Congress. *United States* v. *Babcock*, 4 McLean 113.

44. Where there is an intentional omission by a defendant to place a part of his property on a schedule, on an application under the bankrupt act, which he swears to as containing a true account of all his effects, he is guilty of perjury under the act of Congress. *U. States* v. *Nichols*, 4 McLean 23.

45. An extra judicial oath lays no foundation for a prosecution of perjury. *United States* v. *Babcock*, 4 McLean 113.

46. In the absence of positive acts of the Legislature, there is no criterion by which an act can be ascertained to be criminal, but that of its being against the interest of the State. A false oath is injurious to the State, or to any individual only where it tends to prevent right; therefore, to constitute perjury, it must be to some material fact tending to injure some person. *State* v. *Dodd*, 3 Murphy 226.

47. Perjury may be committed in answering a question that has no relation to the issue, if asked with a design to

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impair the credit of the witness as to those parts of the case which are material and important to the issue, particularly if the witness be cautioned as to his answer. *State* v. *Strat*, 1 Murphy 124.

48. In North Carolina, where iron was left with one for a certain purpose, who, after using part, retained the remainder to his own use, a warrant cannot be brought before a single magistrate to recover the value of the iron retained, the act allowing warrants for specific articles, whether due by obligation, note, or assumpsit, it does not embrace this case. *State* v. *Alex*, 2 Hawks 182.

49. Perjury, therefore, cannot be committed on the trial of the warrant before the magistrate. *Ib.*

50. To constitute perjury it is necessary that the oath relate to some matter material to the question in issue. *State* v. *Hattaway*, 2 Nott & McCord 118.

51. It is not necessary that the particular fact sworn to should be immediately material to the issue, but it must have such a direct and immediate connection with a material fact as to give weight to the testimony to that point. *Ib.*

52. Where a particular fact was material in the case, and the witness swore to the fact, and said that he was present when it took place, and he was asked where he lived at the time, and he answered near the parties, and it was proved he did not live in the State at the time, it was held that it was not swearing to such a material fact as would constitute perjury, though false. *Ib.*

53. A defendant sued for slander in charging the plaintiff with perjury, attempted to justify by proving that in a collateral matter plaintiff had sworn falsely; held that perjury may be committed in swearing falsely to a collateral matter with intent to prop the testimony on some other point, but such collateral matter must be material to the point in dispute; if it be to a point the existence, or non-existence of which cannot affect the question in dispute, it does not tend to prevent the due administration of justice, and therefore is not perjury. *Studdard* v. *Linville*, 3 Hawks 474.

54. Perjury may be assigned in an oath erroneously taken, especially while the proceedings remain unreversed. *Van Steenbergh* v. *Kortz*, 10 John. 167.

55. In Connecticut, when one takes the oath provided for poor imprisoned debtors, falsely and corruptly, in a proceeding to obtain the benefit of that oath, and before a magistrate authorized to administer it, it is perjury. *Arden* v. *State*, 11 Conn. 408.

56. An oath administered by a justice of the peace before arbitrators, on a parol submission not made a rule of Court, is not a judicial oath, nor will its falsity constitute legal perjury. Hence, to charge a person with having sworn falsely on such an occasion, is not actionable. *Mahan* v. *Berry*, 5 Mo. 21.

57. Perjury may be assigned upon an oath or affidavit, which is insufficient to effect the purpose for which it was taken, without additional proof; and it is not necessary to show or aver that such additional proof was made. *State* v. *Dayton*, 3 Zabris. 49.

58. It is not necessary that an affidavit required by statute should be in the words of the act; if the substantial requirements of the act are embodied in it, it will be sufficient, and perjury may be assigned upon it. *Ib.*

59. A magistrate, who has taken the oaths of qualification before one of the associate judges, is not duly qualified, and a person cannot be tried for perjury on an oath taken before a magistrate so qualified; and if on such oath a defendant is convicted, a new trial will be granted. *State* v. *Hayward*, 1 Nott & McCord 546.

60. Perjury cannot be assigned upon an answer in Chancery, unless the bill call for the answer under oath. *Silver* v. *State of Ohio*, 17 Ohio 365.

61. Perjury may be committed in an affidavit made in order to obtain a certiorari to remove into this Court a judgment rendered by a justice of the peace, under the act of 1824, on a trial had before him, for although by that act the writ of certiorari is abolished, there are cases in which a certiorari is the proper remedy. *Pratt* v. *Price*, 11 Wend. 127.

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62. Perjury cannot be committed in an affidavit of an applicant for naturalization, as to his residence in the State previous to the application. The act of Congress of 1802, expressly excludes the oath of the applicant on this point; it is therefore voluntary and immaterial. *State* v. *Helle*, 2 Hill 290.

63. If a plaintiff only swear that the account sued upon is just to the best of his belief, perjury may be assigned of such an oath. *Patrick* v. *Smoke*, 3 Strobh. 147.

64. Perjury consists in the false swearing, without any regard to the form of the oath; and if it be alleged that the oath was taken in any particular form, the statement is unnecessary, and need not be proved; it is sufficient to prove that the defendant was duly sworn. *Ib.*

65. Where a witness comes before a tribunal to be sworn, it is to be presumed that he has settled the point with himself in what manner he will be sworn; and he should make it known to the officer of the Court, and should be sworn with uplifted hand; though not conscientiously scrupulous of swearing on the gospels, and depose falsely, he subjects himself to the pains and penalties of perjury. *State* v. *Whisenhurst*, 2 Hawks 458.

66. *Quere*—Whether perjury that has been committed on a hearing on a criminal complaint before the district judge, is within the act of the 30th of April, 1790, ch. 9, § 18. *U. States* v. *Clark*, 1 Gallison 497.

67. Where a man swears that a thing is so, or that he believes it to be so, when in truth he does not believe it to be so, the oath is false, though the fact really be as stated. *State* v. *Cruikshank*, 6 Blackf. 62.

68. Where, by a legislative enactment, certain oaths are prescribed, and false swearing in taking them is declared perjury, and by a subsequent act the original act is amended, and the form of the oaths altered, false swearing under the amendment is perjury, although it be not expressly declared in the amended act. *Campbell* v. *People*, 8 Wend. 636.

69. Where the contract is to deliver plank on demand, it is necessary to make a demand, to put the party in default; and in a suit for the non-delivery, the material question would be whether a demand was made; it is difficult to conceive of perjury in its legal acceptation, committed on such a trial, unless the swearing is that no such demand was made, when, in fact, the truth was otherwise. *McMurry* v. *State*, 6 Ala. 324.

70. In a trial for perjury, alleged to have been committed in giving evidence in a cause before a justice of the peace, growing out of a written contract, it is necessary that the record or papers of the suit, and the contract, should be produced or accounted for; the first is necessary to show the identity of the proceedings with those described in the indictment; and the other, to ascertain the legal effect of the contract, and consequently what questions of evidence were material or otherwise in that suit. *Ib.*

71. The circuit judge, who presides on the trial of a cause, is, under the practice of Tennessee, competent to try the qualifications of jurors, who may by him be examined on their voir dire; and if upon an issue or question of competency and qualification, a juror wilfully and corruptly state what is untrue in a matter material to such issue, he is guilty of perjury. *State* v. *Wall*, 9 Yerg. 347.

72. Perjury, as defined in the statute, is "when a lawful oath or affirmation is administered in some judicial proceeding, to a person who swears or affirms wilfully, absolutely and falsely in a matter material to the issue or point in question; such person shall be deemed guilty of perjury. *Ib.*

73. At Common Law, and consequently under this statute, to take a false oath in any judicial proceeding, upon any point where its administration is lawful, is perjury. *Ib.*

74. And it is perjury, although the oath be taken on a collateral matter, or branch of a judicial proceeding, which in no way affects the principal judgment. *Ib.*

75. The Circuit Court has power, on an appeal from a justice of the peace, to require a new recognizance to be given, where the security on the recog-

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nizance entered into before the J. P. is insufficient. *State* v. *Lavalley*, 9 Mo. 834.

76. If upon an examination had by the Court as to the sufficiency of the security, the security is sworn and testifies falsely, it will be perjury. *Ib.*

77. To constitute perjury, it is not necessary that the evidence given should be material to the main issue before the Court; it is sufficient if it be material to any collateral matter or inquiry. *Ib.*

78. If the Court have jurisdiction of the parties and the subject-matter, it is not necessary that the proceedings should be strictly regular, to constitute perjury. *Ib.*

79. If on the trial of a charge of assault and battery, which has in fact been committed, a witness falsely testifies to such facts as aggravate the battery, such false testimony is material, and is perjury. *Stevens* v. *State*, 1 Swan 157.

80. It is not necessary that an indictment should specify the perjury which a defendant is charged with having attempted to suborn a witness to commit. *State* v. *Holding*, 1 McCord 31.

81. A conviction for subornation of perjury may be had by the testimony of one witness. *Commonwealth* v. *Douglass*, 5 Metc. 241.

82. Where a party, who is charged with subornation of perjury, knew that the testimony of a witness whom he called would be false, yet if he did not know that the witness would wilfully testify to a fact, knowing it to be false, it was held that he could not be convicted of the crime charged. *Ib.*

83. To constitute subornation of perjury, the party charged must have procured the commission of the perjury, by inciting, instigating or persuading the guilty party to commit the crime. *Ib.*

84. The pardon of a person convicted of a crime does not discharge him from the costs of prosecution; nor is the governor authorized to remit the costs on such prosecution. *State* v. *Farley*, 8 Blackf. 229.

85. Where perjury is committed in proceedings under the bankrupt law, it cannot be prosecuted under the general criminal law of the United States, the 18th section of which applies to perjuries committed in judicial proceedings, whether orally or by deposition. *Anonymous*, 1 Wash. C. C. 84.

86. False oaths of all kinds are prohibited by the Divine law; but civil institutions punish them only in certain cases, and upon reasons of policy. *Ib.*

87. The repeal of the United States bankrupt law was held to be a bar to the prosecution for perjury, which was committed under a law while it was in existence. *U. States* v. *Passmore*, 4 Dall. 372.

88. The penalty of perjury as prescribed by the act of 1839 (Clay's Dig. p. 71, § 4), is changed by the subsequent act of 1841 (Clay's Dig. p. 427, § 2). *De Berine* v. *State*, 19 Ala. 23.

89. In Pennsylvania, previous to the act of April 4th, 1807, a person convicted of perjury out of the county of Philadelphia, could not be sent to the Philadelphia jail. *Barlow* v. *Commonwealth*, 3 Binn. 1.

II. Indictment for Perjury.

90. Where an indictment is laid for perjury in taking a false oath before a regimental court of inquiry, in Virginia, the indictment should state of what number of officers said court consisted, and what was their respective rank, so that the Court may see whether the court of inquiry was legally organized or not. *Connor* v. *Commonwealth*, 2 Virg. Cas. 30.

91. In such case the indictment should distinctly allege what was the subject of inquiry before said court, so that the Court of law may decide whether the testimony of the party accused was upon a material point. *Ib.*

92. Where an indictment is laid for perjury in a court of a justice of the peace, the charging it to have been "committed on the trial of the cause or issue," is not defective for ambiguity. *State* v. *Bishop*, 1 Chip. 120.

93. Where an indictment lies for perjury, it must state a day certain on which the offence was committed. *The State* v. *Offutt*, 4 Blackf. 355.

94. Where, in an indictment for per-

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jury, there was an omission to charge in the bill of indictment that the matter of traverse tried between the State of Tennessee and D., touching which the defendant gave his evidence, was by indictment or presentment, it was held fatal. *Steinston* v. *State*, 6 Yerg. 531.

95. Where, in an indictment for perjury under the bankrupt law, in not giving a true and full account of his property, held that the items on the schedule need not be stated in the indictment. *State* v. *Chapman*, 3 McLean 390.

96. Where an indictment for perjury is founded on an oath made before a clerk of the Circuit Court, it must show that the oath upon which it was founded was one which the clerk was competent to administer; a general averment that the clerk had the competent power, will not be good. *McGragor* v. *State*, 1 Carter's R. 232.

97. Where one was indicted for perjury, and it was alleged that the perjury was committed in making oath to a replication to a plea of usury, that the sum of $20 above the legal interest was not received for the loan of $400, and the proof was that the respondent delivered to one Seygant, who borrowed the money of him, the sum of $380, and received therefor of him a note for $400; it was held that the unlawful interest was received upon the sum of $380, and not upon the sum of $400, and the indictment was defective. *State* v. *Tappan*, 1 Foster's R. 56.

98. In Virginia, where indictments are found for perjury, they must be according to the Common Law. *Com.* v. *Lodge*, 2 Gratt. 579.

99. Where an indictment is laid for perjury, in swearing to an answer in Chancery, it should set out the whole bill and answer. *Ib.*

100. Where an indictment for perjury alleged the perjury to have been committed on a trial before a justice and six men, and the trial seemed to have been with consent of parties,—it was held that the consent was a waiver of whatever irregularity there might have been as to the jury. *State* v. *Hall*, 7 Blackf. 25.

101. On the trial of an indictment for perjury, where it appeared that the defence set up to a criminal complaint amounted to an alibi, that the testimony of a particular witness who was examined thereon, and whose evidence was alleged to be false, tended to establish this defence, and it was averred that each and every part of the testimony became and was material to the defence; held that the materiality of the alleged false testimony was well stated in the indictment. *Com.* v. *Flynn*, 3 Cush. 525.

102. It is not necessary that the indictment should contain an express allegation that the matter sworn to was material to the question before the Court; where its materiality evidently appears from the statement of the matter itself, the express allegation may be omitted. *State* v. *Johnson*, 7 Blackf. 49.

103. Where an indictment for perjury alleged to have been committed before A., alleged the offence to have been committed before A., and the verdict was guilty of perjury before A. and F.; held that the variance was fatal. *State* v. *Mayson*, 3 Brevard 284.

104. Where one is indicted for perjury, the indictment must allege that the evidence which the defendant gave was material, and therefore, if the evidence which the defendant gave before the grand jury is not shown clearly on the face of the indictment, to relate to an offence committed within the county the indictment will be bad. *Com.* v *Pickering*, 8 Gratt. R. 628.

105. Where an indictment for perjury alleges the materiality of the evidence, and there is nothing in the record of the case in which the evidence for which the defendant was indicted was given contradicting it; held that the indictment cannot be quashed for insufficiency. *Com.* v. *Farley*, Thacher's Crim. Cas. 654.

106. It is unnecessary and unusual to aver in an indictment for perjury, that the justice before whom the oath was taken had jurisdiction of the case; that it is sufficient to aver that an issue was duly joined in his Court, and it came on to be tried in the due form of law, and that he had competent authority to administer the oath in ques-

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tion. *State* v. *Newton*, 1 Iowa R. 160.

107. In an indictment for perjury, it is not necessary to set forth the facts which give jurisdiction to the Court or officer trying the case; and that it is enough to aver that he had lawful authority to administer the oath. *Ib.*

108. Where the defendant was indicted for perjury, and the indictment alleged that the defendent had conveyed an estate to B., which had been previously mortgaged to C., that C. had recovered a judgment, under the mortgage, for the possession of the estate, that a petition for a review had been presented by B., by reason of newly-discovered evidence, to show a technical payment of the debt secured by the mortgage, and that defendant was guilty of perjury in testifying at the hearing of the petition; that he had informed B. at the time of the conveyance of the existence of the mortgage; and the record of the proceedings at the hearing, offered in evidence at the trial, set forth that the petition was a review of a judgment for the possession of the petitioner's mill site and mills; whereas it was alleged in the indictment that the judgment was "for possession of land, mill site and mills of B.," and the record also set forth that the petition was "a review of a certain action and supersedeas and stay of execution;" but the indictment alleged that the petition was "for a review of a certain action and judgment;" it was held that, since the record was not recited in the indictment, such variances were no ground for the rejection of the testimony. *Com.* v. *Farley*, Thacher's Crim. Cas. 654.

109. Although the indictment in such case alleged that the hearing was on the third day of April, before three of the justices of the Supreme Judicial Court, when the record set forth that it was on the tenth day of April before the Supreme Judicial Court,—it was held that the record was admissible. *Ib.*

110. Held, that any of the proceedings set forth in such indictment, as having occurred at said hearing, and not set forth in the record, could be proved aliunde. *Ib.*

111. Where the indictment set forth that the parties were "at issue" at the hearing, no issue having been there joined, the words were to be taken in their popular signification. *Ib.*

112. On any indictment for perjury, it is sufficient to allege that the perjury was committed on the trial of an issue duly joined, without an express allegation that the cause of action was within the jurisdiction of the Court. *Com.* v. *Knight*, 12 Mass. 274.

113. In an indictment for perjury, it is necessary that it should be alleged, or at least that it should appear that the facts respecting which the testimony was given, were material on the trial. *Ib.*

114. It is not necessary that it should appear in an indictment for perjury, whether the witness was compelled to attend by a subpœna or whether he attended voluntarily. *Ib.*

115. Nor whether the false affirmation was made in answer to a specific question put to him, or in the course of his own relation of the facts. *Ib.*

116. Where it is not averred that the facts respecting which the defendant testified, were material on the trial, they cannot be considered so, unless they clearly appear to be material from the other facts set forth in the indictment. *Ib.*

117. Where an indictment for perjury alleged that the defendant came before L., a justice, etc., and then, etc., was sworn before said L., being such justice, etc.; held that it showed with sufficient certainty by whom the oath was administered. *State* v. *Ellison*, 8 Blackf. 225.

118. Where such an indictment alleged that on, etc., the defendant had sworn that on, etc., at, etc., A. had feloniously taken and carried away from, etc., one hundred and twenty ears of corn, as the defendant verily believed, and averred that A. did not on, etc., or at any other time, feloniously take and carry away one hundred and twenty ears of corn from, etc., or any number of ears, nor had the defendant any reason to believe, nor did he believe, that A., on, etc., or at any other time, had feloniously taken and carried away any corn from, etc.,—it

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was held that the averment was good. *Ib.*

119. Where an indictment alleges that the false testimony of the prisoner was in reference to whether it was his book of original entries of his daily charges, whether the charges therein were or were not copied into it from another book, and whether in general terms the account had not been settled on such other book: it was held not necessary to specify the particular items of the account to which the testimony related. *State* v. *Keen*, 26 Maine 33.

120. The indictment need not allege that there was a final determination of the controversy, by the referees; if it be alleged that they proceeded to hear the parties, and that false testimony was given in a due course of proceeding before them, that will be sufficient.

121. Where, on the trial of an indictment for perjury, it appeared that the accused was sworn only by and before a justice of the peace, who had no jurisdiction of the case before him, and therefore had no authority to administer the oath; held that the indictment was bad. *State* v. *Furlong*, 26 Maine 69.

122. Where the defendant is indicted for perjury, in swearing that he did not execute a certain deed, and the jury find specially that he is guilty of perjury in denying his signature; held that the judgment must be arrested, for a deed may be executed without signing. *The State* v. *Avera*, 2 Tayl. 237.

123. Where, in an indictment for perjury, there was an omission to charge in the bill of indictment, that the matter of traverse tried between the State of Tennessee and D., touching which the defendant gave his evidence, was by indictment or presentment,—it was held fatal. *Steinson* v. *State*, 6 Yerg. 531.

124. Where an indictment is found against an insolvent debtor for perjury, in swearing to a schedule which did not state certain debts owing to him; it was held bad on demurrer for not averring that he "well knew and remembered" that the omitted debts were then justly due and owing to him. *Cook's case*, 1 Robinson 729.

125. Where an indictment is found for perjury, in giving false testimony before a grand jury, which charged that the defendant, being duly sworn, "did depose and give evidence to the grand jury in substance and to the effect following," (stating the testimony,) "which said evidence was wilfully false and corrupt, for, in truth," &c., falsifying the facts deposed to, and so the defendant did, in manner and form aforesaid, commit wilful and corrupt perjury; it was held on general demurrer to the indictment, that there was not a sufficient averment that the defendant wilfully or corruptly swore falsely, and that the indictment was bad, as well at Common Law as under the statute. *Thomas' case*, 2 Robinson 795.

126. A bankrupt, under the Pennsylvania act, may be indicted for perjury before the expiration of the forty-two days, under the 14th section of the act. *Respublica* v. *Wright*, 1 Yeates 205.

127. Where an indictment is found for perjury, it need not set forth the interrogatories in answer to which the perjury is charged to have been committed. *State* v. *Bishop*, 1 Chip. 124.

128. It is necessary that an indictment for perjury should specify in what the perjury consisted; and it is not enough to allege that the defendant swore falsely in respect to his schedule, in taking the oath of bankruptcy. *U. States* v. *Morgan*, 1 Morris 341.

129. On an indictment for perjury, all the facts necessary to show the materality of the alleged false testimony should appear upon the face of the indictment. *People* v. *Collier*, 1 Mann (Mich.) 137.

130. On the trial of an indictment for perjury, where there is an allegation that "it became and was material to ascertain the truth of the matters hereinafter alleged to have been sworn to," and stating what the accused swore to, it is sufficient. *Ib.*

131. It is necessary that it should be alleged in the indictment that the matter sworn to was material, or that the facts set forth as sworn to, and upon which the perjury is assigned, should be sufficient in themselves to establish

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the materiality. *Com.* v. *Pollard*, 12 Met. 225.

132. Where an indictment for perjury charges that the party accused was sworn as a witness in his own case, and while thus testifying committed the perjury set forth in the indictment; it was held that an affidavit made by the accused was not evidence which could be introduced on the trial of the issue, except by consent of parties. *Copeland* v. *State*, 23 Miss. 257.

133. If it is intended to convict a party of perjury, in falsely swearing to an affidavit, the indictment must sufficiently charge the fact that the affidavit was made by the accused, otherwise it cannot be introduced as evidence. *Ib.*

134. All indictments for perjury upon an affidavit state the charge in one of two ways, either that he did corruptly say, depose, swear and make affidavit in writing, or that he did produce and exhibit a certain affidavit in writing. If the indictment must contain a charge that an affidavit was made when the perjury was committed in that manner, it follows that without such a charge in the indictment, an affidavit could not be introduced as proof to authorize a verdict of guilty. *Ib.*

135. When there is a variance between an indictment for perjury on a trial before a referee, and the evidence in regard to the person before whom the referee was sworn, it is immaterial; the allegations and proof as to the taking of an oath by the referee are superfluous, he acquired jurisdiction by the order of referee, duly made. *The People* v. *McGinnis*, 1 Parker's Crim. R. 387.

136. An indictment for perjury cannot be maintained where the supposed perjury depended upon the construction of a deed. *State* v. *Wolverton*, 8 Blackf. 452.

137. On a motion to quash an indictment for perjury, it was held that the motion should not be sustained, but the party should be put to his demurrer. *Com.* v. *Litton*, 6 Gratt. 691.

138. On an indictment for perjury, by a petitioner in bankruptcy, the indictment need not set out particularly or substantially the petition. *State* v. *Deming*, 4 McLean 3.

139. As to the form of an indictment for perjury, in false swearing that usury was taken in discounting a promissory note, see the case of *the People* v. *Burroughs*, 1 Parker's Crim. Rep. 211.

140. Where it does not appear on the face of the record, by the statement of the issue, and evidence in the indictment, that the matter alleged to be false is material; it is sufficient to aver in the indictment that the matter in relation to which perjury is assigned, became, and was, material upon the trial. *Ib.*

141. Where, in a prosecution by a bank on a promissory note, the accused had testified, as a witness in behalf of the endorser, that F., who at that time was president of the bank, had taken usury in discounting the note, it was held, on a trial of the accused for perjury in giving such testimony, that it was not necessary to set forth in the indictment that F. was acting in the transaction as an officer of said bank, or in what particular way he was connected with the transaction, but that it was sufficient to allege in the indictment that it became a material matter and question, &c., whether the said F. discounted the said note, and whether he took usury in discounting it, and then to set forth particularly the testimony of the defendant on those points, and the facts as they actually existed, which were inconsistent with such testimony, with the usual allegations of falsity and corrupt intent. *Ib.*

142. An indictment against the prisoner for having committed perjury, upon his examination, as to his competency to sit as a juror in a criminal case, in swearing that he had not formed or expressed an opinion as to the guilt or innocence of the accused; and the question is, whether the allegation of the perjury is legally laid in the bill of indictment.

Bills of indictment for questions of this character, being new to our law, are very difficult of proper formation, and exceedingly perplexing to the Court.

We have had but one case of the character before us, in which we attempted, with particularity, to describe what the

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bill should specify and aver ; and we feel satisfied that the Attorney-General, in drawing the bill in the case under consideration, drew it with a view to what is required by that case ; and yet we feel ourselves constrained to say, that the substance of these requisites is not contained therein.

The case referred to, is that of the *State* v. *Wall*, 9 Yerg. 347. From an examination of that case, it will be found that the bill of indictment contained three counts ; and that they in substance charge that the prisoner was offered as a juror, and that it became necessary and material to ascertain whether he had formed or expressed an opinion as to the guilt or innocence of the prisoner on trial ; and that being duly sworn, he falsely swore that he had not formed or expressed an opinion, and that he swore falsely in that respect. This indictment was quashed ; and upon appeal to this Court, the judgment of the Circuit Court was affirmed.

The judge who delivered the opinion of the Court, says : "But the bill of indictment does not allege that an issue or question of competency and qualification, as to the jurors called generally, or as to the particular juror offered, was submitted by the parties, or by either party, to the Court. There is no allegation that the oath was administered by the Court because of any challenge or objection by the State, or the prisoner on trial, to the competency of the juror. We think that the indictment should show that an issue, or question of competency and qualification generally, or of the juror in particular, who was sworn in his voir dire, was submitted by the parties to the Court." *State* v. *Moffatt*, 7 Humph. 250.

143. Where an indictment for perjury, in answer to a bill of discovery, filed in the Supreme Judicial Court by A. H. against G. W., after stating the filing of the bill and setting forth the interrogations therein propounded to said G. W., averred that the said G. W., the defendant in said bill, at, &c., on, &c., did come in his proper person before A. B., being then and there a justice of the peace for the county of, aforesaid, and then and there did make, produce and exhibit to the said A. H., so being such justice as aforesaid, the answer in writing of him, the said G. W., to the said bill of the said A. H., then pending in the Supreme Judicial Court, entitled the answer of G. W., the defendant, to a bill of complaint of A. H., and the said G. W. was then sworn in due form of law, and took his corporal oath touching and concerning the matters contained in his said answer by and before said A. H., so being such justice of the peace as aforesaid, and then and there having sufficient and competent power and authority to administer an oath to the said G. W. in that behalf, and the said G. W. being so sworn as aforesaid, and being then and there lawfully required to declare or depose the truth in a proceeding in a court of justice, did, upon his oath aforesaid, concerning the matters aforesaid, contained in his said answer before the said A. H., so being such justice as aforesaid, then and there swear, make oath, depose and say, that said answer of him said G. W. was true, according to his best recollection and belief; and that the said G. W., being so sworn as aforesaid, and intending unjustly to aggrieve the said A. H., did in his answer aforesaid before said A. H., being such justice as aforesaid, falsely, knowingly, wilfully and corruptly, by his own act and consent, upon his oath aforesaid among other things, then and there answer, swear, depose and say, in substance to the effect following : "The matters sworn to by said G. W. in said answer being set forth, as by said answer of said G. W., still remaining in the Supreme Judicial Court aforesaid, among other things, will appear ;" and the indictment then stated the falsity of the answer, and charged the said G. W. with wilful and corrupt perjury. It was held that the indictment charged that the defendant took a false oath, when required to depose the truth, in a proceeding in a court of justice, and was good. *Com.* v. *Warden*, 11 Met. 406.

144. Where one is indicted for perjury in having sworn falsely, as to his ability to become bail for the prisoner charged with crime. The indictment charged that the perjury was commit-

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ted upon an examination had after he had been previously sworn to make true answers to such questions as should be put to him, touching his qualifications and competency to be and become bail, &c.; and it appeared on the trial that after the answers of the defendant to certain interrogatories had been taken down in writing, an oath was administered to him that the answers to the foregoing interrogatories by him subscribed are each and every of them true, it was held a material variance, and that the proof did not support the indictment. *Smith* v. *People*, 1 Parker's Crim. R. 317.

145. And where the indictment alleged that the perjury was committed on the accused's offer to become bail for one Thompson, committed on McDonald's complaint, in default of bail for $500, and the evidence showed the perjury to have been committed on defendant's examination, as bail for Thompson, committed on the complaint of Sayre, and others, in default of $3,000 bail, it was held to be a material variance, and that the proof did not sustain the indictment. *Ib.*

146. An indictment for perjury will be defective, if it does not aver the oath was willingly, knowingly and corruptly taken, knowing it to be false, or words of the same import. *U. S.* v. *Babcock*, 4 McLean 113.

147. Indictment charged that defendant falsely, wittingly, corruptly, &c., swore to certain facts before the grand jury upon a bill of indictment, but did not charge how or in what way the facts thus sworn to had a bearing upon the allegations of the indictment, nor that they were material to or connected with the question then under consideration by the Grand Jury. Judgment arrested. *State* v. *Dodd*, 3 Murph. 226.

148. In an indictment for perjury, the style of the Court before which the perjury is alleged to have been committed, must be legally set forth. *State* v. *Joseph Street*, 1 Murph. 156.

149. It is not necessary in averring the authority of an officer to administer an oath in an indictment for perjury, to aver that he then and there had authority, if time and place had been added to the act of taking the oath before him. *State* v. *Dayton*, 3 Zabris. 49.

150. When a party by a subsequent deposition expressly contradicts and falsifies a former one made by him, and in such subsequent deposition expressly admits and avers that the former one was intentionally false at the time it was made, or in such subsequent deposition testifies to such other facts and circumstances as to render the corrupt motive apparent, and negative the probability of mistake in regard to the first, he may be properly convicted upon an indictment alleging the first deposition to be false without any other proof than that of the two depositions. Selden, J., dissented. *People* v. *Burden*, 9 Barb. 467.

151. Where there has been a trial and conviction upon such an indictment, it will be a complete bar to any further or other prosecution for the same perjury, in whichever deposition it may in fact have been committed. Selden, J., dissented. *Ib.*

152. The statute of 23 Geo. 2, c. 2, is not of force in South Carolina, yet the precedents in perjury have always been agreeable to it, and are sufficient. *State* v. *Hayward*, 1 Nott & McCord, 546.

153. In North Carolina, in an indictment for perjury it is not necessary to set forth the pleadings in the former case, in which the perjury is alleged to have been committed, the act of Assembly of 1842, ch. 49, having altered the Common Law in that respect. *State* v. *Hoyle*, 6 Iredell 1.

154. In North Carolina, where the perjury on which an indictment is founded, is alleged to have been committed on the trial of a cause at a special term of a Superior Court, it is not necessary to set forth in the indictment the order of the judge directing such special term to be held, nor the appointment by the Governor of the particular judge who is to hold it. *State* v. *Ledford*, 6 Iredell 5.

155. Nor is it necessary to prove either of those facts on the trial of the indictment; a judge who, by the general law and a permanent commission, holds a Superior Court, is not to require evidence that he is the judge of the Court, and the record made by him

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establishes to those who succeed him that he held the Court at the terms at which, according to the purport of the record, he appears to have held them. *Ib.*

156. In an indictment for perjury it is sufficient to aver that the Court had power to administer the oath, without setting forth the facts necessary to give jurisdiction. *Halleck* v. *State*, 11 Stanton's Ohio 400.

157. In an indictment for perjury, which charges the defendant with having taken a false oath to procure his discharge from custody, under a writ of ca. sa., an assignment which alleges that at the time when he took the oath he had moneys whereby to satisfy the debt for which he was arrested, is sufficient. *De Bernie* v. *State*, 19 Ala. 23

158. An indictment for perjury is not vitiated because some of the assignments are bad; and proof of any one assignment that is good, is sufficient. *Ib.*

159. Where an indictment for perjury alleges that the witness took her corporal oath to speak the truth, the whole truth, &c., the Court held it unnecessary that the indictment should go farther, and allege the form in which such bodily assent was signified, as by raising the hand, or otherwise. *State* v. *Norris*, 9 N. Hamp. 96.

160. Where the defendant was charged with making an affidavit, that a certain boat was, as he believed, attempting to pass a certain place, &c., whereas he did not believe that the boat was attempting to pass said place, it was held that the indictment was not objectionable for not alleging that the boat was not attempting to pass the place. *State* v. *Cruikshank*, 6 Blackf. 62.

161. Where there has been a conviction for perjury, and the words stated in the indictment do not from the face of the indictment appear to be material by averment, or by the context of the indictment, or by their own import, judgment will be arrested. *State* v. *Hayward*, 1 Nott & McCord 546.

162. Where one was indicted for perjury, and the indictment omits to state the day upon which the trial took place, and on which the defendant was sworn, in the case in which the perjury was alleged to have been committed, the judgment was arrested. *U. S.* v. *Bowman*, 2 Wash. C. C. 328.

163. In an indictment for perjury against a party voting at an election, an allegation that he was sworn by and before the board of inspectors, is a sufficient allegation that the oath was administered by the board; it seems it would be enough to aver that he took the oath before the board, they being duly authorized to administer it. *Campbell* v. *People*, 8 Wend. 636.

164. It is not necessary in such case to set forth the whole oath taken by the elector; it is sufficient to allege the part of it in which the perjury is charged to have been committed—as where the prisoner is accused of having falsely sworn to his citizenship, only that part of the oath which relates to his being a citizen, need be set forth. *Ib.*

165. It must appear on the face of the indictment that the matter charged to be false was material; but such materiality need not be expressly alleged when it evidently appears on the record. *Ib.*

166. It is well settled, that in a bill of indictment for perjury, the swearing must be charged as it occurred, or it will not be sustained by the proof, and the prosecution must fail; and great strictness is required in this. *Williams* v. *State*, 7 Humph. 47.

167. Therefore it has been held, that if the bill of indictment charge that the prisoner swore upon the Holy Evangelists, and the proof show that he appealed to God with an uplifted hand, the variance is fatal. *Ib.*

168. So if the charge be that he deposed directly and positively to a fact, and the proof be that he deposed with a qualification or reservation, or upon his belief as informed by others, the variation is also fatal. *Ib.*

169. And where the charge is, that he was sworn, and took his corporal oath upon the Holy Gospel of God, concerning the truth of the matters and things therein contained, and the proof was, that he swore that the matters as set forth therein, of his own knowledge were true; held that this is a total variance from the swearing as charged, and fatal. *Ib.*

170. An indictment for perjury under

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the statute, will be bad if it does not charge, in the language of the act, that the defendant wilfully and corruptly deposed, affirmed, or declared matter to be fact, knowing the same to be false, or denied matter to be fact, knowing the same to be true. *State* v. *Morse*, 1 Iowa 503.

171. An indictment for perjury, alleging that in a trial of a suit between P. and M., before a justice of the peace, it became a material question "whether M., on the — day of ——, 1840, was ready to deliver on demand, certain plank to P., according to the contract between them;" on which trial M. swore "that he had the plank always ready for P.," meaning thereby that he had the plank ready to be delivered to P., according to the contract, on the — day of ——, 1840. Have the plank ready to be delivered to P. in accordance with the contract between them, is bad. *McMurry* v. *State*, 6 Ala. 324.

172. An indictment for perjury against a juror, alleging that he falsely and corruptly swore upon his voir dire, that he had not formed or expressed an opinion, when in fact he had, must allege that an issue or question of competency as to the jurors generally, or as to the particular juror, was submitted to the determination of the Court. *State* v. *Wall*, 9 Yerger 347.

173. In an indictment for perjury committed in the taking of an oath by an insolvent, on presenting his petition for a discharge, it is not, nor was it necessary previous to the Revised Statutes, to set forth more than the substance of the oath. *People* v. *Warner*, 5 Wend. 271.

174. Where the oath is set forth in the indictment, to be in substance and to the effect following, to wit, &c., an exact recital is not necessary; and, accordingly, where the indefinite article *an*, was substituted for the definite article *the*, the variance was held to be immaterial. *Ib.*

175. Where a defendant was convicted of perjury, in taking the poor prisoner's oath, and moved an arrest of judgment, because it was not alleged in the indictment that the said oath was administered to him in the prison, or within the yard or liberty of the prison, and it did not appear thereby but that he was at large at that time; held that such allegation was not necessary. *Com.* v. *Alden*, 14 Mass. 388.

176. An indictment against H. for perjury committed upon the trial of P., for larceny, should charge or show that the larceny for which P. was tried was either made felony by statute, or was such as at Common Law amounted to felony. *Hinch* v. *State*, 2 Mo. 158.

177. It should be alleged that the facts sworn to by H., and in which the perjury is charged to have been committed, were material upon the trial of P. *Ib.*

178. An indictment for perjury, alleging the oath to have been taken on the Gospels, will not be sustained by proof that the oath was taken with an uplifted hand; the variance is fatal. *State* v. *Porter*, 2 Hill 611.

179. An indictment for perjury must set out the substance and effect of the testimony in which the perjury is assigned. *State* v. *Groves*, Busb. N. Car. R. 402.

180. Where an indictment charged the defendant with having sworn that A. purchased a gun of B., and his testimony, as proved on the trial, was that B., in conversation with A., asked him if he had brought home his gun, to which A. replied he had forgot it, and said I will keep the gun and allow $15 for it on what you owe me, to which B. replied, enough said; held that the proof did not support the charge, for B.'s answer did not necessarily import an assent to the proposal of A., but was susceptible, under the circumstances, of another interpretation. *Ib.*

181. In a case of perjury, the offence was committed at a time when the punishment under the existing statute, was whipping, not exceeding 100 stripes; but before the time of the conviction of the offender, another act had taken effect, which prescribed punishment for subsequent convictions of such crimes; held that if the indictment in such case concluded in the singular, "contra formam statuti," it was good. *Strong* v. *State*, 1 Blackf. 193.

182. On an indictment for perjury, when the place where the offence is alleged to have been committed is en-

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tirely landlocked and enclosed; held that the offence was not within the purview of the act of Congress of 26th March, 1804, ch. 40, which punishes offences committed on the high seas. *United States* v. *Robinson*, 4 Mason 307.

183. Upon an indictment for perjury under the 7th and 9th sections of the act of 29th July, 1813, ch. 34, granting bounties to vessels engaged in the fisheries; held that the indictment was not supported, if the certificate required by the said 7th sec. was not sworn to by the same person who signed it. *U. States* v. *Kendrick*, 2 Mason 69.

184. An indictment for perjury is defective if it does not allege that the words charged as false were material. *State* v. *Hayward*, 1 Nott & McCord 546.

185. It should be alleged in an indictment for perjury, that the evidence given by the defendant and alleged to be false, was material on the trial of the cause in which he was sworn. *Weathers* v. *State*, 2 Blackf. 278.

186. In an indictment for perjury by an insolvent debtor, in the oath taken by him on presenting his petition and the inventory of his estate required by the statute, it is not necessary to set forth the facts which give jurisdiction to the officer, as is done in pleading a discharge in a civil suit; it is enough to aver that the officer had lawful and competent authority to administer the oath; the truth of such averment must be shown on the trial. *People* v. *Phelps*, 5 Wend. 9.

187. Nor is it necessary, where the perjury consists in omitting to set forth in the inventory property belonging to the insolvent, to spread out in the indictment the inventory exhibited to the officer, or to state the substance thereof; it is sufficient to aver that with the papers presented to the officer was one purporting to be a full and just inventory of all the estate, both real and personal, in law and equity, of the insolvent. *Ib.*

188. The indictment is good if, after averring that the officer had competent authority to administer the oath and alleging the presentation of the inventory, and that at the same time an oath or affidavit in writing was exhibited, in the words prescribed by the statute, setting forth the same or the substance thereof, and that the insolvent was sworn to the truth of the same, it is charged that the inventory is not in all respects just and true, and the particulars are specified in which the falsity consists, as that $3,500 in goods, wares and merchandise, in the hands of G. M. & Co., merchants, in Philadelphia, were knowingly and fraudulently left out of the inventory, and that the insolvent had disposed of the same for the future benefit of himself or his family, and with the intent to defraud his creditors and fraudulently to obtain the benefit of the act. *Ib.*

189. The rule laid down in the 2d sec. of the act to prevent perjury, 1 R. Laws, 171, as to what need not be stated in an indictment, adopted by the Court as a correct exposition of the provision of the R. Sts., that no indictment shall be deemed invalid by reason of any defect or imperfection in matter of form, which shall not tend to the prejudice of the defendant; wherefore, an indictment is good if it contain the substance of the offence, with the circumstances necessary to render it intelligible and to inform the defendant of the allegations against him. *Ib.*

190. Where an indictment for perjury, charging one with swearing, in July, that he had witnessed a certain transaction in October of the same year, was held not to be defective on the ground of inconsistency. *State* v. *McKennan*, Harper 302.

191. In indictments for perjury, the day on which the perjury is alleged to have been committed must actually be the day when it was committed, or the variance will be fatal to the indictment. *United States* v. *McNeal*, 1 Gallis. 387.

192. As to sustaining a demurrer to an indictment for perjury, see *Roache's case*, 1 Gratt. 561.

193. The words corporal oath and solemn oath, when used in an indictment, are synonymous; and in an indictment for perjury, where it was alleged that a defendant took his corporal oath, the allegation will be good. *Jackson* v. *State*, 1 Smith 124.

194. It is not necessary to aver that

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the facts on which perjury is assigned are material, if their materiality sufficiently appears from the face of the indictment. *State* v. *Dayton*, 3 Zabris. 49.

195. Where the defendant is indicted for a perjury, committed on the trial of an issue in a former indictment, the indictment must set forth the finding of the former indictment in the proper Court of the proper County, and should also set forth that indictment, or so much thereof as to show that it charged an offence committed in that County, and of which said Court had cognizance, and also the traverse or plea of the defendant in that indictment, whereon the issue was joined. Judgment on an indictment, defective in these particulars, must be arrested. *The State* v. *Gallimon*, 2 Iredell 372.

196. An indictment for perjury in swearing to an affidavit, charged that the affidavit was "in substance and to the effect following." The assignment was that defendant swore he did not know a writ was returned against him in the above suit. The affidavit when produced had the word case instead of suit—the variance is immaterial, the indictment does not profess to give the tenor. *The State* v. *Caffey*, 2 Murph. 320.

197. In an indictment for perjury against a party to a suit, it is necessary to show, by proper averments, that he was sworn under circumstances which authorized his being sworn as a witness in the cause; see R. S., 1835, title "Justices' Courts," p. 361. *State* v. *Hamilton*, 7 Mo. 300.

198. In Iowa, the omission in an indictment for perjury to charge in the language of the statute that the defendant deposed, affirmed, or declared some matter to be fact, knowing the same to be false, or denied some matter to be fact, knowing the same to be true, is a substantial defect, and is not cured by any statute providing that, "No indictment shall be quashed, if an indictable offence is clearly charged therein, or if the charge be so explicitly set forth that judgment can be rendered thereon;" it does not cure the defect, for the reason that no indictable offence is set forth in the indictment according to the statute. *The State* v. *Morse*, 1 Iowa 503.

III. Proof on the Trial.

199. Where an indictment was found for perjury in swearing falsely to a deposition, the deponent having afterwards testified on the stand that the facts stated therein were not true, it was held that the prisoner was not estopped from showing in his defence the truth of the facts stated in his deposition. *State* v. *J. B.*, 1 Tyler 269.

200. A party to a suit is not disqualified as a witness to prove perjury therein, where a conviction would not entitle him to a new trial, or to damages as an injured party. *State* v. *Bishop*, 1 Chip. 120.

201. An indictment for perjury, setting forth that a warrant was tried in which A. demanded of B. $20, for corn, &c., is sufficiently established by producing a warrant between the same parties for a debt due by account, without specifying the particulars of the account. *The State* v. *Alexander*, 2 Dev. 470.

202. In an indictment against John G. T., for perjury, in making an affidavit signed by him, an affidavit signed John G. T., is not competent in evidence, on account of the variance. *Tardy* v. *the State*, 4 Blackf. 152.

203. The direct oath of one witness, and the declarations of the accused, inconsistent with the oath in which perjury is assigned, is sufficient to warrant a conviction. *The State* v. *Molier*, 1 Dev. 263.

204. An indictment for perjury, charging that the defendant was sworn and took her corporal oath to speak the truth, the whole truth, &c., was holden to be supported by evidence of the oath taken in the usual form. *The State* v. *Norris*, 9 N. Hamp. 96.

205. On the trial of an indictment for perjury, the certificate of the magistrate before whom the oath was taken, his signature thereto being proved, is competent and sufficient prima facie evidence of the taking of the oath of

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the defendant. *Com.* v. *Warden*, 11 Metcalf 406.

206. The rule requiring two living witnesses in contradiction to the statement of the defendant, if it ever existed, has long since been relaxed; and all that is requisite to a conviction of perjury is, that in addition to one directly opposing witness, there should be established by independent evidence, strong corroborating circumstances of such a character as clearly to turn the scale, and overcome the oath of the defendant and the legal presumption of his innocence. *Com.* v. *Farley*, Thacher's Crim. Cas. 654.

207. The defendant to an indictment for perjury may show that the officer who administered the oath charged to be false acted under an invalid appointment, as a ground of defeating the prosecution; and if he establish that fact, he must be acquitted. *Muir* v. *State*, 8 Blackf. 154.

208. An allegation in an indictment, that the accused was sworn as a witness between the Bank and J. B., is sustained by proof that the accused was sworn in a suit brought by the Bank on a promissory note against J. B., the endorser, and S. McF. and the accused, as joint makers, the evidence of the accused in such case being only available in behalf of the endorser. *People* v. *Burroughs*, 1 Parker's Crim. R. 211.

209. Where one was indicted for perjury, committed in giving a deposition taken in perpetuam, the indictmect concluded with the following words: "as by his said answers to said interrogatories written in said deposition remaining, will, among other things, appear;" held that upon the rejection of the deposition, parol evidence might be admitted to prove the testimony of the deponent. *Com.* v. *Stone*, Thacher's Crim. Cas. 604.

210. The record of the Court at which perjury is alleged to have been committed, is not to be excluded in consequence of the day of holding the Court being misrecited in the indictment, especially if under a *videlicet*. *State* v. *Clark*, 2 Tyler 282.

211. Where, in a prosecution for perjury, a written paper is referred to, the place and time of subscribing it by the accused being involved in the alleged perjury, as set forth in the indictment, such paper is proper evidence at the trial. *Osburn* v. *State*, 7 Ohio 212.

212. Where a defendant was indicted for falsely taking the owner's oath at the custom-house; held, that in order to convict the defendant of the crime charged in the indictment, it is not necessary on the part of the prosecution to produce a living witness, if the jury shall believe the evidence from the written testimony sufficient to establish the charge that the defendant made a false and corrupt oath as to the cost of the goods imported in the Sheridan, enumerated in the invoice, upon which the defendant made an entry, by taking the owner's oath at the custom-house. *State* v. *Wood*, 14 Peters' Rep. 430.

213. On an indictment for perjury, evidence is admissible to show that the motives which actuated the prisoner at the time of committing the alleged offence, were corrupt; as, for example, to show that when he swore to a complaint against the prosecutor, ostensibly to procure sureties of the peace, his object was, in fact, to coerce that person to settle a civil suit. *State* v. *Hascall*, 6 N. Hamp. 352.

214. It is settled, that if any one distinct assignment of perjury be proved, the respondent ought to be convicted. *Ib.*

215. On the trial of an indictment for perjury at nisi prius, the postea must be produced by the plaintiff. *Respublica* v. *Goss*, 2 Yeates 479.

216. On a trial for perjury, the testimony of a single witness is sufficient to prove that the defendant swore as is alleged in the indictment. *Com.* v. *Pollard*, 12 Metc. 225.

217. To prove by the testimony of one witness what another person has said or testified, is the constant and invariable practice, and facts of every kind are established by the oath of one witness; and where it is otherwise, it is an exception to the general law of evidence, as in the case of treason, and in the probate of wills, which are the subjects of statute provisions; and so in perjury where the law requires that

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the crime shall be proved by the oaths of two witnesses; or, as it has been held in more modern times, by the oath of one witness, and by other independent and corroborating evidence which is deemed of equal weight with another witness. *Ib.*

218. On an indictment for perjury in swearing that A., one of the several assailants in an affray, struck the defendant, where it appeared that A. did not, but another assailant did strike the blow, it was competent for the defendant, in order to disprove a corrupt motive, to show that immediately on his recovery from the unconsciousness occasioned by the blow, he had given the same account of the transaction he did in his testimony before the court on the trial of the case in which the perjury was charged. *State* v. *Curtis*, 12 Iredell 270.

219. On an indictment for perjury, two witnesses are not necessary to disprove the fact sworn to by the defendant; but where there is but one witness, in addition to his testimony some other independent evidence ought to be adduced. *State* v. *Hayward*, 1 Nott & McCord 546.

220. Where it became material to prove the contents of a book of accounts which had been admitted by the accused to be correct and true, the book may go to the jury as evidence of the extent and nature of the admission. *Halleck* v. *State*, 11 Ohio 400.

221. On the trial of an indictment for perjury, charged to have been committed in an oath taken before a company court-martial, it is not necessary to produce the commission of the captain; parol proof of his acting as such, is sufficient. *State* v. *Gregory*, 2 Murphy 69.

PIRACY.

1. Under the act of Congress of March 3d, 1819, chap. 75, to protect the commerce of the United States, and punish the crime of piracy, any armed vessel may be seized and brought in, or any vessel the crew of which may be armed, and which shall have attempted or committed any piratical aggressio ı, search restraint, depredation, or seizure upon any vessel, and such offending vessel may be condemned and sold, the proceeds to be distributed between the United States and the captors, in the discretion of the Court. *United States* v. *Brig Malek Adel*, 2 How. U. S. 210.

2. It matters not whether the vessel be armed for offence or defence, provided she commits the unlawful acts alleged. *Ib.* To bring a vessel within the terms of the act, there need not be either actual plunder, or an intent to plunder; where the act is committed from hatred or an abuse of power in a spirit of mischief, it is sufficient. *Ib.*

3. The word piratical in the act, is not to be confined in its construction to such acts as by the laws of nations are denominated piracy, but embraces such as pirates are in the habit of committing. *Ib.*

4. A piratical aggression, search, restraint, or seizure, is as much within the meaning of the act as a piratical depredation. *Ib.*

5. The innocence or ignorance on the part of the owner of these prohibited acts, will not save the vessel from condemnation. *Ib.*

6. The condemnation of the cargo is not warranted by the act of 1819. *Ib.*

7. The law of nations does not require the condemnation of the cargo for petty offences, unless the owner thereof co-operates in, and authorizes the unlawful act, but there is an exception in the enforcement of belligerent rights. *Ib.*

8. In order to make all the officers and crew of a piratial vessel parties in guilt, the original voyage must be undertaken with piratical design, and they must have known and acted upon such design, otherwise those only can be guilty who actively co-operated in the conspiracy. *United States* v. *Gibert*, 2 Sumner 19.

9. The fact that they knew that the voyage was to be an illegal one, as in the slave trade, is not enough. *Ib.*

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10. Where the indictment alleged the piracy to have been committed on the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, it was held that this was a sufficient statement of the venue. *Ib.*

11. On an indictment for piracy the production of the vessel's register, or documentary evidence, is not essential to prove her national character. *United States* v. *Pirates*, 5 Wheat. 184.

12. The courts of the United States will respect the belligerent rights of both parties; and so longas they act under and within the scope of their respective commissions, they will not treat as pirates the cruisers of either of the nations who, it is well known, are at war with each other, although one of them be not recognized by our government as an independent nation. *The Josefa Segunda*, 5 Wheat. 338; *United States* v. *Palmer*, 3 Wheat. 610.

13. Such a decision, however, does not apply to the case of a crew whose conduct is such as to set at naught the idea of their acting under allegiance to any acknowledged power. *United States* v. *Pirates*, 5 Wheat. 184.

14. The crime of robbery committed by a person on the high seas, on board of any ship or vessel, belonging exclusively to subjects of a foreign state, or persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States. *United States* v. *Palmer*, 3 Wheaton's R. 610.

15. This opinion will probably decide the case to which it is intended to apply. *Ib.*

16. Any felonious taking or carrying away of a ship, and the property on board thereof, which, if done on land, would have amounted to felony; if done at sea, although there were no violence used to the person of the owner or master, and no putting in fear, would in point of law be piracy. *United States* v. *Tully*, 1 Gallis. 247.

17. A pirate is one who to enrich himself, either by surprise or force, sets upon merchants or other traders by sea, to spoil them of their goods; this description, as is remarked by a respectable writer of our own country, is applicable merely to piracy by the law of nations. *Ib.*

18. Piracy by the Common Law consists in committing those acts of robbery and depredation upon the high seas, which, if committed on shore, would amount to felony there. *Ib.*

19. If a ship shall ride at anchor, and the mariners shall be part in their ship's boat and the rest on shore, and none shall be in the ship, yet if a pirate shall attack and rob her, the same is piracy. *Ib.*

20. Pirates can be captured lawfully on the ocean by the public or private ships of every nation. *The Marianna Flora*, 11 Wheat. 1.

21. A robbery, under the Common Law definition, committed on the high seas, is piracy by the act of Congress of 1790, chapter 36, section 8, even when not punishable with death by the laws of the United States, if committed on land, and the Circuit Courts have jurisdiction of the offence. *United States* v. *Palmer*, 3 Wheat. 610.

22. When a vessel becomes a pirate, she loses her national character. *United States* v. *Pirates*, 5 Wheat. 184.

23. Under the general rule of law, that robbery on the high seas is piracy, there is no exception or qualification in favor of commissioned privateers, in any act of Congress, in the Common Law, or in the law of nations. *United States* v. *Jones*, 3 Washington C. C. 209.

24. When an American citizen fits out a vessel in an American port, really to cruise against a power at peace with the United States, he is not protected by a commission from a power belligerent as to the power against which he is going to cruise, from offences committed by him against the United States. *United States* v. *Pirates*, 5 Wheat. 184.

25. The provisions of the law relating to piracy are not repealed by the act of June 26, 1812. *United States* v. *Jones*, 3 Washington C. C. 209.

26. The 5th section of the act of 1819, chap. 76, did not repeal the 8th section of the act of 1799, chap. 36. *United States* v. *Pirates*, 5 Wheat. 184.

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27. The act of April 30, 1790, chap. 36, section 8, makes it punishable in the courts of the United States, for a crew to act in defiance of all law, and acknowledging obedience to no government whatever. *United States* v. *Klintock*, 5 Wheat. 144.

28. Whatever intercourse with pirates is calculated to promote their views, is within the provisions of the 12th section of the Crimes act of April 30, 1790. *United States* v. *Howard*, 3 Wash. C. C. 340.

29. Where there is a confederacy by citizens on land, or on board of an American vessel, with sea-robbers or pirates by the laws of nations, or a yielding up of a vessel by a citizen to such pirates, it is within the provisions of the 8th section of the Crimes act of April 30, 1790. *Ib.*

30. The crime of piracy, described in the 8th section of the act for the punishment of certain crimes, passed April 30, 1790, are those which are committed by citizens of the United States, or on board of vessels of the United States, and therefore the 10th and 11th sections as to accessories, apply to the acts of piracy described in the 8th section. *Ib.*

31. Where a mariner attempts to corrupt the master of a vessel, and to induce him to go over to pirates, such attempt is within the provisions of the Crimes act of April 30, 1790. *Ib.*

32. In the 8th section of the act of Congress, which construes murder and robbery on the high seas, acts of piracy, the words which if committed in the body of a county, do not refer to murder and robbery, but to the words immediately preceding them, or any other offence. *United States* v. *Jones*, 3 Wash. C. C. 209.

33. To constitute the offence of piracy under the act of April 30, 1790, chap 9, personal violence is not essential, but the intent, animo furandi, must appear. *United States* v. *Tully*, 1 Gallis. 247.

34. Robbery, or forcible depredations upon the sea, animo furandi, is held to be piracy by the law of nations, and consequently it is piracy under the act of Congress of March 2, 1819, chap. 76. *United States* v. *Smith*, 5 Wheat. 153; *United States* v. *Pirates*, 5 Wheat. 184.

35. When a seizure is made, animo furandi, it is piracy, although made under a commission, purporting to be from a republic whose existence is unknown, or from a province of an acknowledged nation. *United States* v. *Klintock*, 5 Wheat. 144.

36. To convict those accused of piracy, it must not only be proved that they participated in the taking of property not liable to capture, but that they did it with a felonious intent. *United States* v. *Ives*, 3 Wash. C. C. 231.

37. Where there was an attack on a vessel of the United States by an armed vessel, upon a mistaken supposition that she was a piratical cruiser, but without felonious intent; held that it was not a piratical aggression within the laws of the United States, nor did it subject the vessel, if captured, to confiscation under the law of nations. *The Marianna Flora*, 11 Wheat. 1.

PRESENTMENT.

1. A presentment made within two years after the commission of a misdemeanor on which an indictment is founded, is the commencement of a prosecution, within the meaning of our act of Assembly, and prevents the statute of limitations from attaching. *State* v. *Cox*, 6 Iredell 440.

2. A presentment need not be signed by all the jury. It should be handed to the Court by the foreman, who is the organ of the grand jury, to and from whom communications are made with the Court. It should be made in the presence of the jury, but when entered of record, no further evidence is required of its authenticity. *Ib.*

3. Where the presentment was not found upon the knowledge of the grand jury, or any one of their body, but upon the information of a certain Neuman C. Gillespie, who was not sworn before the Court, and sent to said grand jury, previous to his being examined by said grand jury, it will be bad on a plea of abatement. *The State* v. *Love*, 4 Humph. R. 255.

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4. It is not necessary to the validity of a presentment by the grand jury, that it should appear upon the record-book of the Court in extenso. *Com.* v. *Tiernan*, 4 Gratt. 546.

5. A presentment made in the ordinary way by a grand jury, is regarded in the practice at Common Law as nothing more than instructions given by the grand jury to the proper officer of the Court for framing an indictment for an offence which they find to have been committed. *Christian's case*, 7 Gratt. 631.

6. When the indictment has been prepared by him, it is submitted to them; and upon their finding it a true bill the prosecution commences upon that indictment. The presentment merged in the indictment, ceases and becomes extinct. *Ib.*

7. In the practice of Virginia the presentment has been allowed an efficacy, not known at Common Law in England. It has been allowed for many purposes to stand in the place of indictment; or to stand as the foundation for further proceedings against the party presented. *Ib.*

8. The presentment, moreover, seems in Virginia, from a very distant period, to have been made the foundation for a summons, to show cause why an information for the offence presented should not be filed against the accused. No authority has been found in the English books that warrants such a use of the presentment; from what has before been stated as to the nature of a presentment in the English practice, no such use, it is supposed, could be made of it; such a practice as an existing one in Virginia seems to be clearly recognized in 1786, in the act directing the method of criminal proceedings against free persons, 12 Hen. Stat. 344; 1 Rev. Code 614; where, in regard to the presentment for small penalties, it is directed that "no information shall thereupon be filed," but a summons to answer the presentment. *Ib.*

9. When a presentment is made, the order of the Court is that the party be summoned to appear at the next Court to show cause why an information should not be filed against him. *Ib.*

10. It seems clear that the presentment has in Virginia the character, in itself, of a criminal proceeding, until it is embodied and merged in an indictment for the same offence, or in an information filed upon it; and may stand in the place of an indictment, on which the prosecution for a misdemeanor may proceed without indictment or information. *Ib.*

11. It is a well-settled principle, that the Court will not, in any case, grant an information where the prosecutor has already preferred an indictment, and the grand jury found a true bill, although it was quashed for insufficiency. *Ib.*

12. The Court regards the presentment, not the time of filing the information upon it, as the date of the prosecution. *Ib.*

PRINTING OBSCENE BOOKS, &c.,

1. An indictment for publishing a bawdy and obscene paper need not set forth the obscene matter contained therein. *The People* v. *Girardin*, 1 Mann. (Mich.) 90.

2. In order to maintain an indictment for publishing an obscene book, it is not necessary that the indictment should so minutely describe the book or picture, as that it may be displayed on the records of the Court. *Com.* v. *Holmes*, 17 Mass. 336.

3. In order to render the exhibition of an obscene picture indictable, it is not necessary to allege in the indictment that the exhibition was in a public place; and it is sufficient to state that it was exhibited to sundry persons for money. The indictment need not describe minutely the picture, as to its attitude and posture. Nor is it necessary to allege that the defendant's house, in which the picture is exhibited, is a nuisance. *Com.* v. *Sharpless*, 2 Serg. & Rawle 91.

4. In indictments for offences of printing obscene books, &c., it is not always necessary that the contents of the publication should be inserted; but whenever it is necessary to do so, or

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whenever the indictment undertakes to state the contents, whether necessary or not, the same rule prevails as in the case of libel, that is to say, the alleged obscene publication must be set out in the very words of which it is composed, and the indictment must undertake, or proffer to do so, by the use of appropriate language. The excepted cases occur whenever a publication of this character is so obscene as to render it improper that it should appear on the record; and then the statement of the contents may be omitted altogether, and a description thereof substituted; but, in this case a reason for the omission must appear in the indictment by proper averments. *Com.* v. *Tarbox*, 1 Cush. 66.

5. Where the indictment sets out the printed paper according to its purport and effect, and not in hæc verba, or according to its tenor, or by the words importing an exact transcript, the mode of pleading adopted cannot be sustained, and the indictment will be insufficient, and judgment will be arrested. *Ib.*

PROFANE SWEARING.

1. A justice of the peace, having plain view and personal knowledge of the offence of profane cursing, may arrest and convict the offender without previous complaint or warrant. *Holcomb* v. *Cornish*, 8 Conn. Rep. 375.

2. Any words importing an imprecation of future divine vengeance, may constitute profane cursing within the statute. *Ib.*

3. Where such words are uttered in presence of a justice of the peace, he has jurisdiction both of the person and the offence, and his sentence thereupon, though erroneous, is not void. *Ib.*

4. Several distinct offences of profane cursing may be committed by the same offender, in relation to the same person, on the same day; several distinct convictions for such offences, which are otherwise regular, are not therefore void. *Ib.*

5. In Arkansas, in an indictment for disturbing a religious congregation, by profanely swearing (Digest, p. 370), it is not necessary to charge the particular language used by defendant; otherwise, it seems, in an indictment for profane swearing. *State* v. *Ratliff*, 5 Eng. 530.

6. An indictment which charges that A. B., &c., at, &c., with force and arms, on, &c., did publicly curse and swear and take the name of Almighty God in vain, for a long time, to wit, for the space of two hours, to the common nuisance of all the citizens of the State, and against the peace and dignity of the State—cannot be supported. *State* v. *Jones*, 9 Iredell 38.

7. To render the offence of profane swearing indictable, the acts must be so repeated and so public as to become an annoyance and inconvenience to the public, for then they constitute a public nuisance. *Ib.*

8. It is not sufficient to the conviction of a defendant in such an indictment, that the State should show by its evidence that the defendant has been guilty of a nuisance; the indictment must charge it, it must set forth specifically the whole fact with such certainty that the Court may be able to see judicially that it rests on sufficient grounds; nor will it be sufficient if the indictment charges that the acts were done "to the common nuisance of all the good citizens of the State," unless the facts so charged amount in law to a nuisance. *Ib.*

9. In South Carolina, profane swearing, independent of the disturbance and injury which it may produce to those who hear it, is not indictable; it is cognizable before a justice of the peace, under the act of 1741, ch. 14; but where it is charged as a nuisance, and there is evidence to support the charge, it is indictable; therefore, a motion to arrest the judgment upon an indictment, which charged "that the defendant swore several oaths in the court-yard during the sitting of the Court, to the great disturbance and common nuisance of the citizens necessarily attending the said Court," was

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overruled. *State* v. *Kirby*, 1 Murph. 254.

RAPE.

I. Statutes respecting Rape.
II. What Constitutes a Rape.
III. Indictment for Rape. Evidence on the Trial.
IV. Trial for Rape. Charging the Jury in Cases of Rape.

I. Statutes Respecting Rape.

1. In Mississippi, the statute (Hutch. Dig. 918, § 21) providing that no person shall be convicted of an attempt to commit an offence, where it appears that the offence was actually committed, has no application to the case of rape by a slave upon a white woman. *Wash* v. *the State*, 14 Smedes & Marsh. 120.

2. There is no statute which prescribes the punishment of a slave for the commission of a rape upon a white woman, but the attempt to commit such offence is a capital crime; and it is held that the statute making the commission a penitentiary offence has no application to the cases of slaves. *Ib.*

3. In Tennessee, the statute of 1839, c. 19, § 10, subjecting a slave to punishment of death for an assault with intent to commit a rape on a free white woman, does not include the case of a female under ten years of age. *Sydney* v. *the State*, 3 Humph. 478.

4. In Arkansas, rape by a slave was punishable by death previous to the statute of 1842. *Denis* v. *the State*, 5 Ark. 230.

5. A white girl, under twelve years of age, and not having attained to age of puberty, is a white woman within the terms of the Virginia statute, which makes it felony punishable with death for a slave, free negro, or mulatto, to attempt to ravish a white "woman." *Watts' case*, 4 Leigh 672.

6. The provision in the Constitution (§ 25, art. 3) which declares that any slave who shall be convicted of a capital offence shall suffer the same degree of punishment as would be inflicted on a free white person, and no other, has reference to the mode of inflicting capital punishment, and does not prohibit the General Assembly from punishing a crime capitally when committed by a slave, and otherwise when committed by a white person. *Charles* v. *the State*, 6 Eng. 389.

7. Where, by the law, the slave and the white man are both punished capitally, they must be executed in the same manner. *Ib.*

8. The 9th sec. of art. 4, of part 4, of ch. 51, Digest, which declares that a negro shall be punished with death for an attempt to commit rape on a white woman, is not unconstitutional because a white man for the same offence is only punished by imprisonment in the penitentiary. *Ib.*

9. An attempt by a negro to commit rape upon a white female under the age of puberty, is in the purview of the statute referred to. *Ib.*

10. The 4th sec. of art. 4, of part 4, of ch. 51, Digest, contemplates cases of carnal knowledge of females below the age of puberty, without force, and not forcible rapes; such females nevertheless are subjects of rape as well as females above that age. *Ib.*

II. What Constitutes a Rape.

11. In Virginia, upon an indictment against a free negro, under the statute of 1822–'3, c. 34, § 3, it was found that the accused, not intending to have carnal knowledge of the woman by force, but designing to have such knowledge of her while she was asleep, got into bed with her, and pulled up her night garment, which waked her, without using any force; held that this was not an attempt to ravish, within the terms of the statute. *Field's case*, 4 Leigh 648.

12. A rape can be committed on an infant. *Stephen* v. *State*, 11 Ga. 225.

13. A child being under ten years old, cannot consent to sexual intercourse,

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in such manner as to rebut the presumption of force. *Ib.*

14. *Quere*—Whether the same presumption will not exist in forcing one over ten years of age, who is still a child in respect to stature, constitution, and physical and mental developments. *Ib.*

15. Rape is the carnal knowledge of a female, forcibly and against her will. In order to convict a negro of an attempt to commit rape upon a white female, it is essential to prove such intention as, if carried into execution, would constitute rape. *Charles* v. *State*, 6 Eng. 389.

16. In this case the prisoner entered a room where a school-girl was sleeping, turned her over (having partly undressed himself), and attempted to get on her; she awoke, screamed, and he fled; he was convicted by a jury, for an assault with intent to commit rape; held that a new trial should be granted, because it did not appear from all the circumstances in proof, that the prisoner intended to accomplish his purpose by force. *Ib.*

17. Held, on the authority of *Commonwealth* v. *Field*, 4 Leigh R. 648, that if the prisoner designed to accomplish his purpose while the girl was asleep, he was not guilty of an attempt to commit rape. *Ib.*

18. The law presumes that an infant under the age of fourteen years, is incapable of committing or attempting to commit the crime of rape; but this presumption may be rebutted by proof that such person has arrived at the age of puberty. *Williams* v. *State*, 14 Ohio 222; vide *People* v. *Randolph*, 2 Parker's Crim. Rep. 174, 213.

19. In the case of *Charles* v. *State*, 6 Eng. Rep. 389, where the intention of the prisoner was to obtain possession of the girl's person while she was asleep, or to have connection with her, if he could do so by her consent, the Court properly applied the law, that in order to convict him of an assault with intent to commit rape, it should appear that he intended to gratify his passion, upon her person, at all events, and notwithstanding any resistance on her part; in other words, that his intention was to have carnal knowledge of her by force and against her will. But it was not the design of the expression used by the Court in that case, either in respect of the crime, or the attempt, to mention the quantity of brute force, or the amount of resistance; if the woman submit from terror, or the dread of greater violence, the intimidation becomes equivalent to force. *Pleasant* v. *State*, 8 Eng. 360.

20. In this case, where the prisoner assaulted the woman openly, and violently threw her several times upon the floor, then upon the bed, stript her clothes over her head, smothered her with them, and attempted to gratify his passion upon her, the Court properly refused to charge the jury, in unqualified terms, that in order to convict the prisoner, they must be satisfied that when he had hold of her he intended to gratify his passion upon her at all events, and notwithstanding any resistance on her part. The law would seem to be (as held in *Charles* v. *State*), that if a man accomplish his purpose by fraud, or by surprise, without intending to use force, it is not rape, because one of the essential ingredients of the offence (force) is wanting. So, when force is used, but the assailant desists upon resistance being made by the woman, and not because of an interruption, it could not be said that his intention was to commit rape; and the Court holds that this law is applicable to such abuse of white women by negroes, but suggests the propriety of amendatory legislation to punish such outrages. *Ib.*

III. Indictment for Rape—Evidence on the Trial.

21. An indictment which alleges "that J. N., late of said county, in and upon one H. S. (she, the said H. S., then and there being a female child under the age of ten years), feloniously did make an assault; and her, the said H. S., then and there did feloniously abuse, in the attempt carnally know," is fatally defective in not specifying with sufficient certainty and precision, the person upon whom the attempt was

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committed. *Nugent* v. *State*, 19 Ala. 540.

22. It is fatal to join a count which charges a negro with carnal knowledge of a white female child, under ten years of age, with counts which charge the commission of a rape upon a white female, as the first offence is entirely different from the others. *State* v. *Dan Cherry*, 1 Swan 160.

23. Where one is indicted for attempt to commit a rape, it is sufficient to allege matter enough to bring the case within the meaning of the statute. *Williams* v. *State*, Wright 42.

24. Where an indictment lies against a slave for a rape on a free white woman, it need not allege the ownership of such slave; and if alleged and disproved, the variance is not fatal. *Peter* v. *State*, 5 Humph. 436.

25. An indictment under the Tennessee acts of 1833, c. 75, § 1, and 1835, c. 19, § 10, should distinctly charge that the assault committed by the slave, with intent to ravish, was on the body of a "free white woman." *Grandison* v. *State*, 2 Humph. 451.

26. Two or more persons may be joined in the same indictment, as principals, for the commission of rape. *Denis* v. *State*, 5 Ark. 230.

27. In an indictment for rape, under the act of February 8, 1819, it has been the practice not to allege that the prisoner is a free person, on the principle that every person is supposed to be free until the contrary appears. *Com.* v. *Bennett*, 2 Virg. Cas. 235.

28. Where the charge in such indictment is, that the offence of rape was committed upon N. G., a female child, instead of, that it was committed on a woman child, that being the language of the statute; held that the description in the indictment was good. *Ib.*

29. And in such indictment, if the word "unlawfully" be omitted; held, that as the word "unlawfully" was not a word of art, as Murder, Rape, &c., the omission of it was immaterial. *Ib.*

30. Where an indictment is laid for rape, the words "forcibly and against the will," are necessary. *State* v. *Jim*, 1 Dev. 142.

31. In North Carolina, under the act of 1823, it is necessary to allege that the assault was made with an intent to commit a rape. *State* v. *Martin*, 3 Dev. 329.

32. It is not necessary to allege, in an indictment for an assault with intent to commit rape, what was the age of the person assaulted. *Bowles* v. *State*, 7 Ohio 243.

33. It is enough if an indictment for rape charge the accused with feloniously ravishing and carnally knowing a woman. *Harman* v. *Com.*, 12 Serg. & Rawle 69.

34. Where the description of rape in an indictment leaves out the word "unlawfully," but is in accordance with the Common Law definition of the offence, it is good. *Weinzorpflin* v. *State*, 7 Blackf. 186.

35. An indictment upon our statute (1 Rev. Stat. c. 34, § 5), for abusing and carnally knowing a female child under the age of ten years, which charges the rape to be "in and upon one M. C., feloniously did unlawfully and carnally know and abuse, &c.," is sufficient without describing the infant as a "female child;" nor is the addition of "spinster" to the name of the infant, requisite in such an indictment. *State* v. *Terry*, 4 Dev. & Batt. 152.

36. A former conviction on an indictment for an attempt to commit a rape, is a sufficient bar to an indictment for a rape; the former offence being necessarily included in the latter. *State* v. *Shepherd*, 7 Conn. 54.

37. At Common Law, rape was a felony; but the offence was afterward changed to a misdemeanor before the statute of Westminster 1; by that statute the punishment was mitigated; but by statute Westminster 2, the offence was again changed to a felony, and thence its present existence as a felony is by statute; an indictment for rape must therefore conclude contra formam statuti. *State* v. *Dick*, 2 Murph. 388.

38. Where an indictment for a rape charged that the defendant, "with force and arms, &c., in and upon one Mary Ann Taylor, in the peace of the State, &c., violently and feloniously did make an assault, and her, the said Mary Ann Taylor, then and there violently and against her will, felonious-

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ly did ravish and carnally know," the Court can and must see with certainty that Mary Ann Taylor was a female. *State* v. *Farmer*, 4 Ired. 224.

39. It is not necessary, in an indictment for a rape, to state that the female ravished was of the age of ten years. *Ib.*

40. If she be under the age of ten, then the fact should be averred; because, abusing a female is made felony by statute, whether she assented to the act or not. *Ib.*

41. Though our law, in view of the relation of master and slave, punishes with death an attempt by a slave to commit rape upon a white woman, yet the rules of law, in respect of what constitutes the offence and the evidence to establish it, are not changed because of that relation. *Charles* v. *State*, 6 Eng. 390.

42. In this case, the evidence sustains the allegations in the indictment, and the verdict of guilty, except as to the prosecutrix being a white woman, and this the jury must have inferred from her appearance on the stand, and from reference, during the course of the testimony, to her domestic relations—as to "her husband," "brother," &c. *Ib.*

43. The constitutional power of the Legislature to provide for the punishment of a slave capitally, for an attempt to commit rape upon a white woman, whilst a white man is punished by imprisonment in the penitentiary for the same offence, was declared in *Charles* v. *the State*, 6 Eng. 289. *Ib.*

44. In an indictment against a negro for such offence, the fact that the person assaulted is a white woman, is a necessary ingredient to constitute the crime, and the averment that she is such, becomes part of the substance of the issue material to be proved. *Ib.*

45. An indictment against a negro man for attempting to commit rape on a white woman, alleging "that P., a negro man, slave, &c., on, &c., at, &c., upon one S. F., a white woman, &c., wilfully and feloniously did make an assault, and the said S. F. did, then and there, beat, wound and ill-treat, with intent her, the said S. F., violently, forcibly, and against her will, then and there, feloniously, to ravish, and carnally know, and other wrongs, &c., contrary," &c., charges the offence sufficiently well, and is free from the objection existing in the indictment in the case of *Joe* v. *the State*, 3 Eng. Rep. 400; *Pleasant* v. *State*, 8 Eng. 360.

46. On a trial for rape, the prisoner may give in evidence that the woman had been his concubine, or that he had been suffered to take indecent liberties with her. *State* v. *Jefferson*, 6 Iredell 305.

47. But he cannot give in evidence, to prove her a strumpet, that she had had criminal connection with one or more particular individuals. It is a question of character, and the evidence, as in other questions of character, must be of a general nature. *Ib.*

48. On a trial for rape, the acts and declarations of the husband of the woman on whom the offence is alleged to have been committed, are not admissible to discredit the wife, examined as a witness. *Ib.*

49. Upon the trial of an indictment for rape, the declarations made by the injured female immediately after the alleged offence, are not admissible evidence for the prosecution to prove the offence committed; and the rule is the same, though it appear that the female is incompetent to testify on account of immature age, idiocy, or other mental defect. *People* v. *McGee*, 1 Denio 19.

50. Such declarations are only admissible where the person injured has given evidence as a witness, and then only upon the question of her credibility. *Ib.*

51. Where the injured female is of sufficient age, and of competent though weak understanding, but is unable to talk, and can communicate and receive ideas only by signs, she may yet be sworn as a witness, and examined through the medium of one who can understand her, who is to be sworn to interpret between her and the Court and jury. *Ib.*

52. Proof of a rape, will sustain an indictment for an attempt to commit a rape. *State* v. *Shephard*, 7 Conn. 54.

53. On the trial of a person charged with the crime of rape, or an assault with an intent, &c., the inquiry may be made of the prosecutrix whether she

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had previous intercourse with other men; and it seems that she, in such case, is not privileged from answering such question. *People* v. *Abbott*, 19 Wend. 192.

54. The prosecutrix may be proved to be in fact a common prostitute; so, also, a previous voluntary intercourse between her and the accused, may be shown; and evidence may be given of particular acts and associations, indicating on her part a want of chastity. *Ib.*

55. It seems, also, that the general character of the prosecutrix, as a common prostitute, may be put in evidence; and that the accused is not restricted to proof of her general character for truth and veracity, but may give evidence of her general moral character. *Ib.*

56. The same rules of evidence are applicable to a trial for an indictment for a simple assault and battery on a female, accompanied with carnal knowledge. *Ib.*

57. The magistrate before whom the complaint was made, cannot be called to prove what the prosecutrix swore to before him as to her having had previous intercourse with other men, if the inquiry is not made for the purpose of showing a discrepancy in the testimony of the prosecutrix. *Ib.*

58. Where the present character of a witness for truth and veracity is in a slight degree impeached, proof of bad character in that respect, in years past, is admissible. *Ib.*

59. On the trial of an indictment for rape, alleged to have been committed on board a vessel, the accused attempted to discredit the testimony of the complainant: 1. By showing on her cross-examination that her story was improbable in itself; 2. By disproving some of the facts to which she testified; 3. By evidence that her conduct, while on board the vessel and subsequently, was inconsistent with the idea of the offence having been committed; and 4. By calling witnesses to show that the account which she had given of the matter out of Court, did not agree with her statements under oath; held that this was not an attack upon the complainant's general character, and, therefore, evidence of her good character was inadmissible in reply. *People* v. *Hulse*, 3 Hill 309.

60. Cowen, J., dissented, being of opinion that evidence of the complainant's contradictory statements out of Court affected her general character; and consequently that evidence of good character was admissible. *Ib.*

61. Although no unreasonable suspicion should be indulged against the complaining witness on the trial of an indictment for rape, yet courts and juries cannot well be too cautious in scrutinizing her testimony, and guarding themselves against the influence of undue sympathy in her behalf. Per Bronson, J. *Ib.*

62. Where the parts of a child, upon whom an attempt to carnally know her is proven by her to have been made, are shown to be bruised and infected with the venereal disease, proof of sexual intercourse between her and other persons, before and near the time of the commission of the alleged offence, is admissible, as tending to weaken the corroborative force of these circumstances. *Nugent* v. *State*, 18 Ala. 521.

63. The credit of a witness cannot be impeached by showing particular acts of immorality disconnected with the question of veracity. *Ib.*

64. Where there is evidence conducing to show that a prisoner charged with an assault, with intent to commit a rape, was at the time in a greatly debilitated condition from a previous debauch, it is a circumstance, however light, to be considered by the jury in ascertaining whether he was physically capable of committing the offence. *Ib.*

65. Evidence of the least penetration warrants a conviction for rape. *State* v. *Le Blanc*, 1 Const. Rep. 354.

66. On an indictment for an assault with intent to commit a rape, proof of reputation that the woman alleged to have been assaulted was of ill-fame with respect to chastity, is competent to impeach her credibility as a witness in the case, as well as to show what was the intent of the accused. *Camp* v. *State*, 3 Kelly 417.

67. In an indictment for rape, it is

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not necessary that emission should be proved. *Penn.* v. *Sullivan*, Addis. 143.

68. In a prosecution for a rape, the fact that the woman made complaint soon after the assault took place, is admissible evidence; the particulars of her complaint, however, cannot be inquired into, and she will not be allowed to name the prisoner as the person having committed the injury, unless by way of information to lead to his arrest. *Stephen* v. *State*, 11 Ga. 225.

69. As to what are the principles of circumstantial evidence, in an indictment for an assault with intent to commit a rape. *Bill* v. *the State*, 5 Humph. 155.

70. In burglary, there must be a breaking, removing or putting aside of something material, which constitutes a part of the dwelling-house and is relied on as a security; but if the door or window be shut, it is not necessary to resort to locks, bolts or nails: a latch to the door or the weight of the window is sufficient. *The State* v. *Boon*, 13 Iredell 244.

71. When a man burglariously entered a room where a young lady was sleeping, and grasped her ancle, without any attempt at explanation when she screamed, this is some evidence of an attempt to commit a rape, and must be submitted by the Court to the jury. *Ib.*

IV. Trial for Rape—Charging the Jury in Cases of Rape.

72. In Massachusetts, under the Rev. Stats. c. 137, § 11, a defendant indicted for a rape, charged to have been committed upon his daughter, may be convicted of incest, where the jury find the criminal connection, but that it was not by force and against the will of the daughter. *The Com.* v. *Goodhue*, 2 Met. 193.

73. On an indictment for a rape, the accused may be acquitted of the offence charged, and may be found guilty of the attempt only, provided such finding is warranted by the evidence. It was held that it would not vitiate the verdict to swear the jury to try the accused for the attempt, as well as the rape. *Stephen* v. *State*, 11 Ga. 225.

74. Upon an indictment against a slave for rape on a free white female, a verdict in these words: "We, the jury, find the prisoner guilty of an attempt to commit a rape," was held sufficiently complete, and that it was necessary to negative the charge of a rape, that being the legal effect of the finding; neither was it necessary to add the words, "on a free white female," as, that being the issue submitted to the jury, the verdict was coextensive with it. *Ib.*

75. In Massachusetts, under the statutes of 1784, c. 66, § 11, and 1805, c. 97, where one is indicted for rape, he may be found guilty of an assault with intent to commit a rape. *Com.* v. *Cooper* 15 Mass. 187. But see *Com.* v. *Roby*, 12 Pick. 496, § 507.

76. Where an infant is under the age of fourteen years, he may be convicted of an assault with intent to commit a rape, though, by technical rule of law, he is incapable of committing the chief offence itself. *Com.* v. *Green*, 2 Pick. 380.

77. Where a defendant is tried in a Court of General Sessions, on an indictment for a rape, and an assault, with intent, &c., and the jury convict of an assault and battery merely, judgment cannot be rendered; since the Sessions have not jurisdiction of the offence of rape. *People* v. *Abbott*, 19 Wend. 192.

78. Though the woman may be unchaste, "or of easy virtue," this is no justification of an assault upon her by a negro. *Charles* v. *State*, 6 Eng. 390.

79. To justify a conviction for rape, under the 2d sub. of § 22, 2 R. S., 663, it ought to appear that there was the utmost reluctance and resistance on the part of the prosecutrix. *The People* v. *Morrison*, 1 Parker's Crim. R. 625.

80. Where a slave is indicted for an assault on a white woman, with an intent to commit a rape, it is necessary that it should appear in the bill of exceptions, that the woman assaulted was a white woman. *Henry* v. *the State*, 4 Humph. 270.

81. On a criminal prosecution for rape, it is competent for the counsel for

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the accused, on the cross examination of the prosecutrix, to ask her whether the treatment complained of "was with her consent or against her will." *Woodin* v. *the People*, 1 Parker's Crim. R. 464.

82. Such a question is not objectionable in form; but if the objection to it had been made on that ground, and an exception taken, it would not have been available, for the form of a question, if not otherwise objectionable, is a discretionary matter with the Court. *Ib.*

83. The Court properly refused to charge the jury, at the instance of the prisoner, that taking a woman and throwing her about on the floor, and then throwing her on the bed, for the sole purpose of having criminal connection with her, is not an attempt to commit rape, because such instruction, in the terms asked for, was calculated to mislead the jury. *Charles* v. *State*, 6 Eng. 390.

84. The prisoner's counsel asked the Court to charge the jury, that the State must prove that he was a negro, to convict, and though he was black, their seeing him was no proof that he was a negro; held that inasmuch as the instruction assumed that the prisoner was black, the presumption arising from color, that he was a negro, would prevail, and the instruction was properly refused. *Ib.*

85. The allegation that the person assaulted was a white woman, being material, the Court erred in refusing to charge the jury, "that the jury should acquit the prisoner, unless the State proves, to their satisfaction, that the person upon whom the assault was committed, is a white woman, and that the jury having seen her, or known her, or heard her testify, will not dispense with proof of that fact." *Ib.*

86. Where the prosecutrix had testified, that as soon as practicable after the alleged rape, she made it known and complained to her husband, and to her mother and other persons, and was corroborated by the testimony of her husband as to the disclosures to him, and it appeared that J. J. was present at the trial, and was not called as a witness, it was held proper for the Court to refuse to charge the jury, that the corroborating evidence of J. J., and others as to her disclosures, was necessary to confirm her testimony and entitle it to full credit; and held that the Court correctly charged the jury, that it was not necessary for the people to call the other persons referred to as witnesses, if the jury were convinced that the prosecutrix or her husband had testified truly, in regard to the communication made by her. *Woodin* v. *People*, 1 Parker's Crim. R. 64.

87. Where the Court charged the jury, that if the female assaulted, consented through fear, or consented after the fact, or was taken at first with her consent, if she was subsequently forced, the offence was committed; held that there was nothing incorrect in this charge. *Wright* v. *the State*, 4 Humph. 194.

RECEIVING STOLEN GOODS.

I. Receiving stolen goods. Statutes respecting.
II. Indictment for receiving stolen goods, &c.

I. Receiving Stolen Goods, &c.—Statutes respecting.

1. In order to constitute the crime of receiving stolen goods, knowing them to have been stolen, it is necessary that the stolen property should be received feloniously, or with intent to secrete it from the owner, or in some other way to defraud him of the property. *The People* v. *Johnson*, 1 Parker's Crim. R. 564.

2. Where one authorizes another to receive property lost or stolen, and the latter receives the property from the thief, knowing it to be stolen, he is guilty of felony. *Cassels* v. *the State*, 4 Yerg. 149; *Wright* v. *the State*, 5 Yerg. 154.

3. An indictment cannot, in South Carolina, be supported under the act of 1769, for receiving the meat of cattle which had been stolen. By the act of 1789, stealing cattle is punishable as

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a misdemeanor only, and the act of 1769 applies only to cases in which the principal has been guilty of a capital felony. *The State* v. *Harkness*, 1 Brevard 276.

4. In Massachusetts, the 20th section of ch. 126 of the Revised Statutes, which prescribes the punishment of "every person who shall buy, receive, or aid in the concealment of any stolen goods, knowing the same to have been stolen," describes only one offence, which may be committed either by buying, receiving, or aiding in the concealment of such goods; and an indictment charging a defendant with receiving and aiding in the concealment of such goods, alleges only one offence. *The Commonwealth*, 6 Met. 241.

5. The statute of this State, in relation to receivers, &c., of stolen property, has enlarged the Common Law offence of receiving stolen property, knowing the same to be stolen, by making persons who shall aid the principal felon in the concealment of the property equally guilty with him who receives such property.. *The People* v. *Reynolds*, 2 Gibbs 422.

6. A person suffering a trunk of stolen goods to be put on board a vessel destined for North Carolina, as a part of his baggage, he having taken his passage, was such a reception of the goods, as purchaser or bailee, as justified a conviction under the statute for receiving stolen goods. *The State* v. *Scovel*, 1 Mills' R. 274.

7. A receiver of stolen goods under the value of twelve pence, who is tried and found guilty, when the thief has never been prosecuted, but is running at large, amenable to process, is not liable to be punished, and no sentence can be pronounced against him. *The State* v. *Goode*, 1 Hawks 463.

8. Where a stranger, pursuant to an arrangement with a party whom he knows has stolen goods, invites an interview with the owner, and afterwards receives the goods under the mere color of an agency, but really to make a profit out of the larceny, he is within the statute against receiving stolen goods. Per Cowen, J. *The People* v. *Wiley*, 3 Hill 194.

9. In this case various English statutes, against receiving stolen goods were reviewed, and their policy examined. *Ib.*

10. Under the statute of New York, the receiving of stolen goods malo animo is a principal offence. *Ib.*

11. Where one receives stolen goods with intent to favor the thief, though it be only by disconnecting him with one of the evidences of his guilt, he is within the statute.—Semble. *Ib.*

12. So where one receives a receipt, with knowledge, designed as a means of depriving the owner of the whole or part of the goods, contrary to his intent. *Ib.*

13. And such is the case, though the purpose be not to deprive him of the specific goods, but of some other portion of his property, *e. g.*, to defraud him into the payment of money by way of reward for the restoration of the goods. *Ib.*

14. Where A., a police-justice of the city of New York, having learned that a large amount of funds had been stolen from a bank in Maryland, invited an interview with the agents of the latter, expressing his belief that the property could be recovered. An interview accordingly took place, in which A. proposed to procure a restoration of the property upon condition that the bank would pay therefor at the rate of ten per cent. on the amount, saying *his employer* would not take less. After several days spent in negotiating, during which A. professed to be acting with entire knowledge as to the views and wishes of the thief, it was finally agreed that the property should be restored for a less sum than the one first demanded, and a place was fixed for carrying the agreement into effect. A. brought the property to the appointed place and delivered it to the agents of the bank, who thereupon paid him the reward agreed upon; held that, though A. received the property under cover of an agency from the bank, the jury was authorized to find that he had procured the agency under a previous arrangement with the thief, intending to make a profit to himself out of the crime, but concealing such intent from the bank; and, if so, he was punishable as a receiver of stolen goods. *Ib.*

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15. If A. had only asked for such a reward as was insisted on by the thief before delivering up the goods, together with a fair compensation for his own trouble, he proposing and being allowed for the whole as such, the case might have been different. *Ib.*

16. *Query*, however, whether any arrangement to obtain and restore stolen property for a reward agreed upon with the owner, followed by an actual receipt of the goods from the thief for that purpose, can be said not to be within the statute. *Ib.*

17. Generally the gist of offences of this nature is the intent to defraud. Per Cowen, J. *Ib.*

18. A party may be convicted of stealing his own goods, *e. g.*, where he secretly and fraudulently takes them from his bailee, so as to bring an action against the latter—per Cowen J. *Ib.*

19. And where the goods have been stolen from the bailee by another person, the owner may make himself criminally responsible by fraudulently receiving them from the thief. *Ib.*

20. Bank-bills complete in form, but not issued, are the *property* of the bank, and may be so regarded in criminal proceedings for receiving them, with knowledge that they were stolen. *Ib.*

21. Where one receives stolen goods, knowing them to be such, he may, under the statute of Conn., of 1830, be prosecuted as a principal. *State* v. *Weston*, 9 Conn. 527.

22. The misdemeanor of receiving stolen goods is not merged in the offence of being accessory before the fact of the larceny; the less is merged in the greater offence only when they result from the same act, or continuing transaction. *State* v. *Coppenburg*, 2 Strobh. 273.

II. Indictment for Receiving Stolen Goods, &c.

23. Where a defendant was indicted for feloniously receiving articles stolen, knowing them to have been stolen; held that such indictment could not be sustained without its appearing on the trial that the principal thief had been convicted, or without the consent of the defendant, in the absence of any proof that the principal had been convicted. *Com.* v. *Andrews*, 3 Mass. 126.

24. But under the Massachusetts statute of 1784, ch. 56, § 9, a receiver of stolen goods, knowing them to be stolen, may be indicted as for a misdemeanor, when the principal is not known or prosecuted. *Ib.*

25. Where an indictment for receiving stolen goods omits to allege that the prisoner received them for the purpose of cheating the owner, but alleges that they were received with the knowledge of their being stolen; the indictment was held to be insufficient, on a motion in arrest of judgment. *Pelts* v. *State*, 3 Blackf. 28.

26. In an indictment for receiving stolen goods, it is not necessary to allege that they were upon any consideration passing between the thief and the receiver. *Hopkins* v. *People*, 12 Wend. 76.

27. In an indictment for receiving stolen goods, it is not necessary to state the name of the principal felon, and if stated, it is not necessary that it should be proved. *State* v. *Coppenburg*, 2 Strobh. 273.

28. In an indictment for receiving stolen goods, it is not enough to charge that the defendant received the stolen property knowing it to be stolen; but it is necessary to allege that the property was received with a felonious and fraudulent intent. *The People* v. *Johnson*, 1 Parker's Crim. R. 564.

29. If there be no such allegation in the indictment, the accused may avail himself of the defect by demurrer, writ of error, or motion in arrest of judgment. *Ib.*

30. Where an indictment lies for receiving stolen goods, it should charge the defendant with receiving them with intent to deprive the true owner of them. *Hurell* v. *the State*, 5 Humph. 68.

31. In an indictment for receiving property, knowing it to be stolen, the name of the principal felon need not be stated. *Swaggerty* v. *State*, 9 Yerg. 338.

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32. Nor need it be averred that the principal felon has been convicted. *Ib.*

33. Where an indictment alleged that A., on, &c., in, &c., two sides of upper sole-leather, of the value of $35, of the goods and chattels of one B., then, lately before, feloniously stolen, taken, and carried away, feloniously and fraudulently did then and there receive and have, he, the said A., then and there knowing the said goods and chattels to have been feloniously stolen and carried away, with intent to deprive the true owner thereof; it was held that the offence was sufficiently described, and that it was unnecessary to allege expressly from whose possession the goods were stolen. *Ib.*

34. In an indictment for receiving stolen goods, &c., it is not sufficient to allege that the defendant received the stolen property, knowing it to be stolen, but it is necessary to aver that the property was so received with a felonious or fraudulent intent. *People* v. *Johnson*, 1 Parker's Crim. R. 564.

35. If there be no such allegation in the indictment, the accused may avail himself of the defect, by demurrer, writ of error, or motion in arrest of judgment. *Ib.*

36. An indictment charging the prisoner with fraudulently receiving stolen goods, knowing them to have been stolen, need not set forth the name of any person from whom the goods were received, nor that they were received from some person or persons unknown to the jurors finding the indictment. *State* v. *Hazard*, 2 Rho. Island R. 474.

37. Where an indictment contains two counts, the first charging the defendant with stealing certain goods, and the second with receiving the same goods, knowing them to be stolen, it is in the discretion of the Court to which the indictment is presented to proceed to trial upon both counts at the same time, or to compel the prosecutor to elect upon which count he will proceed to trial, and so grant a separate trial upon each count; but after verdict it is no ground for a new trial that the Court refused to compel such election. *Ib.*

38. In an indictment for feloniously receiving stolen goods, knowing the same to be stolen, it is not necessary to allege the name of the thief, whether known or unknown, whether he was prosecuted or not, or to state the place where the larceny was committed. *State* v. *Murphy*, 6 Ala. 845.

39. An indictment which charges the felonious receiving of "sundry pieces of silver coin, made current by law, usage, and custom within the State of Alabama, amounting together to the sum of five hundred and thirty dollars and fifteen cents," does not describe the money with sufficient precision, but the number and denomination of the coin should be stated; yet the proof need not be as full and precise as the allegation, but the accused may be convicted if he is shown to be guilty in respect to to either one of the coins alleged to have been feloniously received. *Ib.*

40. Where a statute makes it an offence to "buy, receive, conceal or aid in the concealment of stolen goods," &c., it prescribes four distinct offences, and the disjunctive "or" applies to each of the three verbs which precede, as well as to what follows; but an indictment which employs the terms "receive and conceal," in characterizing the offence, is good. *Ib.*

41. An allegation that stolen goods were feloniously received "with intent to defraud the owner," is sufficient, and refers directly to the individual whose name had been before mentioned as the owner. *Ib.*

42. In an indictment for knowingly receiving stolen goods, the Court sustained the verdict against the defendant, it having been proved that he received the goods from the servant of a carrier and concealed them, and circumstances existing amply sufficient to satisfy the jury that the possession of the goods by the servant, had been furtively acquired. *State* v. *Teideman*, 4 Strob. 300.

43. One count in the indictment charged the defendant with knowingly receiving stolen goods from a slave, which were the property of a person unknown; the jury found a verdict of guilty, and on appeal, it was held that the count was sufficient to cover the goods, and that it was therefore imma-

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terial whether there was proof or not to sustain another count alleging in whom the property was. *Ib.*

44. In North Carolina, an indictment for receiving stolen goods must aver from whom the goods were received, so as to show that he received them from the principal felon; if received from any other person, the statute does not apply. *State* v. *Ives*, 13 Iredell 338.

45. Bank-notes are not "goods or chattels," and the receiver of stolen bank-notes cannot be indicted under the statute making it a misdemeanor to receive stolen "goods or chattels." *State* v. *Calvin*, 2 Zab. 207.

46. Where an indictment is laid for receiving stolen goods, it should describe the goods with certainty and accuracy, and a variance in this particular will be fatal. Per Cowen, J. *People* v. *Wiley*, 3 Hill 194.

47. Receivers of stolen goods taken otherwise than by burglary, or housebreaking, are not liable to indictment under the act of South Carolina, of August 23, 1769. *State* v. *Sanford*, 1 Nott & McCord 512.

48. Where a prisoner was indicted as a receiver of goods stolen from a slave, who had been convicted and punished therefor under the 2d statute of Anne, c. 9, then in force in South Carolina, and was found guilty, but a new trial was granted on the grounds that the statute was intended to apply only to cases where the principal offender had not been convicted, and that although the receiving of stolen goods was a misdemeanor at Common Law, the 3d and 4th of William and Mary, c. 9, in force in South Carolina, repealed the Common Law. *State* v. *Counsil*, Harper 53.

49. It is well settled in England, that, by the Common Law, if a felon steal property in one county, and carry it to another, he is guilty of larceny in that county, and may be there indicted and punished; and this upon the ground that it is a continuing felony, and that the person is guilty in the one county or the other, the Common Law being supreme over each, and a punishment in one a satisfaction for the offence in the other; but before it can be pronounced to be a continuing felony, the first taking must be adjudged to have been a work of supererogation, when that taking had been in a foreign and independent State. *Simpson* v. *the State*, 4 Humph. 456.

50. The stealing of a horse, in the territory south of the Ohio, is not an offence punishable in North Carolina, though the horse was brought into that State. *Ib.*

51. No indictment for larceny lies in the Courts of this State, for property stolen in another, and brought by the thief into this; and that he is only to be criminally considered as a fugitive from justice. *Ib.*

52. If goods are stolen in one county, and carried by the guilty party into another, he may be indicted for the larceny in either county. *The State* v. *Douglass*, 17 Maine 193.

53. One who feloniously takes property in the province of Canada, and brings it into this State, is guilty of larceny, and may be here tried and convicted of the offence. *State* v. *Bartlett*, 11 Vt., 650.

54. Where property is stolen in one county, and is carried by the thief into another, the rule which allows that he may be convicted of larceny in the latter county, applies both to property which is made the subjects of larceny by the statute, and property which is the subject of larceny by the Common Law. *Commonwealth* v. *Simpson*, 9 Met. 138.

RIOT.

I. What constitutes a Riot.
II. Indictment for Riot.
III. Proof on the Trial.

I. What constitutes a Riot.

1. A riot is a tumultuous disturbance of the peace, by three or more persons assembled together of their own authority, with the intent, mutually, to assist each other against any one who shall oppose them, and putting their design into execution in a terrific and

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violent manner, whether the object was lawful or not. *State Connolly*, 3 Rich. 337.

2. To constitute a person a rioter, it is not necessary that he should be actively engaged in the riot; it is sufficient that he be present, giving countenance, support, or acquiescence. *Williams* v. *State*, 9 Mo. 268.

3. An unlawful assembly, riotously and tumultuously disturbing the selectmen of a town in the exercise of their duty, on a public day, and in a public place; and obstructing the inhabitants of a town in the use of their constitutional privilege of election, is a riot, and an aggravated one. *Commonwealth* v. *Runnels*, 10 Mass. 520.

4. To disturb another in the employment of a lawful right is a trespass; and if it is done by numbers unlawfully combined, the same act is a riot.

5. In order to make out a riot at Common Law, an unlawful assemblage must be shown; and if a number of persons lawfully assembled, suddenly and without premeditation fell together by the ears, it was only an affray; but if, being thus assembled, they concoct a breach of the peace, and in pursuance thereof, execute it, this is a sufficient assemblage to make a riot. *Dougherty* v. *People*, 4 Scam. 180.

6. The law of Illinois defines a riot to be, where two or more persons actually do an unlawful act, with force or violence, against the person or property of another, with or without a common cause of quarrel; or even to do a lawful act in a violent and tumultuous manner. *Ib.*

7. It is deemed sufficient that two or more persons, being together, should do an unlawful act, with force or violence, against the person or property of another. *Ib.*

8. If persons, innocently and lawfully assembled, afterward confederate to do an unlawful act of violence, in pursuance of such purpose, this is a riot. *State* v. *Snow*, 6 Shep. 346.

9. If they proceed to this length, it is not necessary that their whole purpose should be consummated. *Ib.*

10. A riot is a tumultuous disturbance of the peace by three persons or more, assembled of their own authority, with intent mutually to assist each other, and afterward putting the design in execution, in a terrific and violent manner, whether the object be lawful or unlawful. *State* v. *Brazil*, 1 Rice 258.

11. A man may lawfully pull down his own house in a tumultuous manner, and with a great concourse of people; yet if it be accompanied by no circumstances calculated to excite terror or alarm in others, it would not amount to a riot; so, also, if a dozen men assemble together in a forest and blow horns or shoot guns, or such acts, it would not be a riot. *Ib.*

12. But if the same party were to assemble at the hour of midnight in the streets of Charleston, or Columbia, and were to march through the streets, crying "fire!" blowing horns, and shooting guns, no one would hesitate in pronouncing it a riot, although there might be no ordinance of the city for punishing such conduct. *Ib.*

13. If a number of men assemble with arms in terrorem populi, although no act be done, it is a riot. *Ib.*

14. An indictment was sustained for riotously kicking a foot-ball in the town of Kingston; it was an amusement, but accompanied with such circumstances of noise and tumult as were calculated to excite terror and alarm among the inhabitants of the town. *Ib.*

15. If the offence consists in going about, armed, without committing any act, the words "in terrorem populi" are necessary, because the offence consists in terrifying the people. *Ib.*

16. An audience may lawfully express their approbation or disapproba- of an actor; yet if a number of persons go there with intent to render the performances inaudible, though they offer no violence to the house or any person there, they are guilty of a riot. *Ib.*

17. If a number of persons assemble in a town in the dead of night, and by noises or otherwise, disturb the peaceable citizens, it is a riot. *Ib.*

18. Where a defendant was at the head of a party according to his own declaration, and was not seen in the midst of them, but was seen coming

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from where they were assembled, in a state of intoxication, with a pistol in each hand; held guilty of riot. *Ib.*

19. On an indictment for a riot, it appeared that two white persons and a negro slave went together to a place where one Brown was at work—that upon their arrival there, one of the white persons cut a club, in the presence of the other two, used threatening language to Brown, and commanded his associates to cut up house-logs which the prosecutor had prepared, which they did; held that these acts were sufficient to constitute a riot. *State* v. *Montgomery*, 1 Spears 13.

20. A negro slave, whether acting under the commands of his master or not, may, in contemplation of law, be one of the three persons necessary to constitute the offence of a riot. *Ib.*

21. It is essential that two or more persons should actually be engaged in some physical act of violence, in order to constitute a riot in Iowa; where a single person is engaged in the act of violence, and others stand by inciting him to the act, it is not riot. *Scott* v. *U. States*, 1 Morris 142.

22. Where three or more armed persons assemble to aid one another in a private enterprise, and execute the same in a threatening manner, it will be a riot, and it is immaterial whether the act be lawful or not. *State* v. *Brooks*, 1 Hill's S. C. 361.

23. In Missouri, the Common Law concerning the offence of riot does not exist. *Smith* v. *State*, 14 Mo. 147.

24. In Missouri, under the statute, in order to constitute a riot, the act done or attempted to be done, must be an unlawful act, and must be done or attempted in a violent or turbulent manner. *Ib.*

25. A riot consists in the execution, with force, of an enterprise of a private nature, by three or more persons, with an understanding mutually to aid one another. *State* v. *Cole*, 2 McCord 117.

26. To beset a house with intent to wound, tar and feather, is an indictable offence. *Penn.* v. *Cribbs*, Addis. 277.

27. Two white persons and a negro slave may commit a riot. *State* v. *Calder*, 2 McCord 462.

28. Where there is a criminal prosecution for a riot, it is no defence that two persons only were engaged in the illegal physical act, where a third was, at the time, aiding and abetting them by reason of his presence. *State* v. *Straw*, 33 Maine (3 Red.) 554.

II. Indictment for Riot.

29. In an indictment for a riot it is not necessary to allege any other unlawful purpose for which the rioters assembled than that of disturbing the peace. *The State* v. *Renton*, 15 N. H. 169.

30. An indictment for a riot, alleging an "intent to make an assault," must charge it to have been "with force and violence;" it is not sufficient to charge it to have been "with force and arms." *Martin* v. *State*, 9 Mo. 283.

31. No prosecutor is required upon an indictment for a riot. *Commonwealth* v. *Bybee*. 5 Dana 219.

32. It is not necessary to allege that the riot was committed by three persons named in the indictment; it is sufficient to name those who are known, and to allege that the others were unknown. *State* v. *Brazil*, 1 Rice 258.

33. In an indictment for a riot in pulling down a dwelling-house, as well as in burglary for breaking and entering a dwelling-house, the indictment must set forth whose house it is. Here it was the dwelling-house of the husband, and should have been so charged. If a person inhabit a dwelling-house, as the wife, guest, servant, or part of the family of another, it is in law the occupation of such other person, and must be so laid in the indictment. *State* v. *Martin*, 3 Murph. 533.

34. In an indictment for a riot, it is necessary to aver, and on the trial to prove a previous unlawful assembly; and hence, if the assembly were lawful, as, upon summons, to assist an officer in the execution of lawful process, the subsequent illegal conduct of the persons so assembled will not make them rioters. *State* v. *Stalcup*, 1 Iredell 30.

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35. An indictment for a forcible trespass, in entering a man's dwelling-house, which does not charge an expulsion from the house, or a withholding of the possession thereof, up to the time of the finding of the indictment, nor set forth the interest of the prosecutor, will not, in case of conviction, warrant a writ of restitution. *State* v. *Bennett*, 4 Dev. & Batt. 43.

36. On the trial of an indictment for riot, and riotous assault and battery by four persons, one of them may be convicted of the assault and battery, and the others discharged of the whole. *Shouse* v. *Commonwealth*, 5 Barr 83.

37. In Missouri it is necessary that the name of the prosecutor should be endorsed on an indictment for a riot. *McWaters* v. *State*, 10 Mo. 167.

38. And when the name of the prosecutor is not so endorsed, the objection may be first raised on appeal in the Supreme Court. *Ib.*

39. In an indictment for a riot, it need not be charged in terms that the defendants assembled unlawfully, and unlawfully did the act charged against them, but only to set forth circumstances which show that they did in fact unlawfully assemble, and do an unlawful act. *Ib.*

40. In an indictment for a riot, it is sufficient to charge that the defendants assembled "with force and arms," and being so assembled, committed acts of violence, without repetition of the words force and arms. *Com.* v. *Runnels*, 10 Mass. 518.

41. The allegation that the acts charged were done in terrorem populi is not essential in such indictment, where there is a charge of unlawful acts riotously committed. *Ib.*

42. To sustain an indictment for a riot, the defendants must be active in doing or countenancing an unlawful act, or stand ready to assist in such act. *Pennsylvania* v. *Craig*, Addis. 190.

43. Where persons unknown were necessary with the persons who are indicted to commit the offence of riot, they should be alleged to be unknown and so proved; if known, it should be averred who they were. *State* v. *Calder*, 2 McCord 462.

44. In Virginia, on a prosecution for a riot, under the 2d section of the riot act, the defendants ought not to be tried and convicted without an inquisition, or indictment, found against them, alleging the nature and cause of the accusation. *Mackaboy* v. *Com.*, 2 Virg. Cas. 268.

45. Where two or more are indicted jointly for a riot and assault, the Court will not consent to their being tried separately. *State* v. *Berry*, 1 Bay's R. 316.

46. A justice of the peace is liable to indictment for not attempting to suppress a riot. *Respublica* v. *Montgomery*, 1 Yeates 419.

47. If one of three defendants indicted for riot, be tried and found guilty (the others not having been tried), judgment may be given against him; and the reason is that the jury, trying one, and finding him guilty, do pronounce by that verdict that three are guilty of a riot. *The State* v. *Allison*, 3 Yerg. 428.

III. Proof on the Trial.

48. Upon the trial of an indictment for riot, evidence of riotous assemblages in previous years is incompetent, either for the purpose of rebutting a defence that this assemblage was of a peaceful character, by comparing it with former assemblages, or of giving a character in the first instance to the assemblage in issue. *State* v. *Renton*, 15 N. Hamp. 169.

49. It is incompetent to show that a person has a disposition to commit the particular offence with which he is charged. *Ib.*

50. A general verdict of guilty, on an indictment for assault and battery, will be sustained, although the evidence establish only an assault. So, also, a verdict of guilty, on an indictment for riot, will be supported, although the evidence establishes no more than an unlawful assembly. *State* v. *Brazil*, 1 Rice's Rep. 258.

51. Indictment for a riot "in pulling down, breaking, removing and destroying the dwelling-house of one Lucy

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Showell, the said Lucy being in the peaceful possession thereof." Upon the trial, it appeared in evidence that Lucy Showell was a feme covert, but her husband did not live with her. The defendants being convicted, the Court awarded a new trial. *State* v. *Martin*, 3 Murph. 533.

52. In an indictment for a riot and forcible trespass in entering a man's dwelling-house, he being in the actual possession thereof, and taking from his possession slaves and other personal property, it is not necessary to show that the prosecutor had the right to the property, or the right to the possession, but whether he had in fact the possession thereof, at the time when that possession was charged to have been invaded with such lawless violence; and any evidence tending to establish that possession, is admissible. *State* v. *Bennett*, 4 Dev. & Batt. 43.

53. On an indictment for a riot, it is only necessary to prove the possession of the prosecutor, and that may be done by parol evidence, without the production of any paper evidence of title. *State* v. *Wilson*, 1 Iredell 32.

54. An indictment charging a riot and forcible trespass to the land of one, cannot be supported by proof that the land belonged to him, but was then in the possession of another as his tenant. It ought to have charged the trespass to have been on the land in the possession of the latter. *Ib.*

ROBBERY.

I. What constitutes Robbery. Statutes respecting.
II. Indictment for Robbery.

I. What Constitutes Robbery—Statutes Respecting.

1. A robbery may be committed by extorting personal property from the person, or in the presence of the owner, by means of threats of an unfounded criminal charge, where such property is obtained in consequence of fear produced by such threats. *The People* v. *McDaniels*, 1 Parker's Crim. R. 198.

2. Where, by reason of a threat to arrest the prosecutor on a charge of having been guilty of the crime against nature (the charge being groundless, and known to be so by the accused), the prosecutor, through fear of such threatened arrest, was prevailed upon to deliver to the defendant $20, and a receipt for $13 owed by the accused to the prosecutor, and to promise to pay the accused $20 more; held that the defendant was guilty of robbery in the second degree. *Ib.*

3. It is not necessary, to constitute such offence, that the charge against the prosecutor should be direct, or should be made in unequivocal language; it is sufficient if the language used was designed to communicate such a charge, and was so understood at the time by the prosecutor. *Ib.*

4. In a prosecution for robbery, it is admissible to prove by the person robbed, that at the time of the robbery he was scared. *Long* v. *the State*, 12 Ga. 293.

5. In Georgia, by the penal code, robbery is committed either by force or intimidation. Force, means actual personal violence, a struggle, and personal outrage. Intimidation, is constructive force, the putting in fear; and where property is extorted by fear, it is held to be robbery, though it be taken under the color of a gift; but the taking should be against the will of the person robbed. *Ib.*

6. Where the taking is under such circumstances as would be likely to create an apprehension of danger in the mind of a man of ordinary experience, and lead him to part with his property for the safety of his person, it is held to be robbery. It is not necessary that actual fear should be strictly proven; it will be presumed. *Ib.*

7. It is not indispensable that the delivery of the property be contemporaneous with the assault, if there be force, or with the first impression of fear, in case of threats or circumstances of terror; but if the property be delivered subsequently, and whilst the fear or

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apprehension of danger continues, held that it might be robbery. *Ib.*

8. It is necessary that the taking should be animo furandi; the taking by force or intimidation being shown, the animus furandi will be inferred from the appropriation of the property. *Ib.*

9. The criterion distinguishing robbery from larceny, is the violence, actual or constructive, that precedes the taking. There can be no robbery without violence; and with it, there can be no larceny. *Ib.*

10. Threats of a prosecution do not constitute that constructive violence which will change an offence from larceny to robbery, with the exception of one instance, namely, a threat to prosecute for an unnatural crime. *Ib.*

11. But where threats to prosecute for other crimes are accompanied with force, actual or constructive, and money or other property is parted with in consequence, the transaction is robbery, and the offence is not mitigated by the guilt of the party threatened, nor aggravated by his innocence. *Ib.*

12. In Georgia, under the penal code, there is only one offence of robbery, but two grades thereof, namely, robbery by force, and robbery by intimidation; both of which may be alleged in one count, provided in that count the offence is set forth in the language of the code, or so plainly that the jury may easily understand its nature; and the jury may find the defendant guilty generally, in which case the highest penalty will be inflicted, or they may find him guilty of the lower grade, and the judgment and penalty will be awarded accordingly. *Ib.*

13. In Massachusetts, to constitute the offence made punishable by the Revised Statutes, ch. 125, § 15, the articles stolen must be carried away by the robber, and must be the property of the person robbed, or of some third person, and these facts must be charged in an indictment on that section, in the same manner as in an indictment for robbery at Common Law. *Com.* v. *Clifford*, 8 Cush. 215.

14. A larceny committed with actual force and violence, or with a constructive force by any assault and putting in fear, is a robbery; and in an indictment for such offence, an allegation of force and violence is sufficient, without alleging that the party robbed was put in fear. *Com.* v. *Humphries*, 7 Mass. 242.

15. Upon an indictment for robbing the mail and putting the life of the mail carrier in jeopardy, a sword or pistol in the hand of the robber, by terror of which the robbery is effected, is a "dangerous weapon" within the meaning of the law, although the sword is not drawn and the pistol is not presented. *U. States* v. *Wood*, 3 Wash. C. C. 440.

16. The word "rob," in the Act of Congress of 1825, § 22, is employed in its Common Law sense. *U. States* v. *Wilson*, 1 Baldwin 78. "Jeopardy," as employed in that section, imports a well-grounded apprehension of danger to life, in case of refusal or resistance. *Ib.* Pistols are "dangerous weapons," within the meaning of the act; the offer or threat to shoot with them comes within the law, without proof that they were loaded. *Ib.*

17. Where several persons associate to commit a robbery, and one alone perpetrates the act, all are constructively present, and are guilty. *State* v. *Heyward*, 2 Nott & McCord 312.

18. In Massachusetts, under the statute of 1818, ch. 124, providing a penalty if any person shall rob, being armed with a dangerous weapon with intent to kill or maim the person robbed, or if, being armed, he shall actually strike the person robbed, it is sufficient where the robber has the intent to kill and maim, as a means of effecting the robbery, if necessary, although not an intent to kill or maim at all events. *Com.* v. *Martin*, 17 Mass. 359. It is necessary that there should be, however, an intent to kill if necessary, to constitute the chief offence of the statute; an intent merely to terrify, is not sufficient. *Ib.*

19. The statute of Massachusetts of 1804, c. 142, containing the terms robbing "by force, violence, or other assault, and putting in fear," has not added to the Common Law requisites in this respect. *Com.* v. *Humphries*, 7 Mass. 242.

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II. Indictment for Robbery.

20. An indictment for highway robbery may charge either that the robbery was committed in the highway, or that it was committed near the highway. *State* v. *Anthony*, 7 Iredell's 234.

21. If an indictment for robbing under the statute charges that the robbery was in the highway, the State cannot give in evidence that it was near the highway. *State* v. *Cowan*, 7 Iredell 239.

22. An indictment for highway robbery which charges that the property was taken from the person and against the will of the owner, feloniously and violently, is sufficient. *Ib.*

23. Where an indictment for robbery alleges that the defendant made an assault upon A. and put him in fear of his life, and did take, steal, and carry away, feloniously, the money of said A., it is insufficient, because it does not allege that the money was taken from the person of A., and against his will, which is an essential allegation. *Kit* v. *the State*, 11 Humph. 167.

24. An indictment for robbery is sufficient at Common Law, which charges the stealing, &c., by force and violence, but omits the allegation that the party robbed was put in fear. *Com.* v. *Humphries*, 7 Mass. 242.

25. An indictment for highway robbery may charge either that the robbery was committed in the highway, or that it was committed near the highway. *State* v. *Anthony*, 7 Iredell 234.

SEDUCTION.

1. Where an indictment was found for the seduction of an unmarried female, under the act of 1848, and the defendant interposed a special plea to the indictment, alleging that at the time of committing the acts charged the defendant was, and for five years previous thereto had been, a married man, having a living wife and family, with which wife and family he was then living, all of which at the time of the alleged promise and seduction was well known to the said female; on demurrer to such special plea, the facts thus alleged were held to constitute a good defence to the prosecution, and judgment was given for the defendant. *The People* v. *Alger*, 1 Parker's Crim. 333.

2. It is not necessary, in drawing an indictment under the act to punish seduction as a crime, passed March 22, 1848, to allege a mutual or valid promise of marriage; it is sufficient to aver, in the language of the act, that the prosecutrix was seduced under promise of marriage. Per Parker, J. *Crozier* v. *the People*, 1 Parker's Crim. R. 454.

3. It is not necessary on the trial of an indictment for seduction, to prove a valid and binding promise of marriage; if the seduction was accomplished by means of a promise of marriage, though the promise was intended to be, and was in fact a false pretence, and one which the seducer knew it was not in his power to perform, the offence is nevertheless within the statute. *Ib.*

4. By "previous chaste character," the statute has reference to personal chastity—actual character—not reputation. In the absence of proof, such chastity will be presumed; but the presumption may be overcome by specific acts of lewdness proved affirmatively on the part of the accused. *Ib.*

5. The evidence contemplated by the statute to be adduced in support of the testimony of the female, is not limited to proof of the fact of illicit intercourse, but extends to proof of other circumstances, such as the illegitimacy of her child, the regular and frequent visits of the accused, his being alone with the prosecutrix at late hours of night, and his confessions made to others on the subject of the engagement to marry her, &c.; but it is not enough to corroborate her as to immaterial facts contained in her testimony. *Ib.*

6. On the trial of an indictment under the "act to punish seduction as a crime," passed in 1848, the accused

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may prove that the prosecutrix was not of "previous chaste character," either by proving an actual want of chastity on her part, or by proving her general bad reputation for chastity. Per Hand, J. *Safford* v. *the People*, 1 Parker's Crim. R. 474.

7. Where the illicit intercourse between the prosecutrix and the accused began four or five years previous to the finding of the indictment, and continued until within two years, it was held not to be a case of seduction within two years before the finding of the indictment, and not to be within the statute. *Ib.*

SENTENCE.

I. Sentence, when legal and proper.
II. Sentence, when erroneous.
III. Sentence to additional punishment. Sentence in case of Insanity.
IV. Effect of Sentence on the civil rights of the convict. Delaying Sentence.

I. Sentence, when Legal and Proper.

1. Where a prisoner was convicted, in 1825, on an indictment which charged him with breaking and entering a shop in the night-time with intent to steal, and stealing therefrom, and which also charged that he had, in 1818, been convicted of two similar offences, and had been thereupon sentenced to the State prison, and had been discharged therefrom; held that a sentence to three days' solitary imprisonment and five years' confinement to hard labor in the State prison was correct, although by the law then in force he should have been sentenced to the State prison for life. *Phillips* v. *Commonwealth*, 3 Met. 588.

2. Where a prisoner, sentenced, in 1828, to imprisonment at hard labor for a certain number of years, in the jail and penitentiary for the city and county of Philadelphia, in pursuance of that sentence, in the Walnut-street prison in the city, and upon the sale of that building was removed, with other prisoners, to the Arch-street prison in the same city, and kept there without being put to hard labor, it was held that he could not be discharged on habeas corpus. *Pembers' case*, 1 Whart. 439.

3. A prisoner who was convicted in the city and county of Philadelphia, and sentenced, in 1830, to imprisonment in the jail and penitentiary thereof, for two years or more, ought, upon the sale of that prison, to have been removed to the Eastern penitentiary, and not to the Moyamensing prison; but the Supreme Court would not discharge him on account of such mistake, on habeas corpus. *Reddill's case*, 1 Whart. 445.

4. Where the statute requires the Court to limit the term of sentence of a convict, so that his imprisonment in the State prison shall expire between March and November, it is merely directory, and a failure to comply with such requirement does not render the sentence void. *Miller* v. *Finkle*, 1 Parker's Crim. R. 374.

5. Where the Court, by inadvertence, in passing sentence has overlooked a requirement of the statute, it may correct the judgment at the same term, and before the sheriff has proceeded to execute it; such correction may be made by expunging or vacating the first sentence, and passing a new sentence. *Ib.*

6. In Pennsylvania, under the statute of April 23, 1829, a sentence to "separate or solitary confinement at labor" is valid. *Drew* v. *Com.*, 1 Whart. 219.

7. Where a prisoner is sentenced to imprisonment for a term, to commence immediately after the expiration of a previous sentence, and the first sentence is reversed; held that the term of the second begins to run from the time of the reversal of the first. *Brown* v. *Com.*, 4 Rawle 259.

8. Punishments must be inflicted in the same county where the criminals were tried and convicted, unless the record of the attainder be removed into the Supreme Court, which may award execution in the county where it sits; they must be such as the laws *expressly* prescribe, or where no stated or fixed

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judgment is directed, according to the *legal discretion* of the court, but judgment must be *certain and definite* in all respects. *Respublica* v. *Longchamps*, 1 Dallas 111.

9. The act of 1846, ch. 70, entitled "An act to protect houses and inclosures from wilful injury," alters the act of 1836, 1 Rev. Stat., ch. 347, so as to reduce the offence of burning a mill-house, &c., from a felony to a misdemeanor, and substitutes the punishment of fine and imprisonment for that of death. *State* v. *Upchurch*, 9 Iredell 454.

10. In this State, where one is indicted and tried as for a felony, yet the facts averred in the indictment do not support the charge of felony, but amount to a misdemeanor, the Court may give judgment for such misdemeanor. *Ib.*

11. Where a defendant was convicted of an indictment for a felony, and appealed from the judgment thereon to the Supreme Court, and the error assigned in this court was, that the facts stated in the indictment did not amount to a felony, the Supreme Court, though it reverses the judgment for this error, yet will (under the provisions of the act establishing the Court) give directions to the Court below to give judgment for a misdemeanor, where it appears that is the judgment which should have been there rendered. *Ib.*

12. Where the accused put in a demurrer to an indictment for a misdemeanor in the Court below, and judgment was then given *against the people*, which was here reversed on error; *held* that this Court must give a final judgment for the people on the demurrer, and pass sentence on the defendant, and that he could not be allowed to withdraw the demurrer, and plead. *People* v. *Taylor*, 3 Denio 91.

13. Since there is a discretion to sentence a defendant to corporal punishment, it does not follow that he should be present; the rule is that such a sentence shall not be imposed in his absence; but where the sentence is a fine merely, it is not necessary that the defendant should be brought into court. *Ib.*

14. Stealing from a dwelling-house in the night time, is not made an aggravated larceny by the Rev. Stats., c. 126; and the result is, that a prisoner can be sentenced for the larceny only, and the property being under $100, the imprisonment cannot by law exceed one year. *Tully* v. *Commonwealth*, 4 Met. 357.

15. Where after sentence a prisoner received a pardon from the governor, on the condition that he should leave the State, and not return; if he afterwards returned, he is remitted to his original sentence, and when brought before the Court to have it reiterated, and another day assigned for its infliction, he may show cause why it should not be passed, but is no more entitled to a trial by indictment, or on a written rule to show cause, than if he had received no pardon from the governor, but the sheriff had omitted, for some reason, to inflict the sentence on the day first assigned. *State* v. *Chancellor*, 1 Strob. 347.

16. It is the constant practice, where the value laid is over one hundred dollars, to permit the jury, if they find the larceny proved in all other respects, but the value under one hundred dollars, so to specify in their verdict, and then the convict is sentenced in the same manner as if the indictment had laid the value under one hundred dollars. *Commonwealth* v. *Griffin*, 21 Pick. 523.

17. For a conviction under the 47th chapter of the Revised Statutes of Mass., one may be sentenced to pay a fine and costs, and stand committed until the sentence be performed. *Harris* v. *Commonwealth*, 23 Pick. 280.

18. Where a prisoner is found guilty generally on an indictment, which charges him with several distinct offences; held that separate sentences need not be awarded. A single sentence is legal, if it do not exceed the sum of the several sentences which might be awarded. *Carlton* v. *Commonwealth*, 5 Met. 532.

19. Upon an indictment, charging the breaking and entering of a dwelling-house with an intent to steal, and actually stealing therefrom, and a general verdict of guilty, the defendant is to be sentenced as for house breaking, and is not liable to a distinct sentence

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for larceny, and is not to be considered as one of three distinct larcenies, rendering a party liable to be deemed and adjudged a common and notorious thief, and, therefore, to be sentenced to imprisonment for a term exceeding five years. *Commonwealth* v. *Hope*, 22 Pick. 1.

20. Where the record is silent upon the subject, this Court will presume that the Court below, in passing sentence upon a person convicted of crime, complied with the provisions of Sec. 2, p. 378, Digest; but if the Court in fact omitted to do so, such omission would be no cause for reversal of the judgment, but a compliance with the statute might be directed. *Brown* v. *State*, 8 Eng. 96.

21. A judgment on a criminal trial cannot be arrested on the ground that there is a variance between the indictment and the proof. *People* v. *Onondaga G. S.*, 1 Wend. 296.

22. Where a defendant was convicted in the Quarter Sessions of Philadelphia County, for keeping a tippling house, and sentenced to pay a fine of $50, and stand committed; held that he is not entitled to be discharged at the end of one month without paying the fine. *Mertz's case*, 8 Watts & Serg. 374.

23. A person who is indicted for cutting trees in Moultreeville, can be fined only $5 for the offence. *The State* v. *Town Council, &c.*, 1 Rice 158.

24. Where the defendant cuts one hundred trees at one time, it will be but one offence. *Ib.*

25. It is necessary that the indictment should charge that defendant used the trees. *Ib.*

26. In order to give the Court authority to sentence one in confinement in the penitentiary, for aiding a prisoner to escape from confinement in jail, the indictment should charge that the prisoner who was thus aided to escape was in confinement on a charge of felony. *Kyle* v. *State*, 10 Ala. 236.

27. In Pennsylvania, under the statute of June 16, 1836, Stat. 1, the Supreme Court has the authority to direct a sentence, which has to commence on the termination of a sentence on another indictment, since reversed, to be computed from an earlier time. *Mills* v. *Commonwealth*, 13 Penn. State R. 1 Harris, 631. Ib. 634.

28. Where a prisoner has been convicted at the same term, on two several informations, for uttering two several counterfeit bills, and sentenced to three years' imprisonment for each offence, the Court may direct that one term of imprisonment shall commence at the expiration of the other. *State* v. *Smith*, 5 Day 175.

29. In Pennsylvania, under the 4th section of the act of March 27th, 1789, where one is sentenced to be imprisoned, and to pay a fine not more than $5, and costs, he is entitled to a release from imprisonment, having been confined for the fine thirty days beyond the time for which he was sentenced; but though he is still liable for the fine and costs. *Commonwealth* v. *Long*, 5 Binn 489.

30. When there is a conviction at the Oyer and Terminer, it is not enough to state in the entry of judgment in the minutes, under the requirement of 2 R. S. 738, § 5, that the accused was convicted of a felony or a misdemeanor, but the particular offence should be stated. *The People* v. *Cavanagh*, 1 Parker's Crim. Rep. 588.

31. And where a party is imprisoned under such a conviction, the particular kind of offence of which he has been convicted should be set forth in the commitment, in order that it may be seen whether the punishment inflicted was warranted by the offence. *Ib.*

32. Where a prisoner is convicted and sentenced to imprisonment for one offence, and during the same term is convicted of others; held that he may be sentenced also on these last, each term of imprisonment commencing from and after the preceding one. *Commonwealth* v. *Leaths*, 1 Virg. Cas. 151.

33. Where there has been a sentence of hard labor, an additional term may be given for a new offence; said term to commence at the end of the old sentence. *Russell* v. *Com.*, 7 Serg. & Rawle 489.

34. Where punishment is inflicted by a statute on what is already an offence, judgment may be given for the punishment, though the indictment does not conclude contra formam statuti. *Ib.*

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35. It is not necessary, except in capital cases, that the Court, in pronouncing sentence, should first demand of the prisoner, "If he has aught to say why sentence should not be passed upon him." *West* v. *State*, 2 Ala. 212.

36. Where the sentence inflicts any corporal punishment, it is necessary that the prisoner should be present in person; but it is not necessary that this should be averred in express terms in the record; it is sufficient if it can be collected therefrom by fair intendment. *Ib.*

37. Where one of the jury did not agree to find the prisoner guilty of murder, but only of manslaughter, and through mistake of his duty he believed that he must assent to the verdict of the major part of the jury; held no cause for delaying sentence. *Com.* v. *Drew*, 4 Mass. 391.

38. The sentence of a justice of the peace for the commitment of an offender to the work-house until released by order of law, is erroneous, since it is for an indefinite time. *Wash.* v. *Belk*, 3 Conn. 302.

39. Where there is a plea of guilty to an indictment for burglary, and the Court sentences the defendant to be imprisoned in the penitentiary for eighteen months, it was held that the proceedings were regular. *Blevings* v. *People*, 1 Scam. 172.

40. Where a prisoner put in a plea of guilty on an indictment for burglary, the Court should fix the time for which he is to be confined in the penitentiary. *Ib.*

41. A defendant pleaded guilty to an indictment, and the prosecuting officer did not move for sentence, but the indictment was put on file, and the defendant was permitted to go at large, on a recognizance to appear when sent for. After several intervening terms of the Court, the attorney for the government moved for sentence, when it was held that the indictment was still in force, and the defendant was rightly sentenced upon the plea. *Com.* v. *Chase*, Thacher's Crim. Cas. 267.

42. Where a prisoner is convicted on two distinct indictments at the same term, he may receive his sentence on the second indictment, to commence when that on the first indictment expires. *State* v. *Smith*, 5 Day 175.

43. The first section of the act regulating certain proceedings in criminal cases, does not extend to collateral issues. On such, if the prisoner stands mute, the Court will enter a plea for him. On collateral issues, no peremptory challenge. General Sessions has no jurisdiction on indictments for a second offence in committing grand larceny. Indictments for second offences, where the punishment is increased, must set forth the record of the former conviction. Prisoner tried at General Sessions for grand larceny, and brought up here on suggestion of its being second offence, this Court will give no other judgment than the Court below might have pronounced. *People* v. *Young*, 1 Caine's C. 37.

44. The Court will not pronounce judgment on a prisoner convicted at Oyer and Terminer of a conspiracy, if the record of his conviction be not before them, but will admit to bail. *McNeill's case*, 1 Caine's C. 72.

45. Where there is a judgment that a defendant pay a fine, and an award of process for the recovery thereof, according to the course and practice of the Court, it is good, although it be not added that the defendant stand committed until the fine be paid: it is enough if there be an award of process to carry into effect the sentence of the Court. *Kane* v. *People*, 8 Wend. 203.

46. Where one convicted of an offence is subject to two distinct and independent punishments, the defendant cannot allege for error that one only of the punishments to which he was liable is adjudged against him; the prosecutor has a right to complain of such omission, but not the party convicted. *Ib.*

47. Where the jury find a general verdict of guilty, the Court must either pronounce its sentence upon the verdict, or grant a new trial. *State* v. *Curtis*, 6 Iredell 247.

48. It cannot set aside the verdict, and direct a judgment of acquittal to be entered for the defendant. *Ib.*

49. Even where the jury find a verdict subject to the opinion of the Court on a point reserved, the Court cannot

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grant a judgment against the verdict, unless the jury say they find such and such facts; and if upon them the Court think the law is with the defendant, they find him not guilty; if otherwise, guilty, or words in substance to that effect. *Ib.*

50. It has not been customary in Massachusetts for the Court, in the case of judgment of death on a capital conviction, to direct the particular form in which it shall be entered by the clerk. *Webster* v. *Commonwealth*, 5 Cush. 386.

51. All sentences of death are to be carried into effect by a warrant from the executive, at a time therein directed, in the mode and at the place fixed by law, and it is not the duty or the province of the Court to fix the time or place, or to issue any warrant to the sheriff directing the execution. *Ib.*

52. Where the sentence pronounced was in these words: "That you, J. W., be removed from this place and detained in close custody in the prison of this county, and thence taken (that is, from such custody), at such time as the executive government of this Commonwealth may by their warrant appoint, to the place of execution, and there be hung by the neck until you are dead;" and the entry in the record was as follows: "Whereupon all and singular the premises being seen and understood, it is considered by the Court that the said J. W. be taken to the jail from whence he came, and thence to the place of execution, and there be hanged by the neck until he be dead." *Ib.*

53. The Court held that the judgment and sentence, in the form in which it is entered, does not by any just construction undertake to direct the place where the sentence shall be executed; that it leaves the executing officer to the full power and authority conferred on him by law, to execute the sentence within the walls of the prison or in the prison-yard, at his discretion, and held it is not erroneous. *Ib.*

54. Although the act of 1807, authorizing the judge to respite the sentence where he reserves questions as novel and difficult, may yet be in force, it is now proper to render the judgment, in conformity with the 1st section, 13th chapter Penal Code. *State* v. *Glass*, 9 Ala. 283.

55. If there be distinct counts, one charging the larceny separately and a general conviction, it cannot be known certainly from the record alone whether one offence only was proved, or distinct offences. *Kite v. Com.*, 11 Metc. 581.

56. If the larceny charged in the second count appears in proof to have been committed at the time of the breaking and entering, then it is merged, and the conviction is properly for burglary, and the sentence must be accordingly. *Ib.*

57. But if a breaking and entering with an intent to steal, be proved, and a different larceny done at a different time, be also proved, then the sentence may properly be awarded as for both offences. *Ib.*

58. But it will be known by the judge before whom the case is tried, whether the verdict is to be considered as a conviction for the single offence only, or for separate offences, and it will be reasonable to suppose that the sentence was awarded accordingly. *Ib.*

59. When, therefore, it becomes necessary to decide as matter of law upon a writ of error, whether the conviction is sufficient to sustain the judgment, which will be presumed good until it appears from the record itself that it is erroneous, as it is impossible for the Court to see from the record itself whether the conviction was for the distinct offences of house-breaking and larceny, or for one combined offence of house-breaking, accompanied with the larceny, the judgment cannot be adjudged erroneous, if warranted by either aspect of the conviction. *Ib.*

60. When the larceny charged in the second count may have been and probably was the larceny done in connection with the breaking and entering stated in the first count, and so merged, the substantive offence of burglary was properly punished by the sentence. *Ib.*

61. It is no error in a judgment in a criminal case to make one term of imprisonment commence when another terminates; it is as certain as the nature of the case will admit, and there is no other mode in which a party may

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be sentenced on several convictions. *Ib.*

62. Though uncertain at the time, depending upon a possible contingency, that the imprisonment on the former sentence will be remitted or shortened, it will be made certain by the event. *Ib.*

63. If the previous sentence is shortened by a reversal of the judgment or a pardon, it then expires, and then by its terms the sentence in question takes effect, as if the previous one had expired by lapse of time. *Ib.*

64. Nor will it make any difference that the previous judgment is reversed for error. *Ib.*

65. It is voidable only, and not void, and until reversed by a judgment it is to be deemed of full force and effect; and though erroneous, and subsequently reversed on error, it is quite sufficient to fix the term at which another sentence shall take effect. *Ib.*

66. It is now well settled, that when breaking and entering a dwelling-house, and stealing therefrom, are charged, this may be regarded both as a charge of the felonious intent of the breaking and entering, and as a substantive charge of larceny, so that if the breaking, entering, and stealing are all proved, the principal charge of house-breaking is established, and the sentence is accordingly; or if the stealing is proved, and not the breaking and entering, the conviction may be for the larceny alone. *Kite* v. *Com.* 11 Metc. 581.

67. Where the conviction was for the whole charge laid in an indictment for burglary, with intent to steal, the sentence was right for the burglary, and this conviction could not be combined with others, so that the convict could be sentenced thereon as a common and notorious thief. *Ib.*

68. The effect of the Revised Statutes of Massachusetts is in the case of each particular crime and offence to prescribe a maximum term of imprisonment, without designating any portion as hard labor, or solitary confinement, leaving the Court to designate what portion of it not exceeding twenty days at a time, shall be passed in solitary confinement, and the residue at hard labor, but that no period of solitary imprisonment, or of hard labor, can be added to the whole term of imprisonment thus described. *Stevens* v. *Com.* 4 Metc. 360.

69. A Court of Special Sessions, before whom a conviction is had, may take the necessary steps to cause their judgment to be executed, notwithstanding notice of an intention to remove the conviction and the entering into a recognizance by the party convicted, if a certiorari is not sued out. *People* v. *Yates*, 5 Wend. 110.

70. One convicted under the Rev. Stats. ch. 143, § 19, who is liable to be punished by solitary imprisonment and confinement to hard labor in the State prison three years or more, may be sentenced to the house of correction for a term not exceeding three years, although he is not liable to be sentenced to the county jail for the same offence for a term exceeding two years. The house of correction being a substitute for the State prison, and not for the county jail. *Stevens* v. *Com.*, 4 Metc. 360.

71. In order to warrant a sentence of imprisonment in the house of correction or county jail under the Rev. Stats. ch. 143, § 19, it need not appear on the record that the convict had not been before sentenced to a like punishment. *Ib.*

72. When there is a conviction on an indictment for larceny which contains three counts, each describing different property and different owners, but each alleging the offence to have been committed on the same day; held that it is not a conviction of three distinct larcenies within the meaning of the Rev. Stats. ch. 126, § 19, and therefore does not require that the convict should be sentenced as a common and notorious thief. *Ib.*

73. Under the Rev. Stats. of Massachusetts, ch. 143, § 49, where a convict who is sentenced to the house of correction for successive terms of imprisonment on several convictions, breaks prison and escapes before the expiration of the sentence on his first conviction; held that he may be sentenced on conviction of such escape, to suffer in the State prison the unexpired term

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to which he was sentenced on all the previous convictions. *Ib.*

74. A defendant in a criminal proceeding need not be present in Court when judgment is pronounced, except when corporal punishment is to be inflicted. *Son* v. *People*, 12 Wend. 344.

75. Although the 22d section of the 8th chapter of the Penal Code requires the Court to sentence a convict who fails to pay the fine and costs to the county jail for a definite time; yet, if the Court fails to render such judgment, and in lieu thereof, directs that he "remain in custody until the fine and costs are paid," he cannot object on error, to the regularity of the judgment, as it is more beneficial to him than the law requires, and he may obtain a discharge from imprisonment upon taking the oath provided for insolvent debtors. *Ooton* v. *State*, 5 Ala. 463.

76. Therefore, where a defendant, who had been convicted of an assault, was sentenced to be imprisoned for two calendar months "from and after the first day of November next," and did not go into prison according to the sentence, and at a subsequent term of the Court it was directed that the sentence for two months' imprisonment should be immediately executed; held that the Court had the power to make such order. *Ib.*

77. The time at which a sentence in a criminal case shall be carried into execution, forms no part of the judgment of the Court. *State* v. *Cockerham*, 2 Iredell 204.

78. Where a prisoner is convicted upon a capital charge, it is proper to ask if he has anything to say why judgment of death should not be pronounced on him. In cases of minor felonies, the omission of this ceremony is not a sufficient ground for reversing the judgment, provided it appears that the prisoner and his counsel were both in court when the sentence was pronounced, and urged nothing in arrest of judgment, or in mitigation of defendant's guilt. *Grades* v. *State*, 2 Ga. Rep. 253.

79. Where one accused is convicted of an offence which was committed before January 1st, 1849, the punishment of which was changed by the act which took effect on that day, and where it is doubtful whether the change was a mitigation or not, the accused should be permitted to decide for himself. *Herber* v. *State*, 7 Texas 69.

80. In the State of Mississippi, the passage of the penitentiary code (which altered the punishment for mayhem), does not amount to a statutory pardon for offences committed before its adoption; the only change which it made in the law, was to commute or change one form of punishment for another, substituting the more mild for the severer punishment inflicted before its passage. *Clarke* v. *State*, 23 Miss. 261.

81. In every case of offences committed before the adoption of the penitentiary code, the prisoner has the option of selecting the punishment prescribed in that code, in lieu of that to which he was liable before its enactment. *Ib.*

82. But when the record does not show that the prisoner claimed a commutation of his punishment, the Court will proceed properly in sentencing him to punishment according to the law in force when the offence was committed by him. *Ib.*

83. In prosecutions for felonies, the defendant should be personally present in court when the verdict is rendered and the sentence pronounced upon him. *Cole* v. *State*, 5 Eng. 318.

84. Where it does not appear from the record that he was present when the verdict was delivered, a new trial will be granted. *Ib.*

85. But if present when the verdict was delivered, and absent when sentence of corporal punishment was pronounced, a new trial will not necessarily be granted; but the judgment will be reversed, and the cause remanded, with instructions to the court below to proceed to pronounce sentence upon the prisoner according to law, &c. *Ib.*

86. Verdict that the defendant be imprisoned in the penitentiary for three years—judgment that the defendant be imprisoned in the penitentiary for the term of three years from and after the commencement of such imprisonment; held that the judgment was responsive

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to and followed the verdict as to the term of imprisonment. *Cole* v. *State*, 5 Eng. 318.

87. The defendant was duly indicted in three several indictments, one of which was under the Revised Statutes, c. 127, § 15, and the others under section sixteen of the same chapter, all relating to the subject of having in possession counterfeit coin, with the intent to pass the same as true; or the passing of the same as true, knowing the same to be false. Having been convicted upon all these indictments, a joint sentence of imprisonment at hard labor for seven years, and one day solitary confinement, was awarded against him upon all the indictments. This sentence he seeks to reverse, upon the ground that no proper case existed for a joint sentence upon three several indictments; that such judgment can only be authorized under the provisions of Revised Statutes, c. 127, § 17, where it is provided, that "if any person, who has been convicted of either of the offences mentioned in the preceding section, shall be again convicted of either of the same offences, committed after the former convictions; or if any person shall, at the same term of the court, be convicted upon three distinct charges of the said offences, shall be deemed a common utterer of counterfeit coin, and shall be punished by imprisonment not more than twenty years." The case specified is that of three distinct offences under the preceding section. The offences, for which that section (section sixteen) prescribes the punishment, are, 1st, the having in possession any number of pieces less than ten, of the counterfeit coin mentioned in section fifteen, knowing them to be counterfeit, with intent to utter or pass them as true; and 2d, the uttering, passing or tendering in payment, as true, any such counterfeit coin, knowing the same to be false and counterfeit. Now, only two of the indictments against the plaintiff in error charged offences under that section; the other indictment charged him with the more aggravated offence described in § 15, namely, the having in his possession, at the same time, ten or more pieces of false money or coin counterfeited in the similitude, &c., knowing the same to be false and counterfeit, and with intent to utter or pass the same as true; held that the sentence in such case was one that could be legally awarded only by virtue of some statute provision; but the statute contemplates three distinct offences under § 16. It was not competent to award the joint sentence, treating the conviction under § 15 as one of the three cases authorizing the sentence precribed in § 17. The offence under § 15 is a more aggravated offence, and should be punished by a separate sentence. *Murray* v. *Com.*, 13 Met. 514.

88. A sentence of a convict to additional punishment on an information setting forth three previous convictions and sentences, will be held valid, if two of these sentences were valid, although one of them was erroneous, and has been reversed. *Newton* v. *Com.*, 8 Met. 555.

89. Where a person convicted of an offence is sentenced to imprisonment for a certain term of time, and until he shall pay the costs, the payment of the costs is a part of the punishment, and until such payment is made, the continued imprisonment, after the expiration of the term, is of the same character as that before. *Riley* v. *State*, 16 Conn. 47.

90. The provision of the Rev. Stats., ch. 139, applies to an original sentence only, and not to a sentence for additional punishment on information, in consequence of a former conviction. *Bump* v. *Com.*, 8 Met. 533.

91. If, after conviction, the indictment be stolen from the files, its place may be supplied by a copy, like lost instruments or pleadings. *Mount* v. *State*, 14 Ohio 295.

92. The presence of the original indictment is not indispensable to the sentence of the prisoner. *Ib.*

93. Where judgment has been rendered in a criminal case, the execution of the sentence is not affected by a repeal of the law, or the enactment of a mitigated punishment for the offence. *State* v. *Addington*, 2 Bailey 516.

94. In Alabama, the statute of 1807,

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"to punish crimes and misdemeanors," provides that one convicted of a certain offence "shall be amerced in such sum as shall be assessed by the verdict of the jury, and imprisoned a term not exceeding one year;" it was held that this statute was not intended to give the jury the power of determining the imprisonment. *Hawkins* v. *State*, 3 Stew. & Port. 63.

95. Whatever may have been required as to making the declaration that the party "is a common and notorious thief," a part of the sentence under the former law, no such requirement is found in the Rev. Stats. c. 126. *Rice* v. *Com.*, 12 Met. 246.

96. Where the criminal act of the defendant was at Common Law a misdemeanor, punishable by fine and imprisonment, at the discretion of the Court, but by statute it had been subjected to a fine of five hundred dollars, and there was in the indictment both a count at Common Law, and one under the statute; the Court held that the statute had enacted a mitigation of the Common Law punishment, and even if the indictment had been at Common Law only, that the provisions of the statute could not be exceeded in their discretion; therefore, after a general verdict of guilty, they adjudged according to the statute. *State* v. *Thompson*, 2 Strobh. 12.

97. Where an indictment, after charging stealing, on, &c., at Lowell, in said county, avers that said S., the said goods so stolen, in manner and form aforesaid, feloniously did receive and have, and then and there did feloniously aid in concealing; held that whatever may be said of this allegation of receiving, the fact of aiding in the concealment is charged with a venire in due form, and either act is sufficient to constitute the offence and warrant the judgment. *Stevens* v. *Com.*, 6 Met. 241.

98. Whether, if there be several counts and one bad, and a general judgment thereon, it can be reversed for error; if the verdict was general, and the judgment were in terms rendered on the good count, the judgment would be undoubtedly good. *Josslyn* v. *Com.*, 6 Met. 236.

99. But the question is whether it is so. When the judgment is general, the rule is, that if there be a good count, and one which alone would be sufficient to warrant the judgment, if it had stood alone in the indictment, the judgment would be good. *Ib.*

II. Sentence, when Erroneous.

100. The statute of 1791, § 3, concerning the murder of slaves, is not sufficiently definite and clear to warrant a sentence of death on a prisoner who is convicted under it. *State* v. *Boon*, 1 Taylor 246.

101. Where the indictment is sufficient, and there is no error on the trial, but the sentence is bad, the Supreme Court will not grant a new trial, but will pass sentence on the prisoner de novo. *Drew* v. *Com.*, 1 Wharf. 279.

102. Under the Mass. Rev. Sts., ch. 143, § 19, the Courts are not authorized to sentence a convict to imprisonment in the house of correction for a longer time than that for which he might by Rev. Sts. ch. 126, § 17, be imprisoned in the county jail for the same cause. *Shepherd* v. *Commonwealth*, 2 Met. 419.

103. When the power is conferred on the Court to sentence either to the State prison or common jail, and they do not sentence to the State prison, the presumption is that, in their judgment, the actual offence was such as ought not to be punished by imprisonment in the State prison, and that they intend to adopt the other alternative. *Ib.*

104. Such being the case, if they think fit to substitute the house of correction, instead of the common jail, as the place of punishment, the term of time cannot exceed what it would be if the commitment were to the common jail. *Ib.*

105. Since the penitentiary is provided by law for the imprisonment of persons convicted in the County of Kings, who shall be sentenced to imprisonment for a term not less than thirty days, it is held to be illegal, in that county, to sentence one so com-

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mitted to imprisonment in the county jail. *People* v. *Cavanagh*, 1 Parker's Crim. R. 588.

106. Under the Rev. Sts. ch. 126, § 19, where a prisoner is convicted of three distinct larcenies at the same term of the Court, there must be a consolidated judgment against him as a common and notorious thief; if separate judgments are awarded on the separate convictions, all those judgments will be erroneous. *Haggett* v. *Commonwealth*, 3 Met. 457.

107. Where a jury have convicted the prisoner, and fixed the term of his imprisonment in the penitentiary for a shorter period than the law allows; held that it will be error in the Court to enter a judgment on the verdict for the shortest period of imprisonment authorized by the law for the offence. *Nemo* v. *Commonwealth*, 2 Gratt. 558.

108. In such case, the proper course would have been to have sent the jury back with proper instructions, to reconsider their verdict; or if they persisted, or had been discharged, to have directed a venire de novo. *Ib.*

109. When the defendant was indicted for stealing less than $100 from a shop, the theft not being alleged to have been in the day-time, and was sentenced to two years and three days imprisonment; held that he could be sentenced for the simple larceny only. *Hutchinson* v. *Commonwealth*, 4 Met. 359.

110. Upon a conviction for a criminal offence, it is irregular to annex to the sentence any condition for its subsequent remission. A judgment, though pronounced by the judge, is not his sentence, but the sentence of the law; it is the certain and final conclusion of the law following upon ascertained premises; it must therefore be unconditional. *State* v. *Bennett*, 4 Dev. & Batt. 43.

111. When, at a Court of Special Sessions, S. was found guilty of petit larceny, and was sentenced to imprisonment for thirty days, and a fine of fifteen dollars imposed upon him, and, also, it was adjudged that unless the fine should be paid he should be imprisoned for the term of four months; held that the sentence was good for thirty days, but void for the four months; that a special session under the act (Sess. 36, ch. 104, § 4,) cannot imprison more than thirty days for non-payment of a fine. *Matter of Sweatman*, 1 Cow. 144.

112. Whether a Court of Special Sessions may sentence to a term of imprisonment not exceeding six months, and then to thirty days imprisonment in addition for non-payment of a fine,—*Query*. *Ib.*

113. Their power to sentence to imprisonment for not paying a fine, depends upon the statute, (Sess. 36, ch. 81, § 1, 1 R. L. 348.) *Ib.*

114. Where a party had been convicted on an indictment for an assault and battery, and the Attorney-General moved for judgment, but stated no circumstances connected with the offence, by which the Court could judge of the degree of punishment which ought to be inflicted, a mere nominal fine was imposed. *People* v. *Cochran*, 2 Johnson 73.

115. Where a criminal trial takes place at the Circuit, judgment is rendered by the bench; and if there be a conviction, *semble* that the circumstance in evidence must be laid before them by a case, or in some other way, in order to enable them to fix the measure of punishment. *People* v. *Vermilyea*, 7 Cow. 108.

116. The Supreme Court of the State of New York will not render judgment against a party in a case of perjury, though convicted on the civil side at the Circuit, unless he be present at Court when judgment is to be rendered. Sentence of the slightest corporal punishment cannot be given in the defendant's absence. See Note A., at the end of this case. *People* v. *Winchell*, 7 Cow. 524.

117. Corporal punishment defined to be imprisonment. Semble, sentence in absentia, can be given only of a fine. *Ib.*

118. Where a penal statute is repealed, without a saving clause of prosecutions already commenced, one convicted of an offence created by such statute cannot be sentenced. *The Commonwealth* v. *Kimball*, 21 Pick. 373.

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119. Where a sentence of imprisonment in the penitentiary imposed upon persons convicted of a riot, is reversed by the Supreme Court on the ground that such imprisonment was illegal, as it should have been in the county jail, but the illegal imprisonment in the penitentiary is deemed, from the time of the sentence to the period of reversal, a sufficient punishment for the offence, they did not sentence the prisoner's de novo, nor remit the record to the Court below for that purpose, but discharged them. *Clellans* v. *Commonwealth*, 8 Barr 354.

120. To sentence a defendant convicted on an indictment found "a bill," omitting the word "true," will not be erroneous. *Sparks* v. *Commonwealth*, 9 Barr 354.

121. In a criminal case, sentence cannot be pronounced upon facts agreed by the parties. *The State* v. *Cross*, 34 Maine (4 Red.) 595.

122. A charter which gives authority to the corporation of a city, or a town, to pass ordinances giving power to the mayor and aldermen to imprison on summary conviction, is unconstitutional and void. *Barter* v. *Com.*, 3 Pennsyl. 260. See, also, *Pittsburgh* v. *Young*, 3 Watts 363.

123. Before the statute of April 4th, 1807, a prisoner who had been convicted out of the county of Philadelphia of an offence, except felony or larceny, could not be sentenced to imprisonment in the jail of that county. *Barlow* v. *Com.*, 3 Binn 1.

124. Where a statute provides how a penalty shall be appropriated, a judgment that appropriates it in a different manner is erroneous. *Werfell* v. *Com.*, 5 Binn 651.

125. Under the act of March 18, 1816, in Pennsylvania, where one is convicted of fraudulent insolvency, he cannot be sentenced to hard labor. *Guldin* v. *Commonwealth*, 6 S. & R. 554.

126. Where there is a joint indictment against several persons, and they are convicted, they should be sentenced severally, and the imposition of a joint fine will be error. *State* v. *Gay* 10 Mo. 440.

127. In Pennsylvania, the Supreme Court has power to modify and correct an illegal sentence of an inferior court, by reason of the statute of 1836; and it would seem that it has that power, independently of the statute. *Daniels* v. *Commonwealth*, 7 Barr 371.

128. Where a statute provides that an offence may be punished by imprisonment in the penitentiary or county jail, a sentence to imprisonment in the county jail at "hard labor" will be void and illegal, and the fact that "hard labor" made a part of a sentence to the penitentiary, under the statute does not authorize such sentence. *Ib.*

129. If a prisoner be found guilty on a charge of larceny, and the Court below pronounced a wrong sentence, the Appellate Court will reverse the sentence and pronounce judgment in conformity with the statute. *Oliver* v. *State*, 5 Howard 14.

130. The act of 1836, which directs that in capital cases whenever points are reversed, as novel and difficult for the decision of the Supreme Court, the execution of the judgment shall be suspended to a time not less than twenty-five nor more than forty days after the commencement of the next succeeding term of the Supreme Court, confers a right on the criminal, who is sentenced under such circumstances, to the delay given by the statute, and a sentence fixing an earlier day for his execution is erroneous. *John* v. *State*, 2 Ala. 290.

131. Under the Rev. Sts. c. 139, § 8, a sentence to imprisonment in the State prison, must be partly to solitary imprisonment, and partly to confinement at hard labor; and a sentence which directs no solitary imprisonment will be held erroneous, and may be reversed on error at the suit of the convict. *Stevens* v. *Com.* 4 Metc. 360.

132. An indictment contains two counts, one for a mayhem, under the statute, and charges the defendant with aiding and abetting the mayhem, the other for an assault and battery; defendant acquitted upon the first count and convicted upon the second, judgment cannot be rendered against defendant upon this conviction. *State* v. *Bridges*, 1 Murph. 134.

133. The true construction of the New York statute, (sess. 42, ch. 246,

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§ 4 which provides that every person who shall be a second time convicted of petit larceny, shall be adjudged to imprisonment in the State prison, is that the second offence must be committed after a conviction for the first in order to justify the increased penalty. *People* v. *Butler*, 3 Cowen 347.

134. It will not be sufficient that there be two successive petit larcenies by the same person, which are severally and successively prosecuted to conviction, though the second indictment allege the first conviction as a part of the crime. *Ib.*

135. Where the clerk of the Court has placed on the margin opposite the several counts, the numbers one, two, and so on, and, by mistake or otherwise, has commenced the numbering on the second count, and the same error has been continued through the whole of the counts, and the jury have returned a verdict of guilty on the seventh and eighth counts, as marked, it is error for the Court to sentence the defendant on the seventh and eighth counts of the indictment, being the sixth and seventh counts as marked. *Woodford* v. *State*, 1 Ohio 427.

136. Where the Court have passed separate sentences on the defendant, on two counts of an indictment, on one of which counts he has been found guilty, and on the other of which he has been acquitted, and have made the sentence on which he was convicted; the whole judgment must be reversed. *Ib.*

137. Where an offence forms but one transaction, and the indictment containing several counts on which the jury have returned a verdict of guilty, it is error in the Court to sentence on each count separately. *Ib.*

138. Where a statute directs that a prisoner on conviction shall be fined and imprisoned, and the Circuit Court on conviction fined the defendant, but failed to direct the imprisonment; held that the Supreme Court would, under the provisions of the act of 1809, ch. 49, order the imprisonment. *Sword* v. *State*, 5 Humph. 102

139. Where the defendant was sentenced by the Court before which he was tried to confinement in the penitentiary for a less time than is authorized by the law for the offence of which he was convicted; held that the Circuit may, upon the proper proceedings had before that Court correct the error, and sentence the prisoner for the shortest period fixed by the statute for the offence of which he was convicted. *Logan's case*, 5 Gratt. 692.

140. The prosecuting attorney has no authority to enter any remission where the jury fix, the punishment. *State* v. *Brewer*, 7 Blackf. 45.

141. Where the verdict of the jury finding the prisoner guilty of manslaughter, is not objected to but the sentence of the Court is defective, the judgment will be reversed without disturbing the verdict, and the cause remanded, with directions to pronounce a correct judgment. *Kelley* v. *State*, 3 Smedes & Marsh. 518.

142. A sentence or judgment of the Court is defective if it does not set forth the time from whence the commencement of the imprisonment shall date. *Ib.*

143. When an information for retailing merchandise without a license, concludes by claiming a penalty imposed by the statute; held that at the trial, if the jury find the defendant guilty, they should assess the fine. *Commonwealth* v. *Scott*, Gratt. 699.

III. Sentence to Additional Punishment—Sentence in case of Insanity.

144. The Legislature has the power to authorize a court in one county to sentence to an additional punishment a convict in the State prison, who has been more than once convicted in other counties of crimes committed in those other counties. *Commonwealth* v. *Phillips*, 11 Pick. 28.

145. In Massachusetts, the 5th and 6th sections of statute of 1817, ch. 176, which prescribes additional punishment against convicts in the State prison, who have been more than once convicted, are not repealed by statute of 1827, ch. 118, except so far as they are

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altered by the 19th and 20th sections of the latter statute. *Ib.*

146. Where the statute of 1817 has prescribed that such additional punishment should be awarded by the Supreme Judicial Court, and the statute of 1827, that it should be awarded by the Municipal Court of the city of Boston; held that the Municipal Court could lawfully pass the additional sentence; the last offence and conviction took place between the enactment of the two statutes. *Ib.*

147. Where an indictment for a third offence recites two former convictions, and they are found by the verdict; it was held that the additional punishment ought to be embraced in the sentence then awarded upon the indictment, so that no information will afterwards lie, to award any further punishment. *Ib.*

148. Where there are two convictions at one and the same term of the same court for two distinct crimes, each of which is punishable by confinement to hard labor for a term of years, they will be deemed two convictions, within the meaning of the statutes before mentioned, for which additional punishment may be awarded. *Ib.*

149. Under the 19th and 20th sections of the Mass. statute of 1827, ch. 118, which provide: that whenever any person who shall be convicted of any crime, the punishment whereof shall be confinement to hard labor "for any term of years," shall have been before sentenced to a like punishment, he shall be sentenced to punishment in addition to that by law prescribed for the offence of which he shall be convicted; it was held that the words term of years refer to the case of a party who has been sentenced to confinement to hard labor for life. *Commonwealth* v. *Evans*, 16 Pick. 448.

150. At the time when a convict in the State prison was liable to additional punishment, under the Mass. statute of 1827, ch. 118, in consequence of having been twice convicted and sentenced to confinement, the statute of 1832, ch. 73, was passed, by which a convict was liable to additional punishment only when he had been twice discharged from imprisonment; but before the prisoner was released from imprisonment upon his second sentence, this statute was repealed; held (the statute of 1827 not being repealed) that the statute of 1832 only suspended, while it continued in force, but did not discharge, the prisoner's liability to additional punishment. *Commonwealth* v. *Getchell*, 16 Pick. 452.

151. Under the Mass. statutes of 1817, ch. 176, §§ 5 and 6, and 1827, ch. 118, §§ 19 and 20, providing that whenever any person who shall be convicted of any crime, the punishment whereof shall be confinement to hard labor for any term of years, shall have been before sentenced to a like punishment, he shall be sentenced to punishment in addition to that by law prescribed for the offence of which he shall be convicted; held that the expression term of years means a period of time not less than two years. *Ex parte Seymour*, 14 Pick. 40.

152. In order to award additional punishment, under statute of 1817, ch. 176, §§ 5 and 6, (since repealed,) it was sufficient that the crime for which he was about to be sentenced was one punishable by confinement to hard labor for a term of years; but in case of a former conviction, it must have been one where he was actually sentenced for a term of years, that is, a period not less than two years. *Ex parte Dick*, 14 Pick. 86.

153. The primary intention of the statute of 1817 was to award the additional punishment as a punishment for the second or third offence respectively, considering such second or third offence as a more aggravated crime, and deserving of severer punishment on account of the character of the accused as a convicted offender, that such punishment is to be awarded as the punishment of that single offence by the Court before whom such conviction is had; and it is only when it is not known and cannot be brought to the judicial notice of that Court, that a subsequent and distinct process by information is to be had. *Ib.*

154. The Court before which such proceeding by information is had, will, therefore, adopt precisely the same rule, and pronounce the same judgment

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which the Court would have done before whom the third conviction was had, in case the two prior convictions had been stated in the indictment, and found by the verdict so as to stand as part of the record upon which that Court was called on to pronounce its judgment. *Ib.*

155. Before sentence, the criminal nature and character of the offence is to be judged by the degree of punishment which the law denounces against it; but after sentence, the criminalty of the party will be estimated by the degree of punishment actually inflicted. *Ib.*

156. To bring a case within the statute of 1817, it is sufficient that the crime upon which the party is to be sentenced is one punishable by confinement for a term of years, but that in regard to the former convictions they must be those upon which the party was actually sentenced for a term of years. *Ib.*

157. After the enactment of the Mass. statute of 1832, ch. 73, where an information was filed in the Municipal Court, praying that additional punishment might be awarded against a convict in the State prison, and setting forth, first, a sentence to hard labor for a term of years, and his discharge in 1824; secondly, a sentence to solitary imprisonment for three days, and to hard labor for one year, and his discharge in 1828, and, thirdly, a sentence to hard labor for a term of years, upon which he was still detained, and thereupon he was sentenced to additional punishment by solitary imprisonment for one day and confinement to hard labor for seven years; held that this additional sentence was not sustained by the statute of 1827, ch. 118, §§ 19 and 20, as a sentence upon a third conviction, but that it could be sustained under such statute as a sentence upon a second conviction. *Ex parte Stevens*, 14 Pick. 94.

158. A conviction and sentence, by which one is sentenced as a common and notorious thief, under the Mass. statute of 1804, ch. 143, is being sentenced to punishment by confinement to hard labor for a term of years, within the meaning of the statute of 1827, ch. 118, §§ 19 and 20. *Ib.*

159. The Mass. act of 1832 alters the provisions of the former law in two respects: first, by the words more than one year instead of a term of years, and secondly, by referring to confinement generally instead of confinement to hard labor. Where, therefore, the solitary imprisonment and the confinement to hard labor together, both of which come under the general denomination of confinement, amount to more than one year, the case is within this statute, though it would not be within the statute prescribing confinement to hard labor for a term of years. *Ib.*

160. Where the Mass. statute of 1804, ch. 134, § 7, provides that a person convicted of robbery "shall be punished by solitary imprisonment for such term not exceeding two years," &c., is not void for uncertainty; a term not exceeding two years is intended, under the Mass. statutes of 1832, ch. 73, and 1833, ch. 85, which imposes additional punishment on convicts who had been discharged from former sentences "in due course of law;" it was sufficient to aver, in an information for such punishment, that the convict had been discharged from a former sentence "in consequence of pardon." *Evans* v. *Commonwealth*, 3 Met. 453.

161. Where the person was convicted in May, 1832, of a larceny in a dwelling-house, committed in March, 1832, and was sentenced to the State prison, and an information for additional punishment was filed against him, and found true, in 1836; which information charged that he had been twice before convicted and sentenced to the State prison, and had been discharged therefrom; held that a sentence to the additional punishment of one day's solitary imprisonment and seven years' hard labor in the State prison, was good under the law then in force. *Phillips* v. *Commonwealth*, 3 Met. 588.

162. Where a convict is sentenced as a common and notorious thief, and is afterwards convicted of an offence which is not punishable by confinement for a term of years; held that he is not

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liable to an additional punishment of confinement for life. *Stephens' case*, 14 Pick. 95.

163. Where an information prays for an award of additional punishment, it must be filed before the term of the convict's sentence has expired; and the day on which he was committed to prison, is to be considered as part of such term. *Commonwealth* v. *Keniston*, 5 Pick. 420.

164. The information being a distinct proceeding collateral to the judgment on which it is founded, the validity and regularity of such judgments cannot in this manner be drawn in question, and that they must be deemed valid until set aside in regular course. *Hopkins* v. *Commonwealth*, 3 Met. 460.

165. Where the offence was breaking and entering, in the night-time, "a house, not occupied as a dwelling-house," and stealing therein goods of less than $100 value; held that it was a simple larceny only, and not punishable by solitary imprisonment and confinement to hard labor in the State prison for the term of two years, either by Sts. 1804, c. 143, or Sts. 1805, c. 101. *Wilde* v. *Commonwealth*, 2 Met. 408.

166. Where a prisoner was convicted, in 1833, under Sts. 1815, c. 136, of cheating by false pretences; held that he might legally be sentenced to pay a fine and costs within a limited time, and in default thereof, to suffer imprisonment, &c., according to the provisions of Sts. 1788, c. 53. *Ib.*

167. Where a prisoner is sentenced to imprisonment, if a fine is not paid within a limited time, the sentence is not for non-payment of the fine, but for the offence for which the party is convicted; and if the fine and costs are not paid within the time limited, the sentence to pay them becomes null, and the sentence to imprisonment alone remains in force. *Ib.*

168. A judgment awarded on an information, it being rather a revival and continuance of the proceedings on the last previous conviction, and an additional judgment and sentence, than an original, distinct, substantial proceeding. *Ib.*

169. Where an information for additional punishment is filed, it is not necessary to set forth the full and entire record of such previous conviction *in extenso*; it is sufficient to set it forth with such particularity as to identify it, and indicate the nature and character of the offence charged, and to set forth the sentence or judgment with so much exactness as to show that it was such a conviction as brings the convict within the law providing for the additional punishment sought for by the information. *Ib.*

170. The Statute of 1815 c. 136, on which an indictment for cheating by false pretences was founded, although it provided for hard labor for a term not exceeding seven years, did not authorize solitary imprisonment, and that it was not aided by St. 1812 c. 134, which was limited to cases *then* punishable by whipping, imprisonment in the county jail, or other like punishments. *Ib.*

171. The mode of proving insanity, is by showing a series of actions or declarations which evince an aberration of mind; and it is not, in general, proper to take the opinion of witnesses derived from knowing or hearing the facts deposed to. Whether there may not be exceptions to the general rule, arising out of some peculiar relation or connexion of the witnesses (whose opinion is offered) to the supposed lunatic—*Quere*. *State* v. *Brinyea*, 5 Ala. 241.

172. If a person, after verdict and before sentence, becomes insane, it is good cause for staying the sentence; but where the question of insanity has been passed on by the jury, a motion to the Court to stay the sentence cannot be entertained. *Ib.*

173. Where the prisoner's guilt is clearly made out, if he relies on insanity as a defence, he must make it out to the satisfaction of the jury beyond a reasonable doubt, which is the rule laid down in *the State* v. *Marler*, (2 Ala. 43.) *Ib.*

174. If a charge is considered objectionable, on account of supposed obscurity or tendency to mislead the jury, those against whom it is to operate

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must ask an explanation of the Court, otherwise this Court will not reverse for that cause, if the charge is substantially correct. *Ib.*

IV. Effect of Sentence on the Civil Rights of the Convict—Delaying Sentence.

175. The qualifications which follow upon a sentence by which all the civil rights of the person sentenced are suspended, commences, as does the running of the time of imprisonment, from the time of passing sentence. *Miller* v. *Finkle*, 1 Parker's Crim. R. 374.

176. The effect of vacating a sentence and pronouncing a new sentence during the same term, is the same with respect to the civil rights of the defendant, as if the first judgment had been reversed on error, and the defendant had been again convicted on a second trial. *Ib.*

177. Where a prisoner was sentenced so that his term of imprisonment in the State prison would expire in December, and subsequently, at the same term, the sentence was vacated and a new sentence was pronounced for a shorter period, but so that it would expire in October, and the prisoner, subsequent to the first sentence and before the second sentence, executed an assignment of his book-accounts to another person, it was held that such assignment was valid. *Ib.*

178. The Court of Oyer and Terminer, where a criminal case has been tried and a verdict of guilty is given, ought not to delay the sentence in order to have the decision reviewed by certiorari, except in cases of great doubt and difficulty; in other cases, the accused should be left to his writ of error. *Colt* v. *the People*, 1 Parker's Crim. R. 611.

179. Even in cases of capital crimes, it can seldom be necessary to delay the sentence, since the governor is authorized in these cases to take the opinion of the Attorney-General, and of all the high judicial officers of the State, before he permits the execution of the sentence, and to suspend the execution of the sentence that the case may be brought before the Supreme Court, and decided on a writ of error, if he, or any of these officers, entertain any doubt as to the legality of the conviction. *Ib.*

SLAVES.

I. Statutes respecting Slaves. Importation of, &c.
II. Offences committed by Slaves, and Indictment therefor. Evidence on the Trial.
III. Inveigling, Enticing, &c., a Slave. Indictment for.
IV. Harboring Slaves, &c. Master's liability for act of the Slave.
V. Selling to and trading with Slaves, Indictment and Statute respecting.
VI. Whipping and Beating Slaves, and Indictment therefor. Killing Slaves, and Indictment therefor.
VII. Miscellaneous.

I. Statutes respecting Slaves—Importation of, &c.

1. In South Carolina, an orderly assemblage of slaves, although on a Sunday night, at a quilting on the premises of a slave-holder, with tickets from their masters, and by permission of the owner of the premises, who was also occasionally present, is not such an assemblage, under the act of 1740, as the patrol are authorized to disperse, or as will authorize them to whip the slaves of which it is composed. *State* v. *Boozer*, 5 Strobh. 21.

2. In North Carolina, after a free person of color has been convicted on an indictment, under the act of Assembly, for marrying a slave before the passage of the act of 1845, it is too late for him to apply to the Court to discharge him on the ground that the master of the slave had given his consent to the marriage. The defence should have been made on the trial. *State* v. *Roland*, 6 Iredell 241.

3. In Alabama, the statute forbidding

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the employment of slaves and free persons of color in sampling cotton, applies to those cases only where the person employing the slave or free person of color is not the owner of the cotton. *Wragg* v. *State*, 14 Ala. 492.

4. The employment of a slave or free person of color to perform the manual labor of drawing the samples from the bale and carrying it to an office under the superintendence and control of a white man, is not a violation of the act. *Ib.*

5. In North Carolina, the act of 1794, ch. 406, relative to slaves hiring their own time, has two objects in view, 1st, to find the owner, and 2d, to abate the nuisance, if it be yet continuing, or, if it be at an end, to pursue the slave, and have him hired out. *State* v. *Woodman*, 3 Hawks 384.

6. The necessity of proceeding by presentment, under the act of 1794, is repealed by the act of 1797, ch. 474, § 3. *Ib.*

7. In Alabama, the 2d section of the act of 1846, requiring slave-dealers to take out a license, is repealed by the 87th section of the act of 1848, to provide for the assessment and collection of taxes; and as the last act contained no provision for the punishment of offenders under the former law, no fine can be imposed on those violating its provisions after its repeal. *Jordan* v. *State*, 15 Ala. 746.

8. The relation of master and slave existed by law when the present constitution of the State of New Jersey was adopted. *State* v. *Post*; *State* v. *Van Beuren*, 1 Spencer 368.

9. That constitution has not destroyed that relation, abolished slavery, or affected the laws in relation to that subject, existing at the time of its adoption. *Ib.*

10. In South Carolina, no person, under the Negro act, shall be permitted to exculpate himself, by his own oath, for killing a negro, but the master, overseer, or some person having the immediate charge of such negro. *State* v. *Welch*, 1 Bay's R. 172.

11. Slavery existed in New Jersey prior to the adoption of the constitution of 1844, and was not abolished by that constitution. *State* v. *Post*, 1 Zabris. 699.

12. In South Carolina, the 38th sec. of the act of 1740, for the government of slaves, which imposes a penalty on an owner for refusing or neglecting to provide for his slaves sufficient food and clothing, to be recovered before a magistrate, is not constitutional. *State* v. *Bowen*, 3 Strobh. 573.

13. That section is not repealed by the act of 1839, regulating the office and duties of magistrates. *Ib.*

14. The act does not provide what kind and quantity of food or clothing shall be sufficient, but leaves that to be determined by custom. *Ib.*

15. No appeal lies from the decision of the magistrate, in a prosecution under that section. *Ib.*

16. Exclusive power over the importation of slaves is vested in Congress after the 1st day of January 1808, by the 9th section of the first art. of the Constitution of the United States. *State* v. *Caroline*, 20 Ala. 19.

17. The State Courts could at no time exercise any jurisdiction in cases of violation of the laws prohibiting the slave trade, except such as were authorized by the Congress of the United States, and all jurisdiction is now taken away from them by the fourth section of the act of Congress, approved March 3, 1819. *Ib.*

18. Where an indictment is found under the Kentucky statute of 1833, prohibiting the importation of slaves into that State, it need not negative the exceptions made in the statute. *Com.* v. *Young*, 7 B. Monr. 1.

19. A slave, born in Virginia, who was removed therefrom, and in 1798 brought back, in 1828 brought suit to recover her freeeom, to which, by the judgment of the Court of Appeals, rendered in 1833, she became entitled, because imported in contravention of the statute of 1792. In 1840, a presentment was made against her, as a person emancipated since the 1st day of May, 1806, and unlawfully continuing in the Commonwealth more than twelve months after her title to freedom had occurred, and after she had attained the age of 21 years; it was held that no information ought to be

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ordered to be filed upon the presentment. *Pleasants' case*, 10 Leigh 697.

20. Where an indictment for importing slaves into Kentucky, under the statute of 1815, lies, it need not charge a sale of them. *Com.* v. *Greathouse*, 7 J. J. Marsh. 590.

21. To an indictment for importing slaves, in violation of the statute of 1833, it is a good defence to plead that the accused has complied with the statute of 1841. *Com.* v. *Jackson*, 2 B. Monr. 402.

22. Where a vessel sails from the United States, owned by a citizen there, and under instructions to correspondents in Rio to sell her at a limited price or charter her; held that the commencement of her voyage is legal on its face, where the consignees charter her to a Brazilian for one year at the ordinary rate of freight, and not to be employed in carrying merchandise or passengers which are unlawful; held that the charter on the face is legal, where under it goods are put on board consisting of rum, cotton goods, brass rings, gunpowder, &c., suitable for sale or exchange in Africa for slaves, and these articles with their owners are carried to the eastern coast thereof, and landed at slave factories; held that this landing alone is not prohibited by any act of Congress. *United States* v. *Libby*, 1 W. & M. 221.

23. But this and other acts of the captain, such as seeing the purchase of slaves there by the owner of the goods, the shipment of them to Brazil in other vessels, and the bringing him and other free persons hither who had an interest in the slave trade, are facts and circumstances from which it is proper for the jury to infer, unless satisfactorily rebutted, that the master was himself intentionally co-operating and interested in the slave trade, and taking a part in its gains and criminality. *Ib.*

24. But he would not be liable for a capital offence committed on board his own vessel, except in case he did so co-operate, and drive, force or receive some African on board there, with intent to make him a slave. *Ib.*

25. Where one came on board there with other blacks, the crew of the pilot, and staid but a few hours, and the captain was busily engaged, and did not know that he was a slave on his way to be sent in another vessel to Brazil, it was not such a receiving of him as was contemplated by the law. *Ib.*

26. So, also, where he received two other Africans on board there, and brought them to Brazil without actually thinking them to be free, he would be guilty either of a misdemeanor or capital offence, according as he was merely carrying them for others, or was aiding and acting with others as a participator in the design to make men slaves longer, who were before in bondage, or to reduce those to slavery who were before free. *Ib.*

27. It was held to be legal evidence against him as to his intent on these points, that his vessel was chartered by persons who turned out to be slave dealers, that he remained a year or more in their company and employment in carrying merchandise and free passengers, and that he was acquainted with their business in Africa, and returned to Brazil in their company. *Ib.*

28. So, on the other hand, it was described to be proper for him to prove that he took no persons on board his vessel knowing them to be slaves, that he neither bought, nor sold, nor kidnapped any; that the two blacks whom he knowingly received on board and brought to Brazil had free papers as if manumitted, and that he believed they were not slaves. *Ib.*

29. It was held to be proof of the genuineness of their manumission papers, that they were attested and sealed by persons who purported to be Portuguese notaries public on that coast, and who had officiated as such in other business; that they were on the kind of paper and under the stamp used there in the public offices, and were lodged with the proper authorities in Brazil; that the Portuguese consul there testified to the notaries being regular officers of this government, and that the American consul at Rio obtained and sent to this country all these papers, with translations. *Ib.*

30. It was held that they must be

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be presumed to have been executed at their date, where no proof appeared to the contrary; and though this and the other matter just alluded to might fail to satisfy the jury that the papers were in truth genuine, yet if they believed that the master considered them to be genuine, and took the two Africans who had them on board supposing them to be in truth free, he was not liable to punishment. *Ib.*

31. To prove the intent of the master, any acts by him on the voyage, and so near the time of the offence alleged in the indictment as to be connected with it and bear on it, were admissible in evidence on the part of the United States, but not what was done on a previous voyage on the western coast of Africa. *Ib.*

32. A passenger is not one of the crew or ship's company within the terms of the act of Congress. *Ib.*

33. Intents and acts which have a tendency to make some one a slave, are both necessary under the acts of Congress of 1820, c. 113, to convict a person of a capital offence, though under other laws of Congress a person may be guilty of a misdemeanor for only transporting slaves from one place to another abroad. *Ib.*

34. Nothing can be punished under the laws of the United States which they do not make a criminal offence; and the transportation of any kind of goods to Africa, by the owner or a carrier, is not yet made a crime by any act of Congress independently of the intent with which it is done. *Ib.*

35. The Constitution and laws have contemplated that slavery is to be safely abolished in this country, by excluding additions to it of ignorance and paganism from abroad, and elevating its victims so as in time to be usefully returned to Africa, or made fit for emancipation here; and it is to be abolished in Africa both by refraining to purchase slaves there, and by civilizing her people so as not to make prisoners of war slaves, and producing, by industry and arts, other articles with which to buy foreign merchandise. *Ib.*

36. The slave-trade is not piracy unless it is made so by the treaties or statutes of the nation where the party belongs. *The Antelope*, 10 Wheat 67.

37. The African slave-trade, when abstractedly considered, is inconsistent with the law of nations; and a claim founded upon it may be repelled in any court where it is asserted, unless the trade is made legal by the nation to which the claimant belongs. *La Jeune Eugenie*, 2 Mason 409; *The Antelope*, 10 Wheat. 67.

38. A seizure may be made under the slave-trade act of 1794, c. 187, § 1, before the vessel goes to sea, so soon as the intention of "preparing," &c., or of "causing to sail," &c., is evident. *The Emily* and *the Caroline*, 9 Wheat 318.

39. Under the act of Congress of May 10, 1800, the offence consists in carrying persons from one foreign country to another, with a view to their being sold as slaves; and as soon as the vessel arrives at the place of destination, the offence is held to be complete, whether the slaves are sold or not. *U. States* v. *Smith*, 4 Day 121.

40. The first section of the slave-trade act of 1800, c. 51, prohibits not only the transportation of slaves, but the being engaged in the business of the slave trade; and therefore a vessel caught in such trade, though before she has taken slaves on board, is held liable to forfeiture. *The Brig Alexander*, 3 Mason 175.

41. Where the master of a vessel is guilty, he is properly charged with serving on board a vessel employed in carrying slaves in violation of the act of 10th of May, 1800. *U. States* v. *Kennedy*, 4 Wash. C. C. 91.

42. The act is penal, and prohibits the voluntary service of an American citizen on board of an American or foreign vessel on a voyage begun with the intent of carrying slaves from one foreign country to another, though no slaves have been taken on board. *U. States* v. *Morris*, 14 Pet. 464.

43. Where Africans are first captured by a belligerent privateer, fitted out in violation of our neutrality, or by a pirate, and then re-captured and brought into the ports of the United States, under a reasonable suspicion that a vio-

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lation of the slave-trade acts was designed, are not to be restored without complete evidence of the proprietary interest; for in such a case the capture is lawful. *The Antelope*, 10 Wheat. 67.

44. The offence of sailing from a port with an intent to enter into the slave trade, under the act of 20th April, 1818, c. 86, §§ 2 and 3, is not committed unless the vessel goes out of the port. *U. States* v. *La Coste*, 2 Mason 129.

45. An allegation in an indictment under the slave-trade act of 1818, of the offence "with the intent that the vessel should be employed," is bad and fatal; the words of the statute being "with intent to employ the vessel." *U. States* v. *Gooding*, 12 Wheat. 460.

46. Proof that the owner commanded, authorized, and superintended the fitment, through his agent, without his personal presence, will sustain a count in an indictment under the slave-trade act of 1818, that "he did fit out for himself, as owner," &c. *Ib.*

47. Under the 4th section of the act of the 10th of May, 1800, c. 205, the owner of the slaves carried away contrary to the provisions of that act, cannot claim the same in a court of the United States, although they may be held in service according to the laws of their own country; but if, at the time of the capture by a commissioned vessel, the offending ship was in the possession of a non-commissioned captor, who had made a seizure for the same offence, it is held the owner of the slaves may claim them; the section only having reference to persons interested in the enterprise or voyage in which the ship was employed at the time of such capture. *The Merino*, 9 Wheat. 391.

48. The prohibitions in the slave-trade acts of 10th May, 1800, and 20th April, 1818, extend both to the carrying of slaves on freight, and to cases where slaves belonging to citizens of the United States are transported, and to the transporting them from one port to another of the same foreign country, as well as from one foreign country to another. *Ib.*

49. Under the act of 18th April, 1818, a vessel is not subject to condemnation for transporting slaves from the United States to Europe, and bringing them back to the United States, where they were again held in servitude. *U. States* v. *Skiddy*, 11 Pet. 73.

50. It is sufficient to support an indictment under the slave-trade act of 1818, if the vessel be fitted out with the intent to be used in the illegal voyage, although no equipments for a slave voyage are actually on board. *U. States* v. *Gooding*, 12 Wheat. 460.

51. And it is not necessary to allege the fitting out in the indictment. *Ib.*

52. If a foreign claimant of a vessel seized for being employed in the slave trade, claims to have a title derived from American owners, he must give affirmative evidence that the case has no admixture of American property. *La Jeune Eugenie*, 2 Mason 409.

53. The offence under the 7th section of the act of Congress of the 2d March, 1807, prohibiting the importation of slaves into any port or place within the jurisdiction, &c., does not consist in importing or bringing persons to hold as slaves, but of hovering on the coast with such intent; and although it forfeits the vessel, it is silent as to the disposition of the colored people on board, any further than handing them over to the proper authorities. *United States* v. *Preston*, 3 Pet. 65.

54. Where there is a forfeiture under the act of Congress prohibiting the importation of negroes after 1st of January, 1808, it may be remitted by the District Court, under circumstances of extreme hardship. *U. States* v. *Schooner Kitty*, Bee. 252.

55. Where a person is only employed in the transportation of slaves, for hire, from port to port, and having no interest in or power over the negroes, so as to impress upon them the future character of slaves, he is not guilty under the act of Congress of 1820, c. 113, § 4, in relation to the slave trade. *U. States* v. *Battiste*, 2 Sumner 240.

56. In order to bring the case within the act, the negroes need not be free at the time of their seizure or reception on board. *Ib.*

57. "To make the negro a slave," within the meaning of the act, is to be

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the instrument or means of fixing on him that character for the future. *Ib.*

58. Where an African negro or mulatto is brought on the coast of Africa by an American citizen, or by any person belonging to an American ship, he ceases to be a slave. *Ib.*

II. Offences Committed by Slaves, and Indictment therefor—Evidence on the Trial.

59. Where a slave is guilty of an offence, he cannot be twice tried and punished for the same offence. *Ex parte Brown*, 2 Bailey 323.

60. A negro, in connection with white men, is capable of committing a riot. *State* v. *Thackham*, 1 Bay 358.

61. In Alabama, where a slave is indicted for the murder of another slave, and found guilty of manslaughter only, his punishment may consist in whipping and branding. *State* v. *Peter*, 1 Stew. 38.

62. It seems that malice is not an essential ingredient of the offence embraced in the second section of the fifteenth chapter of the penal code (Clay's Digest 472, § 2), against a slave "who shall commit an assault with intent to kill any white person." *Dave* v. *State*, 22 Ala. 23.

63. Where a slave is in a personal conflict with his master, and resists his authority by physical force, and in that resistance kills his master; held that he cannot reduce the crime to manslaughter by showing that in the commencement of the resistance he had no design to take life. *Ib.*

64. Where a slave stabs his master with intent to kill, while resisting his authority in a personal collision with him, it is no defence that the slave was impressed at the time with a reasonable sense of imminent danger to his own life. *Ib.*

65. In Georgia, under the amendatory act of February 22, 1850, the attempt to procure a slave to commit a crime or misdemeanor, implies an offence which, if committed, would be a crime or misdemeanor in a free white person. *Grady* v. *State*, 11 Ga. 253.

66. A change of venue cannot be granted on application of the owner of a slave indicted for murder; the slave should petition in person for such change. *Fanny* v. *State*, 6 Mo. 122.

67. The second and third sections of the act of February 6th, 1836, concerning crimes and punishments, providing that any slave thereafter convicted of a felony, &c., shall be punished by whipping, &c., were intended only to substitute a punishment in lieu of that prescribed in the repealed sections, leaving slaves still punishable with death for murder in the first degree. *Ib.*

68. Were there room for doubt on this subject, the 27th section of the 3d article of the State Constitution, providing that a slave convicted of a capital offence shall suffer the same degree of punishment, and no other, than would be inflicted on a free white person for the same offence, settles that doubt. *Ib.*

69. In Georgia, on the prosecutions of slaves under the act of 1850, it was held unnecessary to aver the preliminary proceedings before the magistrates, on a bill of indictment, or to show them on the trial. *Anthony* v. *State*, 9 Ga. 264.

70. In this case, the act of 1850, authorizing the trial of slaves before the Superior Court, was held to be constitutional. *Ib.*

71. On a trial under this act for murder, and a verdict of manslaughter, it was held that the Superior Court might pronounce sentence and inflict the punishment provided by law for manslaughter. *Ib.*

72. On the trial of a slave for an assault with intent to commit murder in the first degree, the Court has authority to discharge the jury and enter a mistrial, with the consent of the slave and the counsel employed by his master to defend him; and it is not necessary that the consent of the master should be shown. *Elijah* v. *State*, 1 Humph. 102.

73. The terms "charged with a capital offence" in the statute (Aik. Dig. 124, § 23), must be understood to intend a charge made in a legal form. *The State* v. *Duncan*, 9 Port. 260.

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74. Slaves are not subject to the death penalty in any case where a freeman would not be subject to the same punishment, except by virtue of the act of 1741. *The State* v. *Sue*, C. & N. 54.

75. Where a slave has been imprisoned on a charge of murder, and a nol. pros. is entered, the owner, after due notice given him of the charge, is liable for the jail fees and the Court costs. *The State* v. *Isaac*, 2 Dev. 47.

76. Where a slave is convicted of a capital offence, it is held that the owner is liable also for the fee for carrying the sentence into execution. *The State* v. *Jones*, 2 Dev. 48.

77. In Virginia, where a slave was committed to the jail of a corporation, "until the next Court of hustings, to be held for the same," by warrant from a justice of the peace of the corporation, which recited that the slave had been apprehended therein, and brought before the justice by J. T. informer, for having been permitted by S. A., his master, to go at large, and hire himself out, in violation of the act of assembly in such case made and provided; and that it appeared to the justice that such slave came within the purview of said act; held that the Court of hustings had jurisdiction to proceed against the master, according to the Statute 1 Rev. Code, C. 111, § 81, and that it was objectionable to the proceeding before the Court, that the master had no notice of the proceeding before the justice. *Abraham's case*, 1 Robinson 676.

78. And it was further held, that in the proceeding before the Court, no presentment, indictment, or information against the master was necessary. *Ib.*

79. A judgment in a county or corporation Court, against a master for allowing his slave to go at large, and hire himself out, contrary to law, is correctly rendered for the costs of the prosecution, including jail fees as well as for the fine. *Ib.* Where several slaves of one master apprehended in a corporation for going at large, and hiring themselves out, contrary to law, were committed to jail until the next corporation Court, by separate warrants from a justice of the peace, and the Court awarded a summons against the master, which was issued and duly served, requiring him to show cause why he should not be fined, according to law, for permitting his slaves A. &c., (naming them all,) to go at large and hire themselves out in the city contrary to law, and made defence, and in respect to each slave a separate trial was had, and a separate fine imposed; held no error to divide the trial. *Ib.*

80. There is no necessity of a warrant for the apprehending of a slave going at large, or hiring himself out, contrary to law. *Ib.*

81. The wearing or carrying about the person, or keeping in the house by a free negro, any one of the articles prohibited by the act of 1840, ch. 40, (as a rifle, musket, bowie knife, &c.,) is a distinct offence, and should be so charged in the bill of indictment. *State* v. *Locklear*, Busb. N. C. 205.

82. But where the indictment charged in the same count the carrying of a musket, rifle, and shot gun, proof of the unlawful carrying of either one of the articles is sufficient to justify a conviction, and the objection to the indictment cannot be taken advantage of either at the trial, or upon a motion in arrest of judgment. *Ib.*

83. In North Carolina an indictment charging that a certain negro slave did hire her own time, contrary to the form of the statute, &c., is defective, and must be quashed because it omits to charge one essential part of the offence, that is, that she was permitted by her master to go at large. *State* v. *Clarissa*, 5 Iredell 221.

84. Under the first clause of the 31st section of the 111th chapter of the Revised Statutes, prohibiting masters from hiring to slaves their own time, the master is not indictable; he is only subject to the penalty of forty dollars. Nor is the master indictable under the second clause of that section, the process is against the slave not against the master. *Ib.*

85. The act of 1794 was not repealed by that of 1831, on the subject of slaves going at large. They were intended to punish different offences, and they are both now retained in the Rev. Stat. ch. 111, §§ 31 and 32. *Ib.*

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86. To constitute the offence under the latter section it is not necessary that the slave should have hired his time. It is sufficient if the master permits him to go at large as a freeman. *Ib.*

87. Presentment and indictment are considered in construing the 31st section as the same. *Ib.*

88. In North Carolina the County Courts alone can take original cognizance of a Common Law grand larceny, committed by a slave. *State* v. *Allen*, 3 Hawks 614.

89. If, therefore, a slave who has once had his clergy, be indicted in the Superior Court for a grand larceny at Common Law, the indictment should state that it was the second offence, so as to incur the punishment of death, and that the Court might see upon the record that it had jurisdiction. *Ib.*

90. In North Carolina, the act of 1741 punishes an act committed by a slave with whipping and the loss of ears for the first offence, and with death for the second, on an indictment in the County Court. The act of 1816 gives to the Superior Court jurisdiction of all offences, the punishment whereof may extend to life, and in its 4th section enacts, that a slave convicted of a clergiable offence, shall have clergy as a freeman. This clause does not give the Superior Court jurisdiction of the offence named in the act of 1741, although it may possibly be the second offence. *State* v. *Adam*, 3 Hawks 188.

91. An indictment under the second section of the fifteenth chapter of the penal code, for an assault with intent to kill, must within the terms of the act allege that the individual assaulted was a white person, and an indictment which does not contain such an allegation cannot be aided by a verdict finding the fact affirmatively. *Nelson* v. *State*, 6 Ala. 394.

92. Although the tenth section of the fifteenth chapter of the penal code provides that at least two-thirds of the jury who try a slave for a capital offence shall be slave-holders, yet it will be regarded as sufficient on error if the judgment entry characterizes the jury in such case as good and lawful men. *Ib.*

93. The act of 1808 to prevent the migration of free negroes and mulattoes to this State makes no provision for a trial by jury, but virtually denies that privilege to the accused, by providing that they shall be tried in and by the County Courts, and was therefore adjudged unconstitutional. *Com.* v. *Edwards*, 9 Dana 447.

94. The act of 1838 passed to remedy that defect, provides that jurors shall be summoned in such cases, but cannot have a retroactive operation consistently with the clause of the constitution, which forbids the enactment of any ex post facto law, consequently no conviction can be had under the act of 1808, unless the offence was committed since the act of 1838. *Ib.*

95. The offence consists of migrating to this State, and remaining in it 30 days, neither of which acts separately will amount to a violation of the act; but whenever a person, to whom it applies after immigration has remained 30 days, the offence is complete, and a procedure under the act being in the nature of an information, and clearly founded on a penal statute, not affecting life or limb, is barred in one year from the expiration of the 30 days by the act of 1797, limiting actions, prosecutions, etc., of that description. *Ib.*

96. Under the provisions of the 41st sec. of the 11th chap. of the Revised Statutes, the Justice of the Peace before whom a slave is brought, charged with an offence not capital, must decide whether the offence is of such a nature as to require a greater punishment than he is authorized to inflict, and shall give judgment accordingly. *State* v. *Bill*, 13 Iredell 373.

97. In such a case an appeal is allowed by the act of 1842, ch. 9, § 1, to the County Court, which may decide without a trial by jury, no appeal from that Court to the Superior Court is authorized by law. *Ib.*

98. The using or carrying of firearms by a slave to be contrary to the intent and meaning of the act of South Carolina, 1819, and subject to seizure and forfeiture, must be an using or carrying without "a ticket or license in writing from his owner or overseer;" and the fact that a slave having such

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license uses the gun in an unlawful manner, will not create a forfeiture. *State* v. *Cattell*, 2 Hill's S. C. 291.

99. The grievous wounding, maiming, or bruising of a white man by a slave, must be done with evil intent, and must be more severe than is expressed by saying that "it must inflict pain, distress, and suffering." *State* v. *Nicholas*, 2 Strobh. 279.

100. Insolence of a slave towards a white person, is, in South Carolina, an offence for which he may be tried and punished. *Ex parte R. B. Boylston* v. *Slave Jim*, 2 Strobh. 41.

101. To constitute the crime of an "attempt to poison" a white person by a slave, there must be an actual attempt to poison, by the administration of some poisonous drug or substance calculated to destroy human life. *State* v. *Clarissa*, 11 Ala. 57.

102. An indictment under this statute, must allege that the substance administered was a deadly poison, or calculated to destroy human life. An indictment which alleges the administration of the seed of the Jamestown weed, but does not contain an allegation that it is a poisonous substance calculated in its effects to destroy human life, is sufficient to sustain a judgment. *Ib.*

103. In North Carolina, when slaves are charged with a simple grand larceny at the Common Law, to give the Superior Courts jurisdiction it should be stated in the indictment that it is the second offence, because otherwise it is not punishable with death. *State* v. *Daniel, Crese & Piety*, 3 Hawks 617.

104. In an indictment against a white man as accessory to a murder committed by a slave, in laying the crime of the slave as principal in the murder, it is not necessary to allege that his offence was contra formam statuti. *State* v. *Posey*, 4 Strobh. 103.

105. It is not necessary, in an indictment against an accessory before the fact, in a felony, to set out the conviction of the principal. Vide *State* v. *Sims*, and *State* v. *Crank*, pages 29 and 66 of 2 Bailey's Reports. *Ib.*

106. Proof that a slave charged as principal in a murder, stood mute, or exceeded his right of challenge, held to be inapplicable on the trial of a white man charged as accessory to the felony, as they do not pertain to the trial of a slave. *Ib.*

107. Wherever a slave is amenable as for a felony, there he may have an accessory, whether he be master or any other person. *Ib.*

108. Murder by a slave, held to be a felony in him at Common Law as it exists in South Carolina. *Ib.*

109. Where an indictment is laid against a slave for a capital offence, the master cannot be compelled to give testimony. *The State* v. *Charity*, 2 Dev. 453.

110. Where the master waives his privilege, it seems that the slave may object to proof of confessions made to the master. *Ib.*

111. In all trials of slaves for capital offences, the preliminary proceedings before the magistrate should appear on the face of the indictment, either by way of recital or allegation, and they must be established by proof before the jury. *State* v. *Porter*, Geo. Decis. (Part 1) 46.

112. Whether it is necessary, to support an indictment against a slave for a capital offence, to prove his ownership as alleged in the indictment, *quere;* but where the indictment charged him to be the property of A., it is sufficient if he be shown to be the property of A. & B. *Wash* v. *the State*, 14 S. & Marsh. 120.

113. So, in such case, where the ownership has been shown to be in A., it is not erroneous to exclude evidence on the part of the defence, of ownership in A. & B. *Ib.*

114. On a criminal prosecution of slaves, or free persons of color, under the Georgia act of 1850, it was held illegal to admit in evidence the opinion of the committing magistrates, that the person charged was guilty of a capital offence. *Allen* v. *the State*, 9 Ga. 492.

115. Where a capital crime is committed by a slave during the session of the Superior Court, and the papers are returned, it is proper for the Court to proceed to a trial at that term. *Ib.*

116. In a community where the almost universal condition of the black man is that of slavery, and where his

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complexion indicates his social condition with a certainty almost as infallible as it does his race, his color is to be regarded, in the absence of all other evidence, as prima facie proof of his slavery. *Bennett* v. *State*, 1 Swan 411.

117. In North Carolina, notwithstanding the act of 1741, a slave tried for a capital crime may be convicted on the testimony of a slave, though uncorroborated by pregnant circumstances. *State* v. *Ben*, 1 Hawk. 434.

118. It is competent to prove on the trial of a colored person for a capital offence, charged in the indictment as a slave, that he admitted himself to be a slave. But where the proof was that the prisoner had brought to the witness a bill of sale of himself to one E., transferred to the witness by E., which was objected to because the bill of sale was not produced; held that although this may be considered as an omission by the prisoner, of his status, and that it was therefore not necessary to produce the instrument by which it was evidenced, yet, as the jury might have been misled, and probably acted on the belief that the bill of sale was proof that the prisoner was, or had been the slave of E., in favorem vitæ, it was proper there should be a new trial. *State* v. *Marshall*, 8 Ala. 302.

III. Inveigling, Enticing, &c., a Slave—Indictment for.

119. Where an indictment is found for advising slaves to escape from their masters, and charged that they were the property of A. B.; held that evidence that they were the property of an estate of which A. B. was executrix, would sustain the indictment. *Cole* v. *the Commonwealth*, 5 Gratt. 696.

120. In an indictment for abducting and enticing away a slave, it must be charged that the slave was taken out of the State, and also that the act was done "with intent," &c. *The State* v. *Rector*, 11 Mo. 29.

121. The words, in the statute of 1754 to punish negro-stealing, "to inveigle, steal, and carry away," or aiding another "to inveigle, steal, or carry away," are to be considered disjunctively, the stealing, or aiding in stealing a negro, being regarded as the offence. *The State* v. *McCoy*, 2 Speers 711.

122. The statute of 1754 (7 St. 426) is not repealed by the statute of 1821 (7 St. 460), with respect to the offence of aiding a slave in running away from his master's service; this act applies to female as well as to male slaves. *The State* v. *Brown*, 2 Speers 129.

123. In an indictment under the statute of 1754, for aiding a slave in running away from service, it is enough to allege distinctly the running away of the slave, and the aid afforded, without stating time and place. *Ib.*

124. There can be no larceny or seduction of a slave committed under the act of 1779, where the owner, through his agent, consents to the taking and asportation, though such consent was given for the purpose of arresting the felons. *The State* v. *Jernigan*, 2 Tayl. 44.

125. But where the accused brings a slave to a particular place, after such assent of the owner, but in pursuance of a plan devised before the assent is given, and for the purpose of selling the slave, they are guilty of felony. *Ib.*

126. The intent to commit a crime, is of the essence of the offence; and a man cannot be held criminally responsible for an offence of the commission of which he was ignorant at the time; thus the commander of a steamboat is not liable to the penalty of the act of 1833, ch. 111, in Tennessee, when his boat has taken and carried off the slave of another, without such commander's knowledge or consent. *Duncan* v. *State*, 7 Humph. 148.

127. In North Carolina, the act of 1779, ch. 11, declares that any person or persons who shall hereafter steal, or shall by violence, seduction, or any other means, take or carry away any slave or slaves the property of another, with an intent to sell or dispose of to another, or to appropriate to their own use such slave or slaves, &c., shall suffer death without benefit of clergy. The indictment charged that A. did steal, take, and carry away a male slave named Amos, of the value of fifty

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shillings, and the property of one B., contrary to the act of the General Assembly, in such case made and provided. Although the stealing is not described as having been accompanied with either of the intentions, to wit, to appropriate to his own use, or sell or dispose of to another, the benefit of clergy is taken away by a conviction on the indictment. *State* v. *Jernigan*, 3 Murph. 12.

128. The design of the act is twofold: 1st. To punish the crime of stealing a slave with death, by taking away the benefit of clergy to which the offender was entitled at Common Law; 2d. To punish in the same way all other wrongful means of depriving an owner of his slave, whether by force or fraud, if the act were accompanied with an intention to sell the slave, or to appropriate him to the taker's use. *Ib.*

129. In Maryland, on a criminal prosecution against a person for giving a pass to a slave, contrary to act of 1796, c. 67, § 19, the loss of service by the master must be alleged in the indictment. *Duvall* v. *State*, 6 Har. & J. 9.

130. Where an indictment for stealing a slave lies, it must state who is the owner of the slave. *State* v. *Davis*, 2 Law Rep. 287.

131. To warrant a conviction on an indictment, for feloniously aiding slaves to escape from the service of their master, the State must prove that the defendant aided the slaves to escape, and that they were the slaves of the person whose property they are averred to be in the indictment. *Winter* v. *the State*, 20 Ala. 39.

132. Where a person, residing in one county, with the intent to convert a slave to his own use, entices or enveigles him from the service of his owner in another county, and thereby induces him to come into the county of such person's residence, the offence is complete in the latter county, and he may be there indicted. *Crow* v. *the State*, 18 Ala. 541.

133. In Virginia, where persons carry slaves out of the State, without the owners knowledge or consent, with intent to deprive the owner of them, until he could receive a reward for apprehending and restoring them; held that it was felony under the Statute 1 Rev. Code, c. 111, § 30. *Thomas's case*, 2 Leigh 741.

134. The words inveigle, entice, steal and carry away, in the penal code of Alabama, (Clay's Digest, 419, § 18,) denote offences of precisely the same grade, and may be included in the same count of the indictment; and upon proving either, the State is entitled to a conviction. *Mooney* v. *State*, 8 Ala. 328.

135. The offence of inveigling or enticing away a slave, is consummated when the slave by promises, or persuasion, is induced to quit his master's service, with the intent to escape from bondage as a slave, whether the person so operating on the mind and will of the slave, is or is not present when the determination to escape is manifested by the act of leaving the master's service, or whether he is or is not sufficiently near to aid in the escape if necessary. *Ib.*

136. The act of Alabama of 1812, upon the subject of abetting the rebellion of slaves, embraces four distinct descriptions of offence: First, for a free person to be aiding and assisting or in any wise concerned with a slave or slaves, in any actual rebellion or conspiracy. Secondly, for a free person to be similarly concerned in any meditated rebellion, or conspiracy. Thirdly, for any free person, in any manner, to advise, plot, or consult with any slave or slaves, for the purpose of encouraging, exciting, aiding or assisting an intended insurrection or rebellion. Fourthly, for any free person in any manner to advise, plot, or consult with any slave or slaves, for the purpose of encouraging, exciting or assisting an intended insurrection or rebellion. *State* v. *McDonald*, 4 Porter 449.

137. Each of the foregoing classes embraces several offences, as in the first class, "aiding and assisting a slave or slaves," &c., is one offence, to be "in anywise concerned with a slave or slaves," &c., is another; and so each category is susceptible of sub-division. *Ib.*

138. To render one guilty of the offence of "aiding and assisting," &c., a

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slave or slaves, in a meditated rebellion or conspiracy, it would not be essential that a rebellion or conspiracy should be first meditated by a slave; if a free person and a slave are concerned, it is immaterial with whom the scheme may have originated. *Ib.*

139. But to make a free person guilty of advising, plotting, or consultting with a slave or slaves, for the purpose of encouraging any insurrection or rebellion under that act, there must be proof of an actual or meditated rebellion by a slave or slaves. *Ib.*

140. Any words or acts of a free person, which manifest or design to effect an insurrection or rebellion, if employed with a view to such result, would, it seems, be sufficient to authorize a conviction for advising, &c., an intended insurrection, &c., without the intention originating with a slave, or his concurrence or assent being obtained. *Ib.*

141. And such intention need not be shown by direct and positive proof where inferrible from facts and circumstances in themselves indicating it. *Ib.*

142. In South Carolina, in an indictment for inveigling, stealing, or carrying away a negro slave from his owner or employer, it is not necessary to prove the act of inveigling to consummate the felony of stealing or carrying away. *State* v. *Miles*, 2 Nott & McCord 1.

143. In an indictment under the act of North Carolina, 1779, (Rev. C. 142,) for seducing and conveying a slave, it was held by the Court, Gaston, Judge, dissenting, that the seduction and conveying away must concur to constitute the offence, and that one who did not himself seduce or aid in seducing the slave, but only assisted in the conveying away, could not be convicted as a principal felon. *State* v. *Harlin*, 2 Dev. & Batt. 407.

144. In North Carolina, an indictment under the act of 1779, (Rev. C. 142,) which charges the seduction of a slave to be with an intent "to sell, dispose and convert to his own use," is sufficient; for the felony created by the act is sufficiently described by charging the seduction to be with an intent "to sell," and the words "dispose of and appropriate to his own use," do not extend the intention imputed beyond that of an intention to sell, and at worse are only redundant. *State* v. *Haney*, 2 Dev. & Bat. 390.

145. Where an indictment was founded on the statute 1 Rev. Code, c. 111, § 30, for feloniously and fraudulently taking and removing a slave from one county to another, with intent to defraud the owner, and deprive him of his property, it was fatally defective, after verdict, for want of an averment that the slave was so taken and removed without the consent of the owner. *Pease's case*, 4 Leigh 692.

146. Upon an indictment under the act of 1825, for carrying away slaves, &c., which found the accused "guilty of the felony of carrying, conveying and concealing, as charged in the bill of indictment," is bad. *The State* v. *Edmund*, 4 Dev. 340.

147. It is not necessary in an indictment under the act of 1754, (P. L. 335, 336,) for aiding a slave in running away and departing from his master's employment, to set out and aver the means used in aiding the slave to run away; it is sufficient for all purposes if the indictment charge the offence in the words of the act; it must definitely and directly charge the defendant with aiding the slave in running away, so that his master has been deprived of his services, the name of the slave and the name of his master, the time and place, &c. *State* v. *Blease*, 1 McMullan 472.

148. Where an indictment founded on the statute of January 27, 1829, charged that the defendant did aid, abet, and assist a certain negro slave, viz., the slave of a certain A., to escape from his owner, without alleging in what manner the slave was aided to escape, and without naming the slave; held that the indictment was good. *House's case*, 8 Leigh 755.

149. It is not error, in such case, for the jury to fix the term of the defendant's imprisonment. *Ib.*

150. A man who was swindled out of the possession of a slave, which he had as agent to sell for another, was held to be incompetent to testify on an indictment against the swindler for

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stealing the slave, in order to show that a bill of sale, which purported to be signed by the owner of the slave, and transferring the property and possession to the swindler, was a forgery, and not made by such witness. *The State* v. *Hope*, 2 Brevard 463.

IV. Harboring Slaves, &c.—Master's Liability for Act of the Slave.

151. It is not a part of the description of the offence in the act of 1821, that the person charged should know the slave to be a runaway; the act of harboring and concealing imports a sense of criminality, which can only arise from a knowledge that the slave so kept has run away. *State* v. *Thomas*, 3 Strob 269.

152. In a trial for harboring a slave, described in the indictment as the property of the owner, it is necessary to identify him by the name by which he was known as the owner's property, and not by that which the defendant had imposed on him, assumed for the purpose of concealment. *Ib.*

153. When no design to misrepresent is charged against a witness, in consequence of his relation to the party or to the cause, evidence of similar statements made by him on former occaions, is not admissible to support the truth of what he may testify. *Ib.*

154. A State law which makes it an indictable offence to harbor or secrete a slave, whether owing service to any person within or out of such State, is a mere police regulation, and not ancillary to the acts of Congress upon the subject, nor contrary to the Constitution of the United States. *Willard* v. *the People*, 4 Scam. 461; *Eells* v. *the People*, 4 Scam. 498.

155. In an indictment for secreting a negro slave, under the statute of Illinois, the name of the slave need not be alleged; it is sufficient to describe him to be a "certain negro slave, the property of A. B." *Ib.*

156. In such case, a scienter need not be alleged; the words "harbor" and "secrete" imply an intention to defraud the owner, which is the essence of the offence. *Ib.*

157. Under the statute, 1 Rev. Code, c. 75, § 5, an indictment found for employing or harboring a free negro or mulatto, in violation of the statute, 1 Rev. Code, c. 111, § 75, is a regular proceeding. *Fisher's case*, 10 Leigh 673.

158. In North Carolina, harboring or maintaining a runaway slave within the Act of 1741, &c. (Rev. Stat. c. 34, § 73), consists in secretly aiding him by any means to continue absent from his master, knowing, at the time of rendering such aid, that he was a runaway. *State* v. *Hathaway*, 3 Dev. & Bat. 125.

159. Indictment, under the act of 1821, for harboring two slaves. Both counts of the indictment alleged the slaves to be the property of J. S.; the first count charging that they were runaways, and fugitives from the service of J. S.; and the second, that J. S. had hired them out, each to a different person (named), and that they were fugitives, respectively, from the service of the person to whom they had been hired. The proof was that J. S., as executor, hired the slaves, each to the person named, for the year 1850; that they ran away, and, while out, were harbored together by the defendant; the defendant was found guilty, and he moved for an arrest of judgment, or for a new trial; held that he was properly convicted—a majority of the Court holding, that it was immaterial to allege or prove that the slaves were fugitives from the service of any one, and, therefore, that the conviction was good under the first count; other judges holding that the second count was not bad for duplicity. *State* v. *Holland*, 5 Rich. 512.

160. In Virginia, on a criminal prosecution under the last clause of the 13th section of the act concerning slaves, &c., against a defendant for allowing a number of slaves, more than five, other than his own, "to be and remain" on his lot or tenement, the Commonwealth must not prove that they remained thereon more than four hours at any one time. *Commonwealth* v. *Booth*, 6 Rand. 669.

161. The testimony in such a prose-

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cution must correspond with the allegation, and, therefore, where the information charges an unlawful assemblage of negro slaves, it is held that the Commonwealth must prove that they were slaves. *Ib.*

162. Where an indictment is found under the act of 1831, c. 113, in Tennessee, charging that an assemblage of slaves was knowingly permitted by the defendant on his premises in a suspicious place, &c.; it need not set forth the circumstances which make the time and place of the assemblage suspicious. *State* v. *Brown*, 8 Humph. 89.

163. Whether an indictment for permitting a slave to go at large, and hire himself, need not aver that the slave did go at large and hire himself —*Quere. Parker* v. *Commonwealth*, 8 B. Monr. 30.

164. In an indictment under the statute of 1840, of Kentucky, prohibiting a master from allowing his slave to go at large, and hire himself, it need not be alleged that the master received any compensation therefor, the latter not being a necessary ingredient in the offence. *Ib.*

165. In an indictment under the statute, 1 Rev. Code of Virginia, c. 111, § 13, p. 424, for allowing more than five slaves, other than the defendant's own, to be and remain at one time on his premises, it is not necessary to charge that it was without the consent of the owners of the slaves. *Commonwealth* v. *Foster*, 5 Gratt. 695.

166. Where one was indicted under the act of the legislature of 1842, which declared it unlawful for any person being the owner or employer, or having the care and control of any slave or slaves, to permit or suffer them to reside or be quartered in any lot or in any outhouse in any incorporated town or city in this State, unless such lot is immediately connected with the lot upon which is the usual dwelling-house or residence of such person, or unless the house in which such slaves reside or are quartered is upon such lot, and was charged in the bill of indictment, as the agent or controller of the slave named, whereas the offence created by the statute applied only to the owners or employers, or to persons having the care and control of any slaves; held that the term agent, used in the description of the party charged, was properly treated as surplusage. *Tefft* v. *the State*, 23 Miss. (Cush.) 567.

167. Where one was indicted under the Tennessee act of 1839, c. 47, for permitting a slave to act as a free man of color, and the indictment alleged that such permission was unlawfully given; it was held that such word was not of equivalent import with the word wilfully used in the statutes, and that the indictment did not allege the offence created by the statute. *Morrow* v. *the State*, 10 Humph. 120.

168. In North Carolina, under the Revised Statutes, c. 111, § 31, a master is not indictable for permitting his slave to go at large, hiring his own time; he is only subject to the penalty of forty dollars, imposed by that section of the act, nor is the slave indictable. *State* v. *Nat*, 13 Iredell 154.

169. But the owner is indictable under the 32d section of the same act, for permitting a slave to go at large, *as a free man*, exercising his own discretion in the employment of his time. *Ib.*

V. Selling to and Trading with Slaves — Indictment and Statutes Respecting.

170. In South Carolina the informer is entitled to a moiety of the fine imposed, upon conviction, under the act of 1817, for trading with a slave without a ticket; the provision in favor of the informer contained in the act of 1796, in relation to the same offence, is not affected by the act of 1817; and the two acts must be construed in pari materia. *State* v. *Baldwin*, 2 Bailey 541.

171. Where one trades with two slaves for two articles at the same time, he is liable to indictment for two offences, under the act of South Carolina of 1817 and 1825, although both slaves belonged to one owner. *State* v. *Fife*, 1 Bailey 1.

172. The act which authorizes inflicting a penalty on persons "who buy, sell or receive from any slave any

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commodity," &c., without the consent of his master, is violated by selling to a slave without the consent of his master. *Worrell* v. *State*, 12 Ala. 732.

173. In Mississippi, so much of the 2d section of the act of March 6th, 1850, "to suppress trade and barter with slaves," as declares that the name of the slave, or his owner, or the kind or quantity of the produce or commodity bought or sold, need not be alleged in the indictment, is repugnant to the 10th section of the bill of rights, which declares that "in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation against him." *Murphy* v. *the State*, 24 Miss. 590; *Allmon* v. *the State*. *Ib.*

174. A partner who was not present, and against whom there was no proof that he knew of, or in any wise assented to, the trading of his co-partner with a slave, cannot be made criminally liable for such act of the latter. *The State* v. *Coleman*, Dudley's S. C. R. 32.

175. The offence of selling liquor to a slave without a permit from his master by an unlicensed grocer, or person having no license to keep a grocery, is a different offence from a sale of liquor to a slave by a grocer who has license. *Frazier* v. *the State*, 6 Mo. 195.

176. A contract to sell spirits to a slave, which is not completed by delivery, is not an indictable offence. *Pulse* v. *the State*, 5 Humph. 108.

177. Where the offence charged in an indictment, under the act, was giving and delivering liquor to a certain "slave of J. F. Mintsing, named Sam," and the verdict was giving and delivering liquor to a slave; held no conviction of the offence charged. *The State* v. *Lohman*, Riley 67.

178. Where a clerk received rice from a negro, in the absence of the employer, this was held the act of the owner, under the Statute of 1834, against trading with a negro, unless the contrary was shown. *The State* v. *Berhman*, Riley 92.

179. To warrant a jury to convict on an indictment for the selling of liquor to a negro, it ought to be proven that it was the usual course of business at the defendant's store to retail; one act is not sufficient. *Ib.*

180. Where the owner of a slave allows the slave to traffic with any one, yet if the slave has no ticket or permit in writing from the owner or manager of such slave, the person who shall traffic with him shall be subject to the penalty imposed by the act of 1796. *The State* v. *Stroud*, 1 Brevard 551.

181. Where an indictment is found, under the act of 1796, for trading with a slave without a ticket, it must negative every branch of the exception contained in the enacting clause; and where such an indictment merely alleged that the slave had no ticket from his master, or owner, without adding, "or any other person having the care or management of the said slave;" judgment was arrested. *The State* v. *May*, 1 Brevard 150.

182. Where the master gives money to his slave, with instructions to buy whiskey with it from a person whom the master suspects of having sold whiskey to his slaves, contrary to the statute against selling liquors to a slave without the permission of his master, for the purpose of detecting the offender, if guilty; this does not justify the sale to the slave of whiskey for such money, it not being such a permission to the slave to purchase as the statute contemplates. *Jolly* v. *State*, 8 S. & Marsh. 145.

183. Where, on the trial of such person, the Court instructed the jury that permission to the slave to buy liquor of any one did not satisfy the statute, which required permission to the seller; held that this instruction was improper, as a permission to the slave to buy implied a permission to the vender to sell, and that it should have been submitted to the jury to say whether his master gave the slave permission to buy, or whether the slave was sent to ascertain and fix the fact that the vender would sell without permission, and did so sell; and that if the jury believed the former, they should find for the defendant, if the latter, against him. *Ib.*

184. In Tennessee, the act of 1829, c. 76, which prohibits selling spirituous

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liquors to a slave without a written permit from the owner, is repealed by the act of 1842, c. 141, which makes a verbal permission good. *Taylor* v. *State*, 7 Humph. 510.

185. And where an indictment charges the defendant with selling spirituous liquors to a negro slave, without a written permission from his owner, it is defective. *Ib.*

186. In Tennessee, in an indictment under the act of 1839, c. 47, against a person having the control of a slave, for allowing said slave to trade in spirituous liquors as a free person of color, it need not be charged that the liquor was sold to a particular person; the indictment is sufficient, if it simply avers that the defendant permitted said slave to trade in spirituous liquors as a free person of color. *State* v. *Weaks*, 7 Humph. 522.

187. Where the selling of liquor to slaves, and permitting them to assemble and tipple, does not constitute a nuisance, each offence of selling may be punished separately. *Wilson* v. *Commonwealth*, 12 B. Monr. 2.

188. Where a house is within the definition given in *Smith* v. *Commonwealth* (6 B. Monr. 22), the permission of the owner of the slaves to sell liquor, does exempt the keeper of the house from the penalty of the law. *Ib.*

189. Where an indictment alleges that the defendant permitted slaves unlawfully to be and remain about his house, buying, drinking and tippling, it is sufficient to negative any implication of the owner's permission. *Ib.*

190. Where an indictment lies for a nuisance in the City Court of Lexington, no prosecutor is necessary. *Ib.*

191. To sell spirituous liquors to slaves is not unlawful, unless it be done without the owner's consent; but to allow them to assemble frequently in his house, and sell liquor to them, and permit them to drink and tipple, amounts to a nuisance. *Ib.*

192. A partner who was not present, and against whom there was no evidence that he knew of, or in anywise gave his assent to, the trading of his co-partner with a slave, cannot be criminally responsible for such act of the latter. *The State* v. *Coleman*, Dudly's S. C. 32.

193. In North Carolina, a person is indictable for buying from, or selling to a slave on his own account, even if the owner of the slave has given his permission for that purpose, unless that permission be in writing. *State* v. *Hart*, 4 Iredell 246.

194. An authority cannot be given by any person to the slave of another to sell an article, though that article be the property of the person giving the permission. *Ib.*

195. Where an indictment charges both a selling by a slave and a selling to a slave in the same count, advantage cannot be taken of this, though not strictly proper, by a motion in arrest of judgment after trial; at least such a defect in form is cured by the statute of amendment, Rev. Stat. c. 35, § 12. *Ib.*

196. Any trading with a slave, without a permit from his owner or employer, in buying or selling, for cash or on credit, for much or for little, is an indictable offence under the act of 1817. *State* v. *Von Glon*, 1 McMullan 187.

197. The confession of a clerk, in the absence of his employer, that he had sold wine to a servant-girl, is not evidence to charge the employer, and a new trial will be granted to the absent defendant without prejudice. *State* v. *Boise & Stuke*, 1 McMullan 191.

198. In South Carolina, it is immaterial whether the property sold by a slave, contrary to the act of 1817, to prevent illicit trading with negro slaves, be the property of the slaves, of his master, or of any other person. *State* v. *Anon*, 2 Nott & McCord 27.

199. The owner or master sending a slave with goods, on purpose to entrap the person who might trade for them with the slave, and standing by to see the act of trading, or otherwise to detect the illegal traffic, and not forbidding or sanctioning the transaction, does not thereby legalize such trading. *Ib.*

200. Where defendant had been in the habit of trading with slaves without a permit, and had authorized his clerk so to trade, and knew that his

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negro slave (whom he also kept as a clerk in his store) had traded in the same manner in his shop, to which he made no objection, it is sufficient evidence to presume that he was so authorized by his master as to make the latter liable for the penalty. *Ib.*

201. A negro dealing with the clerk of a shop-keeper without a ticket from his master, or owner, &c., is not sufficient to charge such shop-keeper on an indictment, unless the knowledge of the fact was brought home to him, or some general order proved for that purpose, though the clerk himself is chargeable. *State* v. *Dawson*, 2 Bay 360.

202. Where one sold a horse to a slave belonging to the estate of H., without a written permit, but in the presence and with the assent of an overseer of the estate, whose agency extended no further than to see that the stock of the plantation was properly taken care of, and to give the negro passes when necessary, it was held that such presence and assent did not legalize the trading. *State* v. *Isaacs*, 1 Spears 223.

203. It might be otherwise where the master, owner, or other person having the unqualified control of a slave is present, and assents to the sale. *Ib.*

204. In Alabama, a verbal permission from the owner of a slave to sell "dry goods" to the slave, is too general and indefinite. The permission, whether verbal or in writing, should specify the article to be sold (Dargan, C. J., dissenting); held that the term "dry goods" was sufficiently definite. *Hurt* v. *the State*, 19 Ala. 19.

205. In Alabama, the act of February 7th, 1850 (Pamphlet acts, 1851), renders it unnecessary, in a prosecution for trading with a slave, to aver in the indictment, or to prove, who was the master, owner or overseer of such slave, or to negative his assent to such trading. *Hirschfelder* v. *State*, 19 Ala. 534.

206. The act of February 7th, 1850, which dispenses with the necessity of certain averments in an indictment for trading with a slave, is not unconstitutional. *Ib.*

207. Permission from the owner or master to sell goods to his slave, not expressing the articles to be sold, is not such a consent as the statute requires, and furnishes no protection to the defendant. *Ib.*

208. An indictment (under A. A., 1817 and 1814) for selling liquor to a slave of William Patton, charged the selling to have been without "a written order of or from the said William Boyce (instead of Patton the owner), or of or from any other person having charge or management of said slave." After verdict of conviction, judgment was arrested. *State* v. *Boyce*, Cheves 77.

209. In Alabama, an indictment for selling spirituous liquors to a slave, which alleges that the defendant sold "to one Henry, a slave, the property of one H. M., a certain commodity, to wit, one gallon of whiskey, without the consent of the master, owner, or overseer of said slave, either verbally or in writing, expressing the article permitted to be sold, being first had and obtained," is good, under the act of 1850 (pamphlet acts, 1849–'50, p. 49). *Lindsay* v. *the State*, 19 Ala. 560.

210. An indictment for selling whiskey to a slave cannot be supported by proof of the sale of any other kind of liquor, although the liquor specified is laid under a videlicit. *Ib.*

211. In an indictment for selling to a slave in the night-time, it is not necessary to negative an order of the owner or manager, the offence having been committed in the night-time. *State* v. *Robbins*, 9 Iredell 356.

212. In such an indictment, the slave is sufficiently identified by his name; a further description, by giving the name of the owner, is not necessary. *Ib.*

213. On the trial of an indictment for selling liquor to a slave, without the permission of the owner, master, or overseer, the State must show affirmatively that the liquor was sold without such permission. *McGuire* v. *the State*, 13 Smedes & Marsh. 257.

214. Where one is indicted for selling liquors to slaves, without the permission of their owner, master, or overseer, it is no defence that the master gave his negro permission to exchange

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certain articles with the accused for liquor, without the knowledge of the accused, and for the purpose of detecting him, although the master was present without the accused's knowledge of the transaction. *Bond* v. *the State*, 13 Smedes & Marsh. 265.

215. Under the statute which prohibits buying and selling to and from a slave, without the consent of the owner, master, or overseer of such slave, in writing, an indictment, alleging the buying or selling, "without the consent of the owner," is good. *The State* v. *Saunders*, 9 Port. 326.

216. In an indictment under the statute against selling spirituous liquors to a slave, it is not necessary that the kind of liquor sold should be proved, nor the name of the master of the slave, to show that he is a slave. *Noonan* v. *the State*, 1 Smedes & Marsh. 562.

217. In an indictment for trading with a slave, in Alabama, the allegation that it was without the consent of the master or owner, is not necessary to be proved. *The State* v. *Gaus*, 9 Port. 633.

218. Where an indictment is found for trading with a slave, contrary to the act of 1796, it was held, on motion in arrest of judgment, that trading for an iron band was within the meaning of the act, being within the mischief. *The State* v. *Thornton*, 2 Brevard 408.

219. It is not necessary such indictment should lay the offence to be committed with force and arms, nor need it state the value of the article traded. *Ib.*

220. Where an indictment is brought under the act of 1817, for trading with a slave, without a permit, proof that the slave carried corn into the defendant's kitchen, at his instance, and there left it, is not the less competent to go to the jury as a fact tending to show the illegal trading, because the act of 1834 has provided that similar proof in certain other cases shall alone be sufficient for conviction. *The State* v. *Bowers*, 2 Speers 671.

221. Where one is indicted for selling liquor to a slave, without license, he may have a new trial if it be shown that it was done by his clerk in his absence, and the clerk has been already punished. *The State* v. *Bohles*, 1 Rice 145, 147.

222. In an indictment, under the 3d section of the act of 1834, against selling spirituous liquors to a slave, without a ticket from the master or owner, the defendant need not be described as a "free white person." *The State* v. *Schroeder*, Riley 65.

223. Nor need the defendant be described as a "vender and retailer of spirituous liquors;" it is sufficient to describe him in any one of the characters designated in the act as a vender, retailer, or distiller. *Ib.*

224. Where an indictment charges the defendant with delivering spirituous liquors to "a slave of a person and name unknown," it is indefinite, uncertain, and insufficient. *Ib.*

225. An indictment on the 33d sec. of the act concerning slaves (Rev. Stats. of Missouri, 1018), which charges the sale of one pint of whiskey, without then and there having a written permit from the owner or overseer of said slave, or any one having legal authority over said slave, authorizing said sale, is valid. A "written permit" to do the act, may be equivalent to the "consent in writing," and the want of such consent from the "owner, overseer of the slave, or any one having legal authority over said slave," may be equivalent to the words, want of consent of the "master, owner, or overseer of such slave." *The State* v. *Swadley*, 15 Mo. 515.

226. In Tennessee, an indictment under the act of 1842, c. 141, which charged that the defendant sold spirituous liquors to a slave, the property of A. V., without permission of A. V., is good. If he sold it by permission of the agent of the owner, it is matter of defence which it is not necessary to negative in the indictment. *Martin* v. *State*, 6 Humph. 204.

227. Where an indictment is found for dealing with slaves, it should negative the consent of all persons authorized to give it; and it is not enough to negative that of one only. *Markly* v. *the State*, 10 Mo. 291.

228. In an indictment against a licensed retailer, for permitting a slave to be in his storehouse between sun-

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set and sunrise, without a written permit from his master, under the statute of 1817, c. 227, § 1, in Maryland, must state the names of the slave and his master, if known; if unknown, the fact should be so alleged, and also that there was no license in existence authorizing the slave to remain in the retailer's store within the period prohibited by the statute; and it is not enough to allege that the slave was there at that time, not having a written order or license from his master. *State* v. *Nuttrell*, 1 Gill 54.

229. It is not necessary that the christian name of the owner of the slave should be inserted in an indictment for selling liquor to a slave; an objection of this kind comes too late after verdict; the proper course is by demurrer or motion to quash the indictment. *State* v. *Rudolph*, 3 Hill's S. C. 257.

230. On an indictment under the act of 1834, for dealing with a slave, a receiving by the clerk is prima facie evidence of a buying by the owner of the shop, and makes them both guilty. *State* v. *Berhman*, 3 Hill's S. C. 900.

231. In an indictment under the act of 1834, for selling spirituous liquors to a slave, it is not necessary to describe the defendant as a free white person. *State* v. *Schroder*, 3 Hill's S. C. 61.

232. If the defendant be a vender of spirits, he is liable, under the act, whether he retails or not. *State* v. *Schroder*, 3 Hill's S. C. 61.

233. On an indictment against defendant for selling spirituous liquors to a slave, the count on which he was convicted was for delivering spirituous liquors to a slave of a person and name unknown; held that the count was insufficient, by reason of its generality. *State* v. *Schroder*, 3 Hill's S. C. 61.

235. Under an indictment for selling to a slave, without the consent of his master, one yard of cotton cloth, it is not necessary that the evidence should prove that the cloth sold was of cotton. *State* v. *Newman*, 7 Ala. 69.

236. In South Carolina, a prosecution under the act of 1817, for trading with a slave, not commenced until six months after the offence, is not barred by the act of 1748, as regards the imprisonment. Corporal punishment is not embraced in the words "penalty or forfeiture," both of which were intended to apply to cases where the punishment is pecuniary only. See *State* v. *Fields*, 2 Bail. 554; *State* v. *Free*, 2 Hill's S. C. 628.

237. In South Carolina, although the overseer of a plantation may, at least in the absence of the owner, give the written permit required by the act of 1817, so as to justify a stranger in trading with the slaves placed under his charge, yet he cannot himself legally trade with them without a written permit so to trade from the owner; in virtue of his office as overseer he has no legal right to trade with the slaves. *State* v. *Chandler*, 2 Strobh. 266.

238. In South Carolina, a person who sells liquor to a negro, without a license, may be convicted under the act of 1784, for retailing without a license, and under the act of 1817, for trading with a negro without a ticket for the same act of selling. *State* v. *Sonnerkalb*, 2 Nott & McCord 280.

239. The act of 1834, against dealing with slaves, repeals the act of 1817 on the same subject, so far as regards distillers, venders and retailers of spirituous liquors. This class of persons are exclusively liable under the act of 1834 for the offences therein specified, and must be charged in the words of the act; and, therefore, where defendant was convicted of selling liquor to a slave, on an indictment which did not describe him as a distiller, vender, or retailer of spirituous liquors, and the testimony was that he was a retailer of spirituous liquors, a new trial was ordered. *State* v. *Evans*, 3 Hill's S. C. 190.

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IV. Whipping and beating Slaves, and Indictment therefor—Killing Slaves, and Indictment therefor.

240. In Missouri, an indictment for inhumanly beating a slave, under the statute (R. C. 1845, 406), the name of the owner of the slave need not be alleged. *Grove* v. *State*, 10 Mo. 232.

241. In South Carolina, in an indictment under the act of 1843, for unlawfully whipping a slave without sufficient provocation, the jury are the proper judges whether the provocation was sufficient to excuse the whipping inflicted. *State* v. *Harlan*, 5 Rich. 470.

242. Such an indictment alleged the slave to be the property of Mrs. S.; the proof was that the slave was generally called Mrs. S.'s, that she had had possession of him with the consent of the legal owner, and that in the exercise of full control over him, she had hired him to a third person; held that he was sufficiently described as her property. *Ib.*

243. In Virginia a master is not liable to indictment for beating of his own slave. *Com.* v. *Turner*, 5 Rand. 678.

244. Where a slave throws off the authority of his master, puts himself in a hostile attitude towards him, resists his dominion and control by physical force, showing by his acts, while in a personal conflict with his master, a design to make that resistance effectual in escaping from his dominion and authority, the master has the authority to employ such means, and so much force, to any extent, as will be sufficient to subdue him; but if the slave is not resisting the master by physical force or by hostile acts, and is simply in a state of disobedience, without personal violence towards the master, then the latter can only inflict such punishment as is appropriate to the case, without endangering life or limb. *Dave* v. *the State*, 22 Ala. 23.

245. The slave, without doubt, has the natural right of self-preservation or self-defence; but to avail himself of this for the justification of his acts, he must not be a wrong-doer himself. If, in the perpetration of a wrong, he does an act which he might justify if he were in the right, the law will not protect him on the ground of natural right any more than it will any other wrong-doer. *Ib.*

246. In South Carolina the crime, by act of Assembly, of killing a slave in sudden heat and passion, is a distinct offence from the Common Law crime of manslaughter. *State* v. *Raines*, 3 McCord 533.

247. In South Carolina, the act of 1821, which makes it murder to kill a slave, does not take away from one who is indicted therefor the right of exculpating himself by his own oath; and the fact of a third person coming up at the moment of the death of the slave, after the wounds were given, does not change the nature of the case. *Ib.*

248. In Virginia, a negro slave is a person on whom a free person can commit the offence of unlawful shooting, stabbing, etc., within the meaning of the act of February 9th, 1819. *Com.* v. *Carver*, 5 Rand. 660.

249. The act of 1791, sec. 3, relative to the murder of slaves, is not sufficiently definitive to warrant a court to pass judgment of death upon one convicted under it. *The State* v. *Boon*, 1 Tayl. 246.

250. In South Carolina, under the act of 1740, for killing a negro in heat and passion, the payment of *one fine* is not sufficient; but every one convicted of the offence is individually liable for the whole penalty. *State* v. *Smith*, 1 Nott & McCord 13.

251. The property in a slave is not of the essence of the offence of the murder of him, and it is immaterial whether it be laid in the indictment or not; hence it need not be proved upon the trial as laid;—*query*, if the property be proved different from that laid. *State* v. *Scott*, 1 Hawks' R. 24.

252. One convicted of wilfully killing a slave, with malice prepense, is guilty of murder, and not entitled to benefit of clergy. *Ib.*

253. An indictment for the murder of a slave which concludes at Common Law, is good. *State* v. *Reed*, 2 Hawks 454.

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254. Where an indictment lies for the malicious stabbing of a slave, it can be sustained under the 3d section of the Virginia act of January 28, 1803. *Com.* v. *Chapple*, 1 Virg. Cas. 184.

VII. Miscellaneous.

255. Where one brings a slave into Kentucky, who is not a person within the exceptions of the statute of 1815, although he intends to export, and actually does export, the slave to another State, he is liable to an indictment for such offence. *Commonwealth* v. *Griffin*, 7 J. J. Marsh. 588.

256. Where there is the sale of a free negro, by his own consent, as a slave, under a collusive contract between the seller and the negro that they would divide the proceeds of the sale between them; held that it is not such a sale of a free negro for a slave, as is made felony under the Virginia statute, 1 Rev. Code of 1792, ch. 103, § 28. *Mercer* v. *Commonwealth*, 2 Virg. Cas. 144.

257. Where two persons have a claim to a negro, who is in possession of one of them, the other cannot take him forcibly. *The State* v. *Cooper*, 2 Overt. 96.

258. Where a constable fabricated charges against free persons of color in order to enslave them, and make money thereby; held that he might be indicted and convicted, although the persons injured are absent; and the argument that he acted under a magistrate's warrant will not protect him. *The State* v. *Greenwood*, 1 Rep. Con. Ct. 420.

259. Where a slave belonged to a person in Virginia, and escaped into Massachusetts, after which the owner died; it was held that under the act of Congress of 1793, ch. 51, the slave could be seized without a warrant. *Commonwealth* v. *Griffith*, 2 Pick. 11.

260. The right of property and commerce in slaves is not controlled by the ordinary rules which distinguish other property, and is the subject of internal regulation by the States, over which Congress has no power. *Commonwealth* v. *Griffin*, 3 B. Monr. 208.

261. In South Carolina, the doctrine on the subject of master and servant applies to the relation of master and slave. *Snee* v. *Trice*, 1 Brevard 178.

262. Where one has hired a slave, he cannot be indicted for a battery on him, committed during the hiring; but the owner may recover damages for an injury depreciating his value. *The State* v. *Mann*, 2 Dev. 263.

263. Upon the trial of a presentment upon the statute, 1 Rev. Code, ch. 111, § 13, against the occupier of a tenement, for knowingly allowing more than five slaves to be and remain at one time on his lot or tenement, without consent of the owners, where the prosecutor shows the assemblage of more than five slaves, the onus probandi lies on the defendant to show the consent of the owners. *Connor's case*, 5 Leigh 718.

264. To support a prosecution for the offence created by the first section of the act to suppress the circulation of incendiary publications, passed March 23d, 1836, the person who is accused must be a member or agent of an abolition or anti-slavery society. *Barrett's case*, 9 Leigh 665.

265. An indictment will lie, under the statute of 1822–'3, ch. 84, against a free person for wilfully, and without lawful authority, injuring, by assaulting and beating, the slave of another. *Howard's case*, 11 Leigh 631.

266. In Virginia, upon an indictment under the statute, 1 Rev. Code, ch. 111, § 28, for selling a free negro for a slave, the proof of the sale was a written agreement importing that the accused sold the negro to the vendee, for which he was to deliver and pay goods and money to the vendor; but the vendee was to take the negro on trial for a month, and if at the end thereof the vendee liked him, he was to pay the price, and the vendor was to give the bill of sale; the vendee paid a small part of the purchase-money, but the negro ran away within the month, and upon suspicion that he was a free negro, or had been stolen by the accused, was apprehended within the month; held, 1st, that the sale of a free negro, to make it a felony within the statute, must be an absolute sale;

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2d, that the contract in this case was, in its terms, a conditional sale, to be affirmed or annulled at the vendee's option within a month; but if affirmed by him, the sale then became absolute, and the felony was complete; and 3d, that such affirmance of the sale by the vendee might be shown, either by positive act of the vendee, or by mere lapse of time, without any act of the vendee affirming or annulling the sale. *Nix's case*, 11 Leigh 636.

267. The master or overseer, and not the slave, is the party to judge whether the slave is too sick to be able to labor; the latter cannot, therefore, resist the directions of the former to go to work. *The State* v. *Abram*, 10 Ala. 928.

268. Evidence that a slave ran away from his owner while in the act of inflicting corporal punishment, and was afterwards found in possession of a man who claimed to be his owner, is not enough to support a conviction for negro-stealing. *Carey* v. *the State*, 7 Humph. 500.

269. The corpus delicti must be established in some mode by positive or presumptive testimony before the presumption of guilt, arising from the possession of a runaway slave, will attach to such possession, and throw the burden of exculpation upon him. *Ib.*

270. In this case, the case of *Tyner* v. *State* (5 Humph. 383), was cited and approved. *Ib.*

271. The act of 1819 (Rev. Stat. ch. 34, § 60,) forbidding any person from passing counterfeit bank-bills, &c., does not embrace slaves. *State* v. *Slave*, Busbee N. C. R. 214.

272. A statute must mention slaves, to bring them under its penalties. *Ib.*

273. A master shall not maim his slave (as castrating him), for the purpose of his moral reform. *Worley* v. *the State*, 11 Humph. 172.

274. Where a white person procures a slave to commit an assault, with intent to commit murder in the first degree on a free white person, he shall be punished by imprisonment in the penitentiary as white men are punished under the Tennessee code of 1829, for that offence, and not as slaves are punished by the act of 1835, ch. 10. *The State* v. *McCarn*, 11 Humph. 494.

275. In Virginia, to sustain an indictment under section 24, chapter 10, session acts of 1847–'8, for punishing any free person who, speaking or writing, shall maintain that owners have no right of property in their slaves, the government must show in the alleged speaking that the defendant denied the right of owners to property in slaves, and that this denial was maintained by him; the denial must be in express terms or necessarily implied. *Bacon* v. *Commonwealth*, 7 Gratt. 602.

276. In North Carolina, the presumption is that a black man is a slave. *The State* v. *Miller*, 7 Iredell 275.

277. A battery committed on a slave, no justification or circumstances attending it being shown, is an indictable offence; but every battery on a slave is not indictable, because the person making it may have matter of excuse or justification which would be no defence for committing a battery on a free person; each case of this sort must in a great degree depend on its own circumstances. *The State* v. *Hale*, 2 Hawks 582.

278. The presumption of law is in favor of freedom. *The State* v. *Dillahunt*, 3 Harrington 551.

279. A convict servant is a free man for the purpose of giving evidence, as well as of punishment. *The State* v. *Griffin & Wilson*, 3 Harrington 560.

280. Section seventeen of the criminal code applies to others as well as the owners of such convicts. *Ib.*

281. Betting is not necessary to constitute the offence of gaming with a negro, under the act of 1834. *The State* v. *Nates*, 3 Hill's S. C. 200.

282. A master who carries off his slave is liable under the act, though the slave is afterwards brought back, tried and punished. *The State* v. *South*, 5 Rich. 490.

283. Permitting a man's slaves to meet and dance on his premises on Christmas eve, or other holidays, even though other slaves, with the permission of their masters, participate in the enjoyment, and though some of the younger members of the owner's family

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occasionally join in the dance, does not constitute the offence of keeping a disorderly house, or any other offence. *The State* v. *Boyce*, 10 Iredell 536.

284. It is not competent for owners of slaves or their counsel, to consent to the removal of a criminal cause against such slave; it cannot be otherwise removed than on affidavit. *The State* v. *Poll*, 1 Hawks 442.

285. If it appears that an offence not capital, committed by a slave, has been done by the counsel, persuasion, or procurement, or other means, of a free white person, he or she shall be prosecuted for the offence, and, if found guilty, shall incur the same punishment as if he or she had actually committed the crime or misdemeanor with which the slave is charged. *Berry* v. *the State*, 10 Ga. 511.

STATUTES.

1. The Court derives its authority to act in criminal matters, not from particular statutes, but from the act which constitutes it a Court. *State* v. *Wilbor*, 1 R. I. Rep. 199.

2. Where a statute is in part repealed or altered, the power of the Court is not affected; but it is called upon to consider the original and amendatory act together, and ascertain and carry into effect their intent where the forms of law through which it must act allow. *Ib.*

3. Where an amendatory act prescribed a mode of distributing the penalty imposed different from the mode prescribed by the original act, it was holden that the amendment did not affect the offence or operate a repeal of the penalty, but only changed the form of the judgment by which it was to be distributed. *Ib.*

4. Where an indictment concludes by charging an offence to have been committed "against the form of the statute," the indictment will be sustained, though the offence is the creation of a number of "statutes." *Ib.*

SUMMARY CONVICTION.

1. Since the power of summarily convicting offenders is in derogation of the Common Law, it must be strictly confined to special statutes, from which its force is derived. *The People* v. *Phillips*, 1 Parker's Criminal Reports 95.

2. The restrictions and regulations concerning these convictions, established by the higher Courts in England before the Revolution, were declaratory of the Common Law, and are in force in this State, unless they have since been repealed or altered by statute. *Ib.*

3. It is necessary that a record should be made up in every such case as a prerequisite to commitment; and a magistrate who commits without having so done, will be liable as a trespasser. The reasons of its necessity are:

1st. For protection of the defendant, that he may not again be convicted of the same offence.

2d. For protection of the magistrate; since a proper record is conclusive evidence in his favor, in cases within his jurisdiction.

3d. In the absence of an appeal, the only way in which the defendant can obtain a review of the sentence is by habeas corpus, or certiorari based on the record. *Ib.*

4. It is necessary that there should be greater certainty in such records than in indictments, because they are taken as true against the defenndant; and nothing will be presumed in favor of the commitment, but the presumption will be against it. *Ib.*

5. Although there is no jury trial, it is necessary that the proceedings should be according to the course of the Common Law in trials by jury.

6. An information or charge is first necessary, and the accused must be summoned and have an opportunity to make his defence. *Ib.*

7. The evidence, in order to sustain the charge, must be such as the Common Law approves, unless otherwise specially directed by statute. *Ib.*

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8. A conviction, judgment and execution, all according to the course of the Common Law, are necessary. *Ib.*

9. The record is intended to show the regularity of the proceedings, and that the sentence is sustained by legal evidence; therefore, everything necessary to sustain a conviction must appear upon it. It must set out:

1st. The particular circumstances of which the offence consists, to show that the magistrate has complied with the law, and has not exceeded his jurisdiction. A mere description of the offence in the terms of the statute is insufficient.

2d. The plea of the accused, whether confession or denial.

3d. The names of the witnesses, in order to show their competency.

4th. That the evidence was given in the presence of the defendant, that it may appear he had an opportunity to cross-examine the witnesses.

5th. The entire evidence, both for prosecution and defendant, so far as applicable to the charge, in order to show that every material averment was sustained by proof.

6th. An adjudication of the guilt of the defendant, which must be exact and precise, since judgment for not enough is as bad as too much. *Ib.*

SUNDAY.

1. The Christian religion is recognized as constituting part of the Common Law; its institutions are entitled to profound respect, and may well be protected by law. *Shover* v. *State*, 5 Eng. 259.

2. The Sabbath, properly called the Lord's Day, is amongst the first and most sacred institutions of Christianity, and the act for the punishment of Sabbath-breaking (Digest, ch. 51, part 7, art. 5, p. 369) is not in derogation of liberty of conscience secured to the citizen by the 3d section of the Declaration of Rights. *Ib.*

3. In an indictment under the above act for keeping open a grocery on Sunday, it is not necessary to aver that it was kept open with any criminal intent—keeping it open on that day is the gist of the offence. *Ib.*

4. When the fact of keeping the grocery open on the Sabbath is established, the law presumes a criminal intent, and the defendant must excuse himself by showing that charity or necessity required it. *Ib.*

5. Keeping a grocery door open on the Sabbath is a temptation to vice, and therefore criminal. *Ib.*

6. In such an indictment, it is not necessary to aver that the person charged with keeping open the grocery is the owner of it; but if alleged, it must be proven. *Ib.*

7. Any person who has control of a grocery, may be indicted for keeping it open on a Sunday, whether he be the owner or not. *Ib.*

8. Where an exception is contained in a clause subsequent to that creating the offence, an indictment need not state that the defendant does not come within the exception, otherwise where the proviso or exception is in the same clause of the statute. *Brittin* v. *State*, 5 Eng. 299.

9. An indictment for keeping open a store on Sunday need not aver a criminal intent; the statute makes the act itself an indictable offence. *Ib.*

10. Where a statute made it an offence for "any person to keep open tippling-houses on the Sabbath day," it was held that when one kept open a tippling-house on the Sabbath day, it was a violation of the Sabbath. *Hall* v. *the State*, 3 Kelly 18.

11. A profanation of Sunday, by performing labor on that day, is not an indictable offence in this State. *State* v. *Williams*, 4 Iredell 400.

12. The sale of liquor by an innholder on Sunday is not within the act against the profanation of the Lord's Day, he being obliged by his occupation to keep a public house of entertainment at all times. *Hall* v *State*, 4 Har. Rep. 132.

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TREASON.

1. The offence of adhering, and giving aid comfort to the public enemies of the United States, is not held to be treason against the people of the State of New York; and where an indictment charges the offence to have been committed against the people of the State of New York, it will be quashed. *People* v. *Lynch*, 11 Johns. 549. Treason against the United States is a matter over which the State Courts have no jurisdiction. *Ib.*

2. The going from an enemy's squadron to the shore, in order peaceably to procure provisions for the enemy, did not amount to an act of treason, as this conduct rested in the intention, which is not punishable by the laws of the United States. *U. States* v. *Pryor*, 3 Wash. C. C. 234.

3. If the intention of the defendant had been to procure provisions for the enemy, by joining with him in hostilities against the citizens of the United States, his progressing towards the shore would have been an overt act of favoring the enemy, though no other act was committed. *Ib.*

4. A resistance of the execution of a law of the United States, attended with any degree of force, if for a private purpose, is not held to be treason. *U. States* v. *Hoxie*, Paine 265.

5. If the overt act of treason is established, and laid before the crime was presented, it is sufficient; and whether it was committed by the number of insurgents mentioned in the indictment, is immaterial. *U. States* v. *Vigol*, 2 Dall. 346.

6. As to what is treason by way of levying war against the United States, how it is to be proved, Ib. *U. States* v. *Mitchell*, 2 Dall. 348.

7. As to what number and addition of jurors to be returned, and the form of the panels in trials for high treason, in the United States Circuit Court for districts of Pennsylvania. *U. States* v. *the Insurgents*, 2 Dall. 335.

8. In an indictment for misprision of treason, the word "alleged," must be spoken with a malicious, and mischievious intention, and drunkenness is held to be no justification. *Respublica* v. *Weidle*, 2 Dall. 88.

9. Enlisting in the service of an enemy is clearly held to be treason, and nothing will justify such act but the fear of immediate death. *Respublica* v. *McCarty*, 2 Dall. 86.

10. Any assemblage of men, for the purpose of revolutionizing by force the government established by the United States in any of its territories, although as a step to, or the means of executing some greater projects, constitutes a levying of war. *Ex parte* Ballman, 4 Cranch 75.

11. But the travelling of individuals to the place of rendezvous, is not enough; the meeting of particular bodies of men, and then marching from places of partial to places of general rendezvous, is considered to be such an assemblage. *Ib.*

12. Where war is levied, all those who take any part in it, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are regarded as traitors. *Ib.*

13. To constitute a levying of war, there must be an assemblage of persons for the purpose of carrying into effect by force a treasonable purpose; enlistment of men to serve against government, is not enough. *Ib.*

14. There must be an actual enlistment of the person "persuaded" to join the enemy in order to constitute treason in the "persuader." *Roberts' case*, 1 Dall. 39.

15. Words showing the prisoner's intention to join the enemy, are proper, as evidence to explain the motives upon which the intent was afterwards carried into effect. *Respublica* v. *Malin*, 1 Dall. 33.

16. Where an overt act has been shown, where the indictment is laid, the defendant's confession may be offered in evidence, to corroborate that proof. *Roberts' case*, 1 Dall. 39; *Respublica* v. *McCarty*, 2 Dall. 86.

17. In an indictment for treason, it is sufficient to lay that the defendant sent intelligence, without alleging the particular letter or its contents. *Carlisle's case*, 1 Dall. 35.

18. The mere charge of levying war

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is not sufficient; but assembling, joining, and arraying with the forces of the enemy, is held to be a sufficient overt act of levying war. *Ib.*

19. Proof that the prisoner had a power to grant passes, when a city was in possession of the enemy, ought to be admitted, but is not conclusive evidence of his "holding a commission under the enemy." *Ib.*

20. But proof of his seizing salt, or disarming the Americans, is not evidence of his "holding a commission" under the enemy, though it may establish his having joined them. *Ib.*

21. Proof may be given of an overt act of treason, committed in another county, after an overt act is shown to have been committed in the county where the indictment is found. *Malin's case*, 1 Dall. 33.

22. On a trial of high treason, a copy of a letter, said to be written by several leaders of the insurrection, was ruled out unless it could be shown to be one of the copies circulated during the insurrection. *U. States* v. *Mitchell*, 2 Dall. 348.

23. An act which was committed with a felonious intention, for which another indictment was depending, cannot be offered in evidence upon an indictment for high treason. *Ib.*

24. In order to constitute the offence of treason against the United States, there should be a conspiracy to resist generally and publicly by force, and an actual resistance by force, or by intimidation of numbers, against a law of the United States. *United States* v. *Hanway*, 2 Wallace, Jr. 139.

25. Where there is a conspiracy to resist by force the execution of such law in particular instances only, a conspiracy for a personal or private, as distinguished from a public and national purpose, it is not treason, however great the violence or force or numbers of the conspirators may be. *Ib.*

26. On an indictment for treason, everything which tends to prove that there was an intention to make public resistance to a law of the United States, is entirely evidence in chief, and cannot be received in rebuttal. *Ib.*

27. On an indictment for treason, the intent of the act being necessary, it is competent to prove that a long time (say within nine months) before the alleged treasonable occurrence, facts had occurred, and rumors prevailed in the neighborhood, which would explain certain particulars relied on to show treasonable intent and make them show a different intent. *Ib.*

28. Where a person stands indicted for treason, along with the defendant in another indictment not now trying, he is a competent witness for him in an indictment now trying and in which such person is not included. *Ib.*

TRESPASS.

1. In Missouri, a prosecutor is not needed on an indictment for a trespass on school lands; a prosecutor only indispensable in case of trespasses on private property. *State* v. *Roberts*, 11 Mo. 510.

2. Where an indictment alleges that the defendant "with force and arms, unlawfully, wilfully, and maliciously did break in pieces and destroy two windows in the dwelling-house of M. C., to the great damage of the said M. C., and against the peace," &c., it does not charge an offence indictable by the laws of this State. *Kilpatrick* v. *the People*, 5 Denio 277.

3. Where an act would otherwise be only a private trespass, it does not become indictable by being charged to be done with force and arms. *Ib.* Nor would such act become indictable by being alleged to have been committed maliciously, or without claim of right or without any motive of gain. *Ib.*

4. Whether if the breaking of the windows in this case had been charged to have been done secretly, or in the night-time, the act would have been indictable,—*Quere*. Per Beardsley, C. J. *Ib.*

5. Where indictments have been sustained for maliciously killing or wounding domestic animals, it was in

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cases depending upon features peculiar to such offences, as the depravity of mind and the cruelty of disposition which such acts evince. *Ib.*

6. Where several persons are indicted for a trespass, it is not a matter of right for any of the defendants to insist, on the trial, that the jury should be required to pass upon the guilt or innocence of any of the others, before they pass upon the whole; this is a matter of discretion in the presiding judge, a discretion rarely, if ever, used, except in cases where there is no evidence against a part of the defendants, or where the Court is satisfied that the persons are made defendants to prevent their being examined in the case. *The State* v. *Bogue*, 9 Iredell 360.

7. The gist of the offence of forcible trespass, is a high-handed invasion of the possession of another, he being present; title is not drawn in question. *The State* v. *McCauless*, 9 Iredell 375.

8. If two are in the same house, the law adjudges the possession in him who has title; but not so as by relation back, to make the other guilty of a forcible trespass, when the entry was with force. *Ib.*

TRIAL.

I. Trial in criminal cases. General principles on.
II. Joint and separate trials.

I. Trial in Criminal Cases—General Principles on.

1. A party may be tried at the same time for different offences charged in the same indictment if the offences are of the same grade, and subject to the same punishment. *People* v. *Gales*, 13 Wend. 310.

2. It is in the discretion of the Court whether a prosecutor shall be compelled to elect on which count of an indictment he shall proceed; where the same offence is alleged in different forms, the Court may very properly refuse to compel an election. *The State* v. *Jackson*, 17 Mo. (2 Bennett) 544.

3. It is erroneous to admit illegal evidence and afterward exclude it by instructions; the injury may be too deeply rooted in the minds of the jury to be easily eradicated. *The State* v. *Mix*, 15 Mo. 153.

4. It is erroneous to admit illegal evidence against the accused, in spite of his objections, and after it may have impressed the jury unfavorably towards him, to undertake a reparation by instructions. *The State* v. *Wolf*, 15 Mo. 169.

5. It is the right of either party, where the statute makes it necessary to take down the witness' testimony in writing, to have the testimony of the witness read over to him, in his hearing, in order that he may correct and improve it; and if the Court remarks in the presence and hearing of the jury, "never mind reading over the testimony taken down on cross-examination, it does not amount to much, any way," it will be an error of the Court. *Crawford* v. *the State*, 12 Ga. 142.

6. Where the county surveyer, who was a witness for the prisoner, illustrated his evidence with a diagram which he had himself made, showing the relative situation and distances from each other, of several places near the scene of the murder, and the diagram was introduced without objection from the State, and the witness was cross-examined on it; held that it was in the discretion of the Court to allow the jury to take it with them on their retirement, and its exclusion from them was not a matter for review on error. *Campbell* v. *the State*, 23 Ala. 44.

7. In North Carolina, upon the second removal of a cause, under the acts of 1821 and 1822, the trial may take place on the papers that were sent with the first removal of the cause. *The State* v. *Lewis*, 3 Hawks 410.

8. Where a case is carried up to the Circuit Court of Missouri from a Justice's Court, a trial should be had de novo, and it is error to reverse the

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judgment below and give judgment against the party recovering below. *Duncan* v. *Travis*, 4 Mo. 369.

9. The Circuit Court should not permit juries to take law books to their room for the purpose of investigating the law of the case, but they may be permitted to take a law book in their retirement when the paragraph applying to the case is separately marked out, as in the case of a statutory provision. *Hardy* v. *State*, 7 Mo. 607.

10. Where the presiding judge remarks, on determining certain motions to quash an indictment, that he had doubts about the law, and would give the State the benefit of them, because the State was not allowed to carry the case to the Supreme Court; it was held to be neither an error nor an irregularity. *Cook* v. *State*, 11 Geo. 53.

11. It is erroneous for the Court, when requested to prevent it, to allow counsel to comment in their argument to the jury, on facts not put in evidence. *Mitchum* v. *State*, 11 Geo. 615.

12. In New Jersey, if a defendant is arrested upon a warrant, and enters into bonds (according to sec. 10 of the Small Cause act, Rev. Laws 630), for his appearance before the justice, and fails to appear at the day, the justice cannot proceed to trial in his absence, nor render judgment against him. *Camman* v. *Randolph*, 2 Halst. 136.

13. Counsel have a right to correct misrepresentations of the evidence made by counsel in argument, and it is improper for the Court not to allow the correction to be made by recalling the witness when in Court, by referring to the testimony required to be taken down in cases of felony. *Long* v. *State*, 12 Geo. 293.

14. Unless the rights of parties be affected, the Supreme Court will not lay down rules as to the manner of intercourse between the bench and the bar during a trial. *Ib.*

15. A judge in a criminal trial may properly correct counsel when they mistake the evidence, but has no right to express an opinion on the facts of the case. *Bill* v. *People*, 14 Ill. 432.

16. When a proper and legal request is made to the Court to instruct the jury, the party making such request is entitled to have the instructions prayed for given to the jury in the manner requested, and it is erroneous for the Court to say to the jury "such is the law," in responding to such request. *Davis* v. *the State*, 10 Geo. 101.

17. It is not a sufficient justification for a person who does an unlawful act, to show that he did not believe it unlawful. When the act is unlawful and voluntary, the quo animo is inferred necessarily, from the act itself. *State* v. *Presnell*, 12 Iredell 103.

18. A charge predicated on a state of facts which the evidence does not tend to establish, is abstract, and should be refused, although it may assert a correct legal proposition. *Murray* v. *State*, 18 Ala. 727.

19. In New Jersey, a prisoner cannot be tried by two justices of the peace on a charge for larceny without an accusation in writing. *State* v. *Quigg*, 1 Green 293.

20. It is proper for a party, after having closed his case so far as relates to the evidence, to introduce additional evidence by the cross-examination of the witnesses on the other side, for the purpose of more fully establishing his case. *Com.* v. *Eastman*, 1 Cush. 189.

21. The act of assembly restraining judges from expressing to the jury an opinion as to the "facts" of the case, only applies to those "facts" respecting which the parties take issue or dispute, and on which, as having occurred, or not occurred, the imputed liability of the defendant depends. *State* v. *Angel*, 7 Iredell 27.

22. Upon a question of law addressed to the Court, the judge is under no obligation to hear an argument from the prisoner's counsel, if his opinion is already formed. *Howel* v. *the Com.*, 5 Gratt. 664.

23. A request by the accused in a criminal prosecution that the Court would instruct the jury upon a legal point which was relied on in the defence, prevents him from objecting to the authority of the Court to instruct the jury, though unfavorably to him upon that point. *The State* v. *Madison*, 33 Maine (3 Red.) 267.

24. When the evidence disclosed that the defendant presented a gun within

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shooting distance of and against the prosecutor, who was then armed with a knife, and about to attack the defendant, that is no assault if there was no attempt to use the gun or intention to use it, unless first assaulted with the knife. *State* v. *Black*, ——— 79.

25. When a jury disagree with regard to the evidence, and return to the Court for further instructions, it is no error for the judge to remark that it was more probable the recollection of a majority of the jury was correct than that of the minority, as there was nothing to show it was intended to instruct the minority to yield their opinion. *Ib.*

26. A judgment in a criminal case will be reversed where there was an omission or want of an arraignment of the prisoner. *Powell* v. *U. States*, 1 Morris 17.

27. Held that upon the trial of an indictment for murder, when death has ensued, the defendant cannot be convicted of a simple assault and battery, though he may be convicted of manslaughter. *Burns* v. *the People*, 1 Parker's Crim. Rep. 182.

28. There is not any fixed form of words in which the minute entries of Courts are required to be made. They should show substantially that all was done at the trial which the law requires to be done, and this should be set down in fit and expressive words; but the form adopted in England, and followed in some of the United States, is not indispensably necessary to their legal sufficiency. *Crist* v. *State*, 21 Ala. 137.

29. Although a trial may continue through several days of the term, and the adjournment and re-assembling of the Court may be noted by the Clerk on the minutes; yet, all that is recorded therein, from the beginning of the trial to the judgment, must be regarded as but one entry, and the whole may be looked to, to ascertain its sufficiency. *Ib.*

30. Where the minute entry in the record recited: "Thereupon came a jury, to wit: (here follow their names) good and lawful jurors, who were selected and impanelled, well and truly to try the issue joined between the State of Alabama and the said defendant, and the trial of the said cause commenced," and that the Court adjourned in the evening until the following morning, the trial not being finished, and the next minute entry, after reciting that the Court reassembled on the following morning, continues: "Thereupon, also, came the defendant and his counsel, as also the counsel for the State, together with the jury that had been impanelled and sworn as aforesaid, and the trial of said cause was resumed; and after the evidence of all the witnesses had been given in, and the argument of counsel had been heard, the jury received the charge of the Court, and retired in charge of the sheriff to make up their verdict, and now return into Court, and on their oaths do say," &c., it was held that it sufficiently appeared from the record, that the jury was sworn; and that the Appellate Court would presume they were sworn before the testimony was heard. *Ib.*

31. Where the jury, in a criminal case, is sworn "well and truly to try the issue joined between the State of Alabama and the said defendant," and the record shows that the defendant had been arraigned on an indictment for murder, and that he had pleaded "not guilty," the oath is a sufficient compliance with the requirements of the forty-sixth section of the tenth chapter of the Penal Code. (Clay's Digest 458.) *Ib.*

32. Whether the objection can avail in any case that the past, instead of the present tense, is employed in recording the action of the Court and jury—*Quere*. *Ib.*

33. It is not the duty of a Court, in conducting a trial, to determine abstract propositions submitted by counsel (*e. g.*, whether certain testimony which had been given, had a bearing upon the issue, or only upon the credit of witnesses); it is sufficient if the Court respond to all objections to testimony taken by either party, and give the proper instructions to the jury. *People* v. *Cunningham*, 1 Denio 524.

34. Where a principal in a case of murder was tried, and the Court appointed counsel to assist the prosecuting attorney at his request (the prisoner's counsel not objecting), and the

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same counsel promised, at the request of the Attorney-General, to assist the prosecution on the trial of the accessory, without charge; he was permitted to assist on the trial, the counsel for the prisoner not having objected before the jury were impaneled. *Com.* v. *Knapp*, 9 Pick. 496.

35. Where a prisoner, indicted for murder, upon his arraignment pleads not guilty, "and for his trial puts himself on his country," this is sufficient without his saying "on God and his country." *State* v. *Reeves*, 8 Iredell 19.

36. One who is prosecuted by indictment or information, has, by the Constitution, his right to a speedy and impartial trial. He shall not be unnecessarily hindered and delayed in his efforts to relieve himself from the burden of an onerous charge of crime. *Nixon* v. *State*, 2 Smed. & Marsh. 497.

37. A bill of particulars affects the proof and the mode of trial only, and not the indictment; it is no part of the record, it is not open to demurrer. *Com.* v. *Davis*, 11 Pick. 432.

38. When a prisoner is confined after sentence, a motion to take up his case out of its turn, without proof of notice to the Attorney-General, cannot be entertained. *Stone* v. *State*, 1 Spencer 404.

39. If a deaf and dumb prisoner be arraigned, the indictment must be explained to him by an interpreter, sworn for that purpose, and the trial will then proceed in the usual manner. *Com.* v. *Hill*, 14 Mass. 207.

40. Where insanity in a person indicted is alleged or suspected, the most discreet and proper method of deciding the question of insanity in an important case, is a trial by jury; but other modes may be adopted, in the discretion of the Court. *Freeman* v. *People*, 4 Denio 9.

41. A complaint for a breach of Sabbath, exhibited by a tithing-man to a justice of the peace, is not an information under the 9th section of the first article of the Constitution of Connecticut, and consequently the defendant is not, on the prosecution of such complaint before the justice, constitutionally entitled to a trial by jury. *Goddard* v. *State*, 12 Conn. 448.

42. In Indiana, in criminal cases, except petit misdemeanors, the State, as well as the defendant, may insist on a trial by jury. *State* v. *Mead*, 4 Blackf. 309.

43. And if the State claim a jury in such criminal case, but the Court notwithstanding try the cause without a jury and acquit the defendant, the trial is a nullity. *Ib.*

44. In Missouri, the provision of the statute (R. C. 1845) directing the trial of a person guilty of felony in that State, on board of any vessel in the course of a voyage, to be had in any county through which such vessel shall pass, or at which such voyage shall terminate, is held constitutional. *Steerman* v. *the State*, 19 Mo. 503.

45. Where a defendant has pleaded not guilty to an indictment, the judge cannot try the prisoner on the indictment, even with his consent. *Neales* v. *State*, 10 Mo. 498.

46. A party indicted under the act of 1817, ch. 227, may submit his case to be tried by the Court; there is nothing in the fourth section of this act, which authorizes the inference that cases arising thereunder must necessarily be tried by a jury. *State* v. *Fearson*, 2 Md. 310.

47. The act of 1809, c. 144, puts the Court, in cases submitted to them for trial, in the place of the jury on the question of the innocence or guilt of the accused, and at the same time gives them power to hear evidence in mitigation of the offence, and to decide and pronounce judgment accordingly. It is a power conferred on the courts for the benefit of the accused, to be exercised only at his election. *Ib.*

48. It is well settled, that where a jurisdiction is once conferred, it cannot be ousted by implication. *Ib.*

49. In this case the traverser pleaded not guilty, and thereupon submitted to the Court for trial; held that a technical joinder of issue on the plea of not guilty, is unnecessary in such a case. *Ib.*

50. Such a joinder of issue need not appear in the record, in jury trials before Courts of Oyer and Terminer and jail delivery; and the act of 1809, ch. 144, confers the same power upon the county courts as was formerly pos-

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sessed by the Court of Oyer and Terminer, but materially enlarged for the benefit of the accused; and there is no reason why the same forms of proceeding should not be observed in both Courts. *Ib.*

51. The prosecution is not confined to the list of witnesses endorsed on the indictment, and furnished previous to the arraignment; but that the Circuit Court, in the exercise of a sound discretion, and having a strict and impartial regard to the rights of the community and the prisoner, may permit such other witnesses to be examined as the justice of the case may seem to require. *Gardiner* v. *the People*, 3 Scam. 83.

52. The statute simply provides that the accused, in capital cases, shall be entitled to have a copy of the indictment and of the venire, two entire days before his trial, and is silent as to who shall furnish them. He has, therefore, a right to look to the Court, and it is surely the duty of the Court to see it done by some one of its officers, and there is none more proper than the sheriff to serve the prisoner with such copy. *Friar* v. *the State*, 3 Howard's Miss. R. 422.

53. The district attorney is the officer appointed to prosecute; and so far as official acts on prosecutions are required by law to be done in a particular way, or to assume permanent character, he is required, and, indeed, the only one authorized to discharge such duty. For instance, the indictment must be signed by him, and all other proceedings where an official act on the part of the State is necessary. But when all the preliminaries to trial have been duly performed, it is not error that other counsel should appear on the trial in his stead. *Byrd* v. *the State*, 1 Howard's Miss. R. 247.

54. Prisoners might refuse to be put on their arraignment until furnished with "a copy of the indictment, and a list of the witnesses who gave testimony before the grand jury;" but the neglect or omission to demand this copy and list of the witnesses, on the arraignment, was a waiver of the right, and left it discretionary with the solicitor-general, after arraignment, whether he would or would not furnish a copy of the indictment and list of witnesses. *State* v. *Calvin and others*, R. M. Charlton's R. 142.

55. A witness who had not been sworn to give testimony before the grand jury, could not be sworn and examined on the trial of the accused before the petit jury. *Ib.* *Quere*—But suppose that notice had been given by the solicitor, that he intended to apply for a witness' name to be recorded on the bill, which notice allowed time for an inquiry as to character; was not this a compliance with the requisition and object of the Penal Code? *Ib.*

56. Under the 18th section of the 14th division of the Penal Code, which is in these words: "Any person against whom a true bill of indictment is found for an offence not affecting his or her life, may demand a trial at the term when the indictment is found, or at the next succeeding term thereafter, which demand shall be placed upon the minutes of the Court; and if such person shall not be tried at the term when the demand shall be made, or at the next succeeding term thereafter, provided that at both terms there were juries impanelled and qualified to try such prisoner, then he or she shall be absolutely discharged and acquitted of the offence charged in the indictment. *Durham* v. *State*, 9 Ga. 306.

57. Where the statute says that on the trial of all indictments a defendant may plead the general issue, and give in evidence any and every matter of defence, the statute means matter in bar of the prosecution, not mere matter in abatement. *Uterburgh* v. *State*, 8 Blackf. 202.

58. The defendant, by pleading not guilty, admitted the name by which he is designated in the indictment, and is estopped by that admission from afterward denying that to be his name. *Ib.*

59. The Court will not hear a motion made by the counsel of the prisoner to compel the State's attorney to elect on which count in the indictment he would try the prisoner, before swearing the jury and charging them with the case and reciting the indictment. *Stephen* v. *State*, 11 Geo. 225.

60. In Missouri, the statute which

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requires prisoners indicted and imprisoned, to be released, in case they are not brought to trial during the second term after the indictment was found, has reference to pending indictments only; and where the prisoner has been imprisoned under an indictment which has been quashed, the time of such imprisonment cannot be added to the time of his imprisonment under a new indictment for the same offence. *Fanning* v. *State*, 14 Mo. 386.

61. Where the two days are computed in which a prisoner indicted capitally, in Alabama, is entitled to have a list of the jurors before the trial, the day of delivery and the day of trial are to be excluded. *State* v. *McLendon*, 1 Stew. 195.

62. Under the Alabama statute, where a prisoner is not indicted and tried before the second term of the court after his commitment for treason or felony, he is entitled to his discharge, although the trial be prevented by an unavoidable adjournment of the court; unless the delay be on his own application, or with his consent. *State* v. *Phil*, 1 Stew. 31.

63. A list of the witnesses whom the prosecution intend to call on the trial of an indictment, need not be furnished the prisoner, as of those sworn on the finding of the indictment. *Com.* v. *Walton*, 17 Pick. 403.

64. Where judgment has been arrested in case of an indictment for a felonious offence, because of the defect and uncertainty of the verdict, it was held that the defendant might be tried a second time on the same indictment. *Hatton's case*, 3 Gratt. 623.

65. Although a prisoner has put in a general plea to an indictment containing two counts, yet the jury may be sworn and charged with respect to one of the counts only, to the exclusion of the other. *Burk* v. *State*, 2 Har. & J. 426.

66. It would seem, if a defendant be "discharged" for want of prosecution upon an indictment, that he cannot be afterwards arraigned or tried under that indictment. *State* v. *Garthwaite*, 3 Zabris. 143.

67. But such discharge is no bar to a subsequent indictment for the same offence, or to the trial upon it; and a plea of such former indictment and discharge is bad upon demurrer. *Ib.*

68. By the penal code of Georgia, 14th division, section 18, a defendant is entitled to make his demand for a trial at the first, second, or any subsequent term of the court. *Denny* v. *State*, 6 Ga. 491.

69. And where, at the second term, the demand for a trial was made and entered on the minutes, and an order passed that the defendant be tried at the next term or discharged, the presumption is that the Court, in passing the order, did its duty, and that it would not have been granted unless there was a jury present qualified to try the issue at the term so ordered. *Ib.*

70. Where a prisoner is indicted for felony, his right to be present in court at his trial, cannot be waived by his counsel nor by himself; and therefore, where a prisoner was indicted for burglary and larceny, and his presence in court at the rendition of the verdict was waived by his counsel; held that the judgment was erroneous. *Prine* v. *Com.*, 18 Penn. State Rep. (6 Harris) 108.

71. Where, in the course of a criminal case, from any cause a party is placed in such a situation that justice cannot be done on the trial without the aid of the information to be obtained by means of a specification or bill of particulars, the Court, in virtue of the general authority to regulate the conduct of trials, has power to direct such information to be seasonably furnished, and in an authentic form; and that such an order may be effectual and accomplish the purpose intended by it, the party required to furnish the bill of particulars must be confined to the particulars specified. *Com.* v. *Snelling*, 15 Pick. 321.

72. The statute of 1807 was not intended to prohibit the appointment of the counsellors of this court, in aid of the law officers, whenever the circumstances of the case should require the Court, in the exercise of a sound discretion, to make such appointments. *Com.* v. *Knapp*, 10 Pick. 477.

73. In a capital felony, in the State

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of Pennsylvania, the presence of the prisoner at the trial, verdict and passing of the sentence, cannot be dispensed with. *Dann* v. *Com.*, 6 Barr 384.

74. On an indictment for a misdemeanor, if the evidence be such as to prove a felony actually committed, the prisoner must be acquitted of the misdemeanor, in order to being indicted for the felony. *Com.* v. *Roby*, 12 Pick. 496.

75. The penal code of Georgia of 1833, providing by the 34th section of the 14th division, that "all crimes and offences committed, shall be prosecuted and punished under the laws in force at the time of the commission of such crime or offence, notwithstanding the repeal of such laws before such trial takes place," warrants the trial of an offence committed while the 48th section of said division was in force, after its repeal in 1843. *Reynolds* v. *State*, 3 Kelly 53.

76. The Court has the power, where the jury are unable to agree, or for any reasonable cause, to discharge them, continue the prosecution, remand the prisoner, and try him at a subsequent term. *Hurley* v. *State*, 6 Ohio 400.

77. A prisoner may be remanded where a witness for the government, at the first term after the finding of the indictment, fraudulently avoided to attend court, though under recognizance to do so, and no connivance appearing on the part of the prisoner to keep the witness away. *Com.* v. *Carter*, 11 Pick. 277.

78. Where a prisoner is infected with the small-pox, he cannot demand a trial at the second term after the finding of the indictment. *Com.* v. *Jailer*, 7 Watts 366.

79. Where the prisoner is entitled to three days to prepare for trial, in case of felony, the three days include the day on which he moves for a copy of the indictment. *State* v. *Briggs*, 1 Brev. 8.

80. The accused, being entitled by statute to a copy of the indictment and venire two days before trial, waives this right by pleading not guilty and proceeding to trial. *State* v. *Johnson*, Walker 392.

81. A prosecutor will be allowed to engage counsel to assist the attorney for the Commonwealth in a criminal prosecution. *Hopper* v. *Com.*, 6 Gratt. 684.

82. The Court has no right to call the jury from their room after they have retired to consider of their verdict, into the court-room, and read over to them the written testimony as taken down by the Court, without the consent of the prisoner's counsel, and while the prisoner is absent. *Wade* v. *State*, 12 Ga. 25.

83. On the trial for a capital offence, after the evidence on behalf of the prosecution had been closed, and none offered by defendant, by consent of parties and with leave of the Court, the jury were dispersed until morning; on the re-opening of the court the counsel for the State re-examined some witnesses for the prosecution that had been examined before, and introduced some additional ones; held to be error. *Mary* v. *State*, 5 Mo. 71.

84. Where, in a capital offence, the Court permitted the jury to view the premises, accompanied by officers of the Court, and by the prisoner's counsel and the counsel for the Commonwealth, it was held proper. *Com.* v. *Webster*, 5 Cush. 295.

85. Where, after the evidence for the State had closed, on a trial for murder, and after the prisoner's counsel had announced to the Court that he would not introduce any evidence, a witness who had been sworn and examined on the part of the State, went to the presiding judge and told him privately that he wished a correction in his testimony, to wit, that when witness asked deceased who hurt him, deceased replied who did it, and "would have satisfaction;" witness then asked deceased if it was some one that went off with the wagon, and deceased replied that it was, which fact the Court announced in the presence and hearing of the jury; it was held to be an error in the Court to report the witness' statement publicly before the jury. *Crawford* v. *State*, 12 Ga. 142.

86. The Court will not have a motion made by the counsel of the prisoner to compel the State's attorney to elect

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on which count in the indictment he would try the prisoner, before swearing the jury and charging them with the case, and reading the indictment. *Stephen* v. *State*, 11 Ga. 225.

87. The law regulating proceedings in criminal and penal cases, secures to the accused the right of having the facts tried by a jury, and the amount of fine to be assessed by them, in cases where the fine to be imposed on the offending party is uncertain in amount, or exceeds five pounds. In other cases, upon the establishment of the defendant's guilt, the judge may assess the fine without the aid or intervention of a jury. *Frost* v. *Com.*, 9 B. Monroe 362.

88. It is the policy of the Massachusett's system of criminal jurisprudence, that the district attorney, or other public officer having official charge of the criminal department, should have the active superintendence and management of all criminal cases on the trial of the same before the jury. As a general rule this is required, and the conducting of the case before the Court and jury, is to be confined to the public prosecutor. But exceptions may occur to this rule, arising from peculiar circumstances applicable to particular cases, which would justify the Court in associating with the public prosecutor, at his request, additional counsel to aid him in the conducting of a cause. When this takes place, it must be at the request of the district attorney and under some stringent reason arising in the particular case; and the control and direction of the case must be with the public prosecutor. *Com.* v. *Williams*, 2 Cush. 583.

89. In all criminal prosecutions under the Constitution and laws, the jury are the judges both of the law and the evidence, and as a necessary consequence, should be sworn to decide according to both. *Patterson* v. *State*, 2 Eng. 60.

90. In that class of offences where the ordinary judgment will not extend to the infliction of imprisonment, by way of punishment primarily, the accused may appear by counsel, and having made appearance, the trial may proceed without regard to the continued presence of either the respondent or his counsel. *Tracy, ex parte*, 25 Vt. 93.

91. In criminal trials, after the testimony has closed on the part of the State, it should not be re-opened. It will not do to allow to any party the right to introduce evidence at any time, at his own election, and without reference to the stage of the trial on which it is offered. It is obvious that by permitting such a practice, the proceedings of the Court would be often greatly embarrassed, the purposes of justice obstructed, and the parties themselves be surprised by evidence destructive of their safety, and against which they could not guard. *Hoskins* v. *State*, 11 Ga. 92.

92. But where no motion had been made, nor testimony tendered, on the part of the prisoner, and the witnesses were not discharged by reason of the declaration that evidence for the prosecution was closed, the rule does not apply, and further testimony may be given by the prosecution. *Ib.*

93. The Court ought to permit either party to introduce new witnesses and new testimony. *Livingston* v. *Com.*, 7 Gratt. 658.

94. There is no rule or practice on the trial of criminal causes which would authorize the prosecution to introduce evidence against the defendant after the cause has been submitted to the jury on both sides; such a proceeding would be unprecedented in the trial of criminal causes in the State. *Judge* v. *State*, 8 Ga. 173.

95. On the application of the attorney for the State, a gentleman who appeared in the cause as assistant counsel, was permitted by the Court to conclude the argument on behalf of the government; this was held correct. *Jarnagin* v. *State*, 10 Yerg. 529.

96. In criminal, as in civil causes, the party having the affirmative of the issue has the right to open and conclude the argument before the jury, and that the reason of the rule applies more forcibly in criminal causes arising from the familiar and sacred principles in criminal jurisprudence, that every person accused of crime is presumed to be innocent until his guilt is clearly proved; the burden, therefore,

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of establishing the guilt of the accused devolves upon the prosecutor, and of necessity draws to it the right to open and conclude the argument before the jury. *Doss* v. *Commonwealth*, 1 Gratt. 557.

97. The return of the sheriff that he has served the prisoner with a list of the jury, must be conclusive of the fact, as his return to any process issuing from the Court and properly directed to him. *Woodsides* v. *the State*, 2 Howard's Miss. R. 665.

98. Where the judge directs the jury to bring in a sealed verdict, and gives them permission to separate after agreeing on the same, the parties will be deemed to have assented to such permission, if no objection is made; and it is no cause of objection to the verdict. *Friar* v. *the State*, 3 Howard's Miss. R. 422.

99. A criminal case cannot be moved out of its order on the calendar by the accused, unless the notice of argument states his intention of bringing it on out of its order. *Barron* v. *the People*, 1 Barb. 136.

100. A judgment against the accused, in a criminal case, will not be reversed by default, but the Court must be satisfied that there was error in the record or proceedings of the Court below. *Ib.*

101. The part of the 97th rule which gives to the counsel for the prosecution, alone, the right to move cases out of their order on the calendar, applies only to the first week in term; after that, either party, on a four days' notice, may bring on the argument of the case out of its order. *Ib.*

102. Where the defendant was put upon his trial on the presentment of the grand jury, instead of an indictment; held that this practice has been so long followed in the State of Tennessee, it is now too late to question its legality, although it may not be sanctioned by established principles. *Smith* v. *the State*, 1 Humph. 396.

103. The plea of non-identity, which in practice is interposed ore tenus at the bar of the Court, is never allowed in cases, except where the prisoner has escaped after verdict and before judgment, or after judgment and before execution; it should not be received, if the record does not show any escape. *Joseph and others* v. *the State*, 5 Howard's Miss. R. 20.

104. After the jurors have separated, and there has been an opportunity for others to converse with them after verdict, to operate upon their judgments, prejudices or fears, to induce them, or some of them, to give a different account or explanation of it, there would be great danger in permitting new inquiries to be made and explanations to be given, and such a course is not considered as regular, or authorized by practice of the Supreme Court of Maine. *State* v. *Whittier*, 21 Maine 341.

105. On a criminal trial, a Court is not obliged to permit the introduction, even on a cross-examination, of a collateral fact, which may occasion a new and distinct issue. *Ib.*

106. Where a prisoner will not appear in Court to hear the verdict, which the jury announce themselves ready to render, the Court may order a mistrial, and a direction to them to erase their verdict, as it has no other effect than the mistrial itself, it cannot prejudice the prisoner, and consequently, he can claim no advantage of it. *The State* ex rel. *Battle*, 7 Ala. 259.

107. Where the jury, after being long kept together, cannot agree, where it is manifest that they have no reasonable prospect of agreeing, and no means remain but famine or exhaustion, to compel them to agree, or where the powers of the Court are near terminating by the legal termination of their session, the Court, as a power necessarily incident to the due and regular administration of justice, may discharge the jury without the consent of the prisoner, and again impanel a jury and put him upon his trial. *Commonwealth* v. *Roby*, 12 Pick. 496.

II. Joint and Separate Trials.

108. Where several persons are jointly indicted for a felony, they cannot claim separate trials as a matter of right, although they sever in their pleas; but the Court in its discretion

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may allow them to be tried separately. *Hawkins* v. *the State*, 9 Ala. 137; vide *U. S.* v. *Wilson*, 1 Bald. 78.

109. Where prisoners indicted together, sever in their defence, it is the right of the prosecuting officer, who asserts the affirmative as to their guilt, to elect whom of them he will first put upon his trial. *Jones* v. *the State*, 1 Kelly 610.

110. Where two or more persons are jointly indicted for felony, and demand separate trials, they are not entitled to elect which defendant shall be tried first. *The People* v. *McIntyre*, 1 Parker's Crim. Rep. 371.

111. The order of the trials in such case is under the control of the District Attorney, subject to the direction of the Court; and as a general rule, the Court should not interfere to control the District Attorney in regard to it. *Ib.*

112. The decision of the Court, refusing to give direction to the District Attorney in such case, is not the subject of review upon exceptions. *Ib.*

113. Where a defendant, jointly indicted with a co-defendant for felony, has a separate trial, such defendant cannot improve his co-defendant as a witness in his behalf; such co-defendant is not a competent witness for the defendant on trial, till discharged from the record by nolle prosequi, acquittal or otherwise. *Ib.*

114. It is a matter of discretion with the Court to permit the District Attorney to try prisoners, who are jointly indicted, jointly or separately, as it seems best for the advancement of justice; and the Court has no power to correct any error in the exercise of that discretion upon a bill of exceptions. *The People* v. *Stockham*, 1 Parker's Crim. Rep. 424.

115. That discretion may be exercised by an order made on the motion of the District Attorney, as well as on that of the defendant's counsel. *Ib.*

116. Upon a joint indictment for a capital offence, there is no doubt that the prisoners may be jointly tried; and it is equally true that upon such an indictment they may be severally tried. *United States* v. *White and others*, 4 Mason's R. 158.

117. Where the trial is separate, each party is, of course, entitled to the full number of peremptory challenges, which is in no degree narrowed or affected. *Ib.*

118. Whether prisoners are to be tried jointly or separately, has been long since settled by the Supreme Court of the United States, to be a matter not of right, but of sound discretion, to be exercised by the Court. *U. S.* v. *Gibert*, 2 Sumner 19.

119. Where the sole ground for separate trials was, that by means of separate trials the prisoners wished and intended to make use of the testimony of each other in their defence, it was held to be insufficient. *Ib.*

120. Where, on an indictment containing two counts, the defendants were convicted on but one, on a new trial ordered at their instance the defendants may be tried again on both counts; the case stands as though it never had been tried. *The State* v. *the Commissioners of Roads*, 3 Hill 239.

121. If one indictment charges several persons with committing the same offence, each of them has a right to be tried separately. *U. States* v. *Sharp*, Pet. C. C. 118.

122. By the Common Law, until it was changed by a recent act for the summoning of venires and impanelling juries in criminal cases, the Commonwealth and not the prisoner, in case of joint indictments, had the right of objection, subject to the control and discretion of the Court, whether to arraign and try prisoners or defendants jointly indicted, separately or jointly. *Curran's case*, 7 Gratt. 619.

123. It is the well-settled practice of the Court that the judge has no power to order the names of any of the defendants to be struck from an indictment, though he may, at his discretion, in furtherance of justice or for the attainment of truth, separate the trial of the parties, and send the case of such as in his opinion there is no evidence to convict, to the jury, so that if acquitted they may be examined for the others. *The State* v. *McLendon*, 5 Strobh. R. 85.

124. In every indictment against two or more, the charge is several as well as joint—in effect, that each is guilty

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of the offence charged; so that if one is found guilty, judgment may be passed on him. Although one or more may be acquitted, there may be exceptions, as in case of conspiracy and riot, and perhaps some others, when the agency of two or more is of the essence of the offence. *Commonwealth* v. *Griffin*, 3 Cush. 523.

125. By the law now in force (see Revised Criminal Stat., Sessions act 1847–'8 p. 149, sections 11 and 12), each defendant has a right to a separate trial, if he so elect. *Ib.*

126. The public may, in many cases, be much interested in compelling joint indictees to sever in their trials; and for the purposes of public convenience and public justice, the Courts ought always to require and order it when it appears necessary. *The State* v. *Yancey*, 3 Brevard 306.

127. Where several persons are jointly indicted and on trial, the submitting of the case of one of them to the jury alone in the course of the trial, at the request of the other defendants, in order that such defendant, if acquitted, may be called to testify for them, is a matter peculiarly within the discretion of the judge who presides on the trial, and depending upon his view of the evidence to be allowed where there is no evidence against the party, and to be refused where there is such evidence, although in the opinion of the judge it may be altogether insufficient to warrant a conviction. *Com.* v. *Eastman*, 1 Cush. 189.

USURY.

1. Where an indictment is laid for taking unlawful interest, founded on the act passed February 12, 1791, it need not aver that there have been no qui tam proceedings within the trial limited by the act passed January 26, 1790. *State* v. *Tappan*, 15 N. Hamp. 91.

2. Where there have been any such proceedings, the fact may be shown in the defence. The taking of unlawful interest is an offence against the New-Hampshire statute of 1791, which may be punished either by indictment or by a qui tam action, but not by both proceedings. *Ib.*

3. Where, in a civil suit upon the usurious contract, the treble deduction provided for by statute had been claimed and allowed; held that it would not be a bar to such an indictment. *Ib.*

4. In indictments for usury it is not necessary that the corrupt agreement should have been entered into at the time of the contract and execution of the note. *Ib.*

5. A contract to pay more than six per cent. for past forbearance, is illegal. *Ib.*

6. In an information on the statute, for making a usurious contract, it is sufficient to set forth the corrupt bargain generally, because matters of this kind are supposed to be privily transacted, and such information may be brought by a stranger. *Ib.*

7. It was not necessary to aver how much of the money alleged to have been received, was over and above the lawful interest. *Ib.*

8. The act of 1835, ch. 50, § 6, enacts, that "in any case where more than legal interest shall be taken, the person taking the same shall be liable to indictment or presentment; and, on conviction, shall be fined a sum not less than the whole usurious interest so taken and received, which amount shall be ascertained by the jury trying the case, provided that no fine shall be less than ten dollars." Now, by this statute the offence consists in receiving illegal interest—not contracting to receive it. The contract, then, is merely inducement, and need not be described with that particularity which is required when it constitutes the body of the offence, or is the foundation of an action. This is so upon reason and authority. *Gillispie* v. *the State*, 6 Humph. 164.

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VAGRANCY.

1. The first section of the act passed 12th April, 1833, (see laws of 1833, page 353), prescribing and authorizing a general form for a record of conviction in case of vagrancy, is held to be constitutional. *Morris* v. *the People*, 1 Parker's Crim. Rep. 441.

2. Whether the second section of that act, authorizing a discharge before the expiration of the term, on an order jointly made by the committing magistrate and one of the governors of the almshouse, is not unconstitutional and void, as conflicting with the pardoning power vested in the governor by the constitution—Act 4, sec. 5—*Quere. Ib.*

VENUE.

1. In Virginia, where a prisoner has been arraigned and has pleaded in the county in which the offence was committed, he need not be arraigned, nor required to plead in the county to which the venue is changed. *Vance* v. *Com.*, 2 Virg. Cas. 162.

2. It is proper to lay the venue in an indictment in the county aforesaid, a county having been named in the commencement, for which the grand jurors were sworn. *State* v. *Ames*, 10 Mo. 743.

3. An order of Court, directing the venue of an indictment to be changed, is conclusive of its own regularity, unless the contrary appear of record. *McCauley* v. *United States*, 1 Morris 486.

4. Where, on an indictment for petty larceny, the jury, in their verdict of guilty, find the term of imprisonment, this will be considered as mere surplusage. *Cropper* v. *United States*, 1 Morris 259.

5. In cases of misdemeanor, the Superior Court of Law in Virginia, has no power to change the venue. *Commonwealth* v. *Rolls*, 2 Virg. Cas. 68; contra, in the case of *Commonwealth* v. *Bedinger*, 1 Virg. Cas. 125; and in case of felony, it was held that the Court could not change the venue. *Commonwealth* v. *Wildy*, 2 Virg. Cas. 69.

6. But by statute, 1 Rev. Code of 1819, ch. 169, sections 9 and 15, the venue may now be changed in any case of treason or felony, under certain regulations, and in cases of misdemeanors. *Commonwealth* v. *Wildy*, 2 Virg. Cas. 69, note.

7. The act authorizing a change of venue in criminal cases, is imperative whenever a case is made out in conformity with its requisitions, and it is not left to the discretion of the Court, when the requirements are complied with, to grant or refuse the application as a mere matter of discretion. *Freleigh* v. *the State*, 8 Mo. 606.

8. Where the name of the county is written in the margin of the indictment, and in the body of the indictment the county is referred to by name, as "the County of Washington aforesaid," the venue is well laid. *McDonald* v. *State* 8 Mo. 283.

9. In a change of venue in a criminal cause, the original indictment should be retained in the office of the Clerk in the county in which it is found. A copy only should be included in the transcript of the record and proceedings. *Ruby* v. *the State*, 7 Mo. 206.

10. Where, in a change of venue in a criminal case, the venue sent up is imperfect, the Court will not, for that reason, discharge the defendant from his recognizance, especially as the change of venue in such cases is on the application of the defendant. *Laporte* v. *the State*, 6 Mo. 208.

11. The usual and regular mode of proceeding in such cases, is for the circuit attorney to suggest a diminution of the record, and move for a writ of certiorari, directed to the Circuit Court of the county from which the change of venue was taken, to send up the record. *Ib.*

12. A writ of error will not lie on the decision of the Circuit Court in overruling a motion to discharge a defendant from his recognizance, such not being a final decision in the cause. *Ib.*

13. Where there is a motion for change of venue, it is to require the

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plea to be entered before the motion is awarded. *Gardiner* v. *the People*, 3 Scam. 83.

14. In Illinois, where an indictment was found in one county against several jointly, and the venue was changed to another county, on motion of one of the persons, without consent of the others, where he was tried, and afterwards the indictment was returned to the county where it was found, and the others held to answer, it was held that the proceedings were lawful. *Hunter* v. *the People*, 1 Scam. 453.

15. Under the laws of Indiana, a refusal to change the venue in a criminal case, cannot be assigned for error. *Findley* v. *the State*, 5 Blackf. 576.

16. In Indiana, where an indictment is found in the Circuit Court of one county, and is tried in the Circuit Court of another, the record not showing a change of venue, nor that any objection was made to the jurisdiction of the latter court, the presumption will be, that there was a change of venue. *Doty* v. *the State*, 6 Blackf. 529.

17. A venue must be established in criminal cases, and when a bill of exceptions does not show the place or county in which the offence was committed, a new trial will be granted. *Ewell* v. *the State*, 6 Yerg. 364.

18. It is not necessary that the petition for change of venue should be contained in the transcript. The *State* v. *Hicklin*, 5 Ark. 190.

19. In Illinois, a prisoner is entitled to a change of venue whenever, by petition verified by affidavit, he brings himself within the requisitions of the statute, and the Court cannot examine its discretion whether to allow it or not. *Clark* v. *the People*, 1 Scam. 117.

20. And where the defendant, on his arrest, said that he desired to be carried to the court-house, which was within five miles from the place, and when so carried there, did not object that it was not the proper court-house; held that it was error in the judge below to leave these circumstances to the jury upon the question of venue. He should have instructed them that there was no evidence that the offence was committed in the county as charged. *State* v. *Revels*, Busbe N.C. 200.

21. What constitutes reasonable notice of an application for a change of venue, in a criminal case, depends upon circumstances. If the party making the application had knowledge of the ground for a change, he should give notice before the day of trial. If, however, he gives notice as soon as he learns that he has ground to apply, it will answer, even if at the time the cause is called for trial. *Reed* v. *State*, 11 Mo. 379.

22. When the Court refuses to change the venue in a criminal case, it cannot be assigned for error. *Spence* v. *State*, 8 Blackf. 281.

VERDICT.

1. Where the jury in a special verdict do not say that they find in one way or the other, according as the opinion of the Court may be upon the law, the verdict is imperfect. *State* v. *Wallace*, 3 Iredell 195.

2. Where a special verdict is imperfect or bad, so that no judgment can be given thereon, the proper course is to direct a venire de novo. *Ib.*

3. Instructions given by the presiding judge, intended as the act of the Court, and simultaneous with the annunciation of an adjournment, are the act of the Court. *The State* v. *Engle*, 13 Ohio 490.

4. A Court may, in the exercise of a sound discretion, in a criminal case, direct the jury to seal up their verdict, and separate, and bring it in open Court, should they agree when the Court is not in session. *Ib.*

5. A special verdict is defective which finds only the evidence from which facts may be inferred. It must find the facts themselves. *The State* v. *Watts*, 10 Iredell 369.

6. Where a person was indicted under a statute which imposed a specific fine for suffering unlawful gaming in his house, it was held that a general verdict of guilty, without fixing the penalty, was sufficient. *English* v. *Com.*, Lett. Sel. Cas. 417.

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7. The variance was held fatal, where a verdict was given of "guilty of perjury before D. & E., Esqrs., in conjunction;" the indictment being for perjury before "D.," Esq. *State* v. *Mason*, 1 Const. Rep. 200.

8. Where a verdict on an indictment for keeping a disorderly house was, "that defendant kept a disorderly house, and disturbed his neighbors," it was held bad. *Hunter* v. *Com.*, 2 Const. R. 298.

9. Where, on an indictment for forgery of a note, there is a verdict of "guilty of attempting to pass the note, knowing of the forgery," it will warrant the passing of sentence on the prisoner. *State* v. *Fuller*, 1 Bay 245.

10. In Virginia, on an indictment for breaking open a storehouse, and stealing therefrom goods to the value of four dollars, the verdict found the accused guilty of grand larceny, and fixed his imprisonment at seven years; held that the verdict was too defective and uncertain for judgment, and that it should be set aside, and a venire de novo granted. *Com.* v. *Smith*, 2 Virg. Cas. 327.

11. A verdict which fixes the term of the prisoner's confinement at "twelve months," where the law fixed the minimum at "one year," was held sufficient. *Vandewall* v. *Com.*, 2 Virg. Cas. 275.

12. A verdict in either a civil or criminal case must be considered an entire thing; it must respond to the whole declaration, and to every count in the indictment, or the Court cannot legally receive it as the verdict of the jury. *Hurley* v. *State*, 6 Ohio 400.

13. Where on the trial of a indictment for an assault on M., with an intent to ravish and carnally know her, by force, and against her will, the jury returned a verdict that the defendant was not guilty of an assault, with attempt to commit a rape, in manner and form, &c., but that he was guilty of an assault upon and illicit and unlawful intercourse with the said M., at the time and place in the indictment alleged; held that this was not a special verdict, and that it justified a judgment against the defendant for a simple assault. *The Com.* v. *Fischblatt*, 4 Met. 354.

14. A special verdict, which finds the defendant guilty of the same facts as those alleged in the indictment, but not finding him guilty in the county where the offence is laid, cannot be sustained. *The Com.* v. *Call*, 21 Pick. 509.

15. In a criminal case, where the facts found by the verdict are so defective that no judgment can be rendered upon it, an inferior Court has the power to set it aside, and grant a venire de novo. *Lawrence* v. *the People*, 1 Scam. 414.

16. Where the prisoner was indicted for an assault and battery, with the intent to kill and murder, and was convicted of an assault with intent to commit manslaughter, it was held that he was convicted of another and different offence than that charged in the indictment. *Morman* v. *State*, 24 Miss. 54.

17. Where the finding of the jury negatived the intent as charged in the indictment, and that intent was averred in the indictment to "kill and murder," but the intent found by the jury was to "commit manslaughter," another and different felony from that charged; it was held that that variance was fatal, and the judgment is overruled. *Ib.*

VOTING, &c.

1. A person resisting by threats a demand made upon his father by the judges of an election to answer certain questions which the judges had no authority to ask, was held not liable to an indictment under the 17th section of the election law of Pennsylvania, against threatening persons in the discharge of their duty. *Com.* v. *Gibbs*, 4 Dall. 253.

2. One who votes illegally at an election of sheriff, cannot defend himself against an indictment, upon the ground that the election was conducted illegally. *State* v. *Cohoon*, 12 Iredell 178.

3. In Indiana, on the trial of an indictment under the statute against fraudulent voting, the defendant's statements, made under oath at the polls, on being challenged, are not

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evidence for him, neither is the decision of the judges of the election in favor of his right to vote. *Morris* v. *State*, 7 Blackf. 607.

4. In Tennessee, it is not indictable to vote illegally for the officers of municipal corporations. *State* v. *Liston*, 9 Humph. 603.

5. In Maine, an indictment against a person for voting twice at the same election for the choice of a selectman, at a town meeting, cannot be sustained, unless such meeting was warned and notified in manner prescribed by the Rev. Stat. *State* v. *Williams*, 25 Maine 561.

6. In Tennessee an indictment under the statute of 1841, ch. 31, that certain persons were judges of the election, is a sufficient averment that they were duly made and appointed judges. 7 Humph. 9.

7. If the party voting know the existence of a state of facts which disqualify him in point of law (and that law he is held not to be ignorant of), then he shall be guilty of a misdemeanor. If the voter believe himself to be 21 years of age, when he is not, and vote, he does not know the existence of the disqualifying fact, and may, on that ground, be excused; but if he know that he is only twenty years of age, yet believe he is old enough in point of law to vote, such ignorance of the law will not excuse him. *McGuire* v. *State*, 7 Humph. 54.

8. The act of Tennessee, 1842, ch. 141, § 4, provides that all violations of the penal law may be prosecuted by indictment, or presentment of a grand jury, and in case of presentment upon the information of any one of the grand jury, this statute repeals that provision of the act of 1823, which required the offence to be presented by two of the grand jurors upon their own knowledge, and makes it indictable. *State* v. *Shaw & Rutledge*, 8 Humph. 32.

9. In Tennessee, the act of 1823, ch. 25, § 1, makes it an offence for any person offering himself as a candidate for any office of honor, profit, or trust, to treat the electors, for the purpose of obtaining their votes, with spirituous liquors, and provides that the act shall be given in charge by the judges and solicitors to the respective grand juries, whose duty it shall be to present all such offenders, when two or more of the body have knowledge of the facts, and not otherwise. *State* v. *Darnal*, 1 Humph. 290.

10. In Massachusetts, upon an indictment for giving false answers to the selectmen, it is not necessary to prove that the selectmen were legally chosen; it is sufficient if it be proved that they were acting as selectmen. *Com.* v. *Shaw*, 7 Met. 52.

11. It is no cause for arresting judgment on such an indictment that it is not alleged that the district was in the Commonwealth. *Com.* v. *Shaw*, 7 Met. 52.

12. The party voting, or attempting to vote, must know at the time that he is not a qualified voter, and that he is doing, or attempting to do an unlawful act. If he voluntarily gives in a vote, or attempts to vote, with this knowledge at the time the offence is committed, it is done wilfully, and he incurs the penalty. *Com* v. *Aglar, &c.*, Thacher's Crim. Cas. 412.

13. To constitute a wilful aider and abettor under the statute of Massachusetts, he too must know at the time that the person was an unqualified voter, and had no right to vote, and with such full knowledge he must have done or said something which, in the opinion of the jury, was designed and calculated to encourage the party to vote, or attempt to vote. If the person charged as an abettor should honestly, though erroneously, believe at the time that the party voting or attempting to vote had a right to do so, he will not be within the statute, for the offence both of the principal and the abettor is made by the statute to consist in having the guilty knowledge of the lack of legal qualifications, and the wilful intent to do the unlawful act; therefore it is that knowledge is not to be presumed in such case, but it is to be alleged and proved like any other fact. *Ib.*

14. In general, knowledge of qualifications, as well as disqualification, is presumed to be possessed by the citizen who appears at the polls and tenders his vote; still, however, there

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may be circumstances which will satisfy a jury that a party acted ignorantly, under belief of right, and without a wilful intention to offend. *Com.* v. *Wallace*, Thacher's Crim. Cas. 592.

15. Where a man is indicted under the statute for knowingly and fraudulently voting at an election when he is not qualified to vote, he cannot justify himself by showing that he was advised by a very respectable gentleman that he had a right to vote, for the maxim that ignorance of the law excuses no man, applies as strongly to this case as to any other. *State* v. *Boyett*, 10 Ire. 336.

16. In Maine, where an indictment for double voting, under the statute, alleges that the inhabitants were convened according to the constitution and laws of the State in legal town meeting for the choice of town officers, it is not necessary also to allege that the inhabitants were summoned by warrant from the selectmen duly and legally served. *State* v. *Bailey, &c.*, 21 Maine 62.

17. If a presiding officer or judge of election, acting honestly, from the best judgment he can form on the evidence before him, takes a vote which turns out to be an illegal vote, he is not liable legally or morally; but if such officer, knowing a vote to be illegal, takes it corruptly, his position cannot protect him from the just punishment of his offence. *State* v. *McDonald*, 4 Harr. 555.

18. Distinction between offering and promising a reward to a voter. *State* v. *Harker*, 4 Harr. 559.

19. In Massachusetts, in order to convict a party under the statute, it is necessary to prove not only that the party had no right to vote, but that he knew it. *Com.* v. *Bradford*, 9 Met. 268.

20. If the voter, in good faith, and with an honest purpose to ascertain the right, shall make a true statement of the facts of his case to a professional man, or any other man of skill and experience capable of advising him correctly, the evidence of such advice, and the facts upon which it was taken, are competent as bearing upon the question whether he knew that he had not a right to vote. *Ib.*

21. In Arkansas, held that the ordinance of the city of Little Rock, of 13th July, 1841, entitled an ordinance concerning elections, provided only for such elections for city officers as were annual, and that the judges who held the election under that ordinance had no right to hold an election for justices of the peace, the election of those officers being biennial. *State* v. *Smith*, 4 Ark. 613.

22. The Statute of Tennessee of 1841, authorizes the grand juries to bring before them, by subpœna, the judges, inspectors, clerks and officers of elections. *Deshaso* v. *State*, 4 Humph. 275.

WARRANT.

1. In North Carolina, a magistrate has no right to issue a search-warrant for runaway slaves, or such as have been seduced away. *State* v. *Mann*, 5 Iredell 45.

2. A search-warrant can only issue for goods and chattels which are distinctly alleged to have been stolen. *Ib.*

3. Where, on the face of such a warrant, it appears that the magistrate had not jurisdiction, the officer who attempts to execute it is a trespasser. *Ib.*

4. A magistrate ought to issue no such warrant except on oath; but although it does not appear to have been issued on oath, the officer is justified in executing it, if the subject-matter be within the magistrate's jurisdiction. *Ib.*

5. In South Carolina, a judge at chambers may issue a warrant for any offence. *Berry* v. *State*, Dud. Rep. 215.

6. In Connecticut, a warrant issued by a justice of the peace, on the complaint of an executor or administrator, against a person having in his possession and refusing to deliver up effects belonging to the testator's or intestate's estate, may be directed for service to an indifferent person. *Kelsey* v. *Parmelee*, 15 Conn. Rep. 260.

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WITNESS.

I. Impeaching Witnesses.
II. Credibility of Witnesses.
III. Examination of Witnesses.
IV. Competency of Witnesses.
V. Miscellaneous.

I. Impeaching Witnesses.

1. Where witnesses swore to what they saw on a certain night, aided by the star-light and the light from neighboring houses, it was not allowed to impeach them by witnesses who offered to prove that on a similar starlight night they made experiments between the same hours, and with the same degree of light, and were unable to discern objects distinctly at the distance sworn to by the witnesses to be impeached. *Sealy* v. *State*, 1 Kelly 213

2. When the testimony of a witness is impeached, his confession taken by a magistrate, on the commencement of a prosecution for a criminal offence against another person, may be read in evidence, to sustain his testimony; it may also be read to impair the testimony of the magistrate, in the account given by him of the facts testified to by the witness in such examinations. *People* v. *Moore*, 15 Wend. 419.

3. A party may impeach a witness, although he has cross-examined him, unless on such cross-examination he has endeavored to establish a matter wholly disconnected with the direct examination; as to such matter he makes him his own witness, and cannot afterwards discredit him. *Ib.*

4. When a witness, after he has been sworn and left the stand, declares that what he has testified to was a sheer fabrication, such declaration may be given in evidence to impeach his credibility. *Ib.*

5. A witness cannot be impeached by proof of contradictory statements previously made by him, whether oral or written, without first giving him an opportunity to explain such previous statements. *Powell* v. *the State*, 19 Ala. 577.

6. To discredit a witness, it is incompetent to offer testimony to prove that the witness has been guilty of stealing. *Free* v. *the State*, 1 McMullan 494.

7. To render a witness competent to testify to the general character of the accused, he need not know what a majority of his neighbors said or thought of him; nor is it necessary that he should have heard some one say what a majority of them said or thought of him; the only test of his competency is, whether he is acquainted with the general character of the accused among his neighbors, or those acquainted with him. *Dave* v. *the State*, 22 Ala. 23.

8. Proof that several indictments for libel are pending against a witness is not admissible to impeach him. *Campbell* v. *the State*, 23 Ala. 44.

9. A witness may be cross-examined with regard to his habits of drinking. *Ib.*

10. A party may ask his own witness, whether he has not previously made statements which are inconsistent with what he has just stated on the trial. *Ib.*

11. The individual opinion of witness, based on rumor, with regard to the guilt of another witness of the crime of murder, is not admissible for the purpose of impeaching the latter. *Ib.*

12. Where a witness has been cross-examined respecting his former statements, with a view of impeaching him; held that he might be asked on re-examination in chief his motive in making those statements. *Ib.*

13. Where a witness is introduced for the purpose of impeaching another, by proof of his general character, and, on cross-examination, testifies that public rumor gave the impeached witness "a bad moral character, as to drinking, fighting, murder, shooting at men, and certain publications, reputed false, in his newspaper;" held that he could not be asked, on re-examination in chief, "What other moral delinquencies public rumor attributed to him;" nor "what rumor said in regard to those publications;" nor "whether he did not know of his own knowledge that they were false." *Ib.*

14. In order to throw discredit on

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the character of a witness, it is not competent to show general bad character disconnected with veracity. *U. States* v. *Vansickle*, 2 McLean 219.

15. The legal inquiry is, what is the general character of the witness for truth in the place where he resides? *Ib.*

16. And it is proper to ask the witness under examination, whether from his knowledge of his general character he would believe him under oath. *Ib.*

17. Particular facts of a criminal nature can be shown to discredit the witness. *Ib.*

18. It is not proper for the respondent to show on the trial of an indictment, that a witness introduced by the attorney for the State, "bore a notoriously infamous character." *The State* v. *Bruce*, 11 Shep. 71.

19. A witness' bad moral character may be shown to discredit his testimony. *The State* v. *Boswell*, 2 Dev. 209.

20. For the purpose of impeaching a witness, questions irrelevant to the issue cannot be asked of him, in order to contradict the answers. *U. States* v. *Dickinson*, 2 McLean 325.

21. The interrogation put to an impeaching witness may be, whether he knows the general character of the former witness; and from such knowledge, would he believe him on oath? though the narrower form of inquiry, "What is his character for truth and veracity?" is to be preferred, as being more direct; and in either case, the witnesses may be required to declare, whether the character, as known to him, is so very bad, that in his opinion the witness is utterly unworthy of credit on oath. Per Cowen, J. *People* v. *Rector*, 19 Wend. 569.

22. Where a witness was called, for the purpose of impeaching the character for truth and veracity of a witness called on the other side, it was held that such impeaching witness can only speak of the general *reputation* of the witness sought to be impeached in the community, and cannot give his opinion of his *character*. *Bucklin* v. *State*, 20 Ohio 18.

23. It is the general opinion of the party's character, and not the individual opinion of the witness called for the purpose of impeaching, that is competent to be given in evidence. *Ib.*

24. Before the credit of a witness can be impeached by evidence of anything which he has said in relation to the cause, a foundation must be first laid for such evidence, by first asking him whether he has said that which is intended to be shown. *Clementine* v. *State*, 14 Mo. 112.

25. When a witness is asked on his cross-examination, whether, on a former occasion, he has not made certain statements, and answers that he does not recollect having made such statements, his credit may be impeached by evidence that he did in fact make the statement. *Garret* v. *State*, 6 Mo. 1.

26. On cross-examination, the prisoner's counsel asked the prosecutrix if she had not proposed, before the institution of the proceedings, to take $200 from the master of the prisoner not to prosecute him? and, on the objection of the State, the question was ruled incompetent; held that the Court erred in overruling the question on the objection of the State; that if the answer would have tended to implicate the prosecutrix in a charge of compounding a felony, the objection should have come to her, and that, with such qualification, the question was proper to be answered, not for the purpose of excusing or extenuating the offence of the prisoner, but to impeach the credibility of the main witness, the prosecutrix. *Pleasant* v. *State*, 8 Eng. 360.

II. Credibility of Witnesses.

27. Where the question in criminal prosecution is the same with that in a civil cause in which the witness is interested, that goes to his credit, unless the judgment in the prosecution can be given in evidence in the cause where he is interested. *The State* v. *Hassett*, 1 Tayl. 55.

28. Where the cross-examination of the principal witness for the people was conducted in a manner tending to impair her credibility, and to show that the prosecution was the result of a

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conspiracy in which she was concerned; held that it was competent to sustain the witness, by showing that another person, to whom the facts had become professedly known, wrote to the public authorities, and was the cause of the prosecution being instituted. *Lohman* v. *People*, 1 Comstock 379.

29. Where, on the trial of an indictment, an accomplice, on his cross-examination, testified that the magistrate before whom the preliminary examination took place, had given competent assurances that he should not be prosecuted if he would disclose all he knew of the transaction in question; held that this statement was material to the issue, and that the testimony of the magistrate corroborating this statement, was competent evidence to support the general credit of the accomplice. *The Com.* v. *Bosworth*, 22 Pick. 397.

30. But where the defendant in such case, for the purpose of impeaching the testimony of the accomplice, introduced a letter from him, admitting that his testimony in regard to the transaction, upon a former occasion, was false, and the prosecuting attorney, in order to show that the letter had been obtained unfairly, asked the accomplice certain questions, in answer to which he testified that the letter was part of a correspondence which had been carried on in jail, and stated the means by which the correspondence had been carried on, the relative position of the several rooms, and the arrangement of the prisoners therein, corresponded; held that it was not proper to call witnesses to show that the position of the rooms and the arrangement of the prisoners therein, corresponded with the account given by the accomplice, in order to support his general credit. *Ib.*

31. A witness may be discredited by showing that he was drunk at the time the transaction he attempts to relate took place; the large quantity of liquor drank, is a circumstance tending to establish drunkenness, and, as such, is admissible evidence to prove that fact. *Fleming* v. *the State*, 5 Humph. 564.

32. The credibility of a witness is a question of fact to be submitted to the jury, not by the number who may testify for or against his credibility, but by their respectability, intelligence, consistency, and means of information. *Kinchelow* v. *the State*, 5 Humph. 9.

33. A child of any age, that is capable of distinguishing between good and evil, may be examined on oath; and the credit due to the statements is to be left to the jury, who should consider the age, the understanding, and the sense of accountability for moral conduct, in coming to their conclusion. *The State* v. *Whittier*, 2 Me. 341.

34. The testimony of an infant of seven years, who was corroborated by circumstances, was held sufficient to warrant a conviction of a capital offence. The credibility of such witness is properly submitted to the jury. *The State* v. *Le Blanc*, 3 Brevard 339.

35. Where the general moral character of a witness is impeached, whether by witnesses called for that purpose, or on his own cross-examination, it is competent for the party calling him, to introduce testimony in support of his character for truth and veracity, in order that the jury may pass upon his credibility. *The People* v. *Rector*, 19 Wend. 569.

36. The mere contradiction of a witness, is no ground for calling testimony in support of his character. *Ib.*

37. Where a witness on the part of the State, on his cross-examination, was asked whether the prosecutor had not paid him for coming from another State to be a witness, and answered that he had not, it is incompetent for the defendant to introduce witnesses to prove his declaration that he had been so paid. *State* v. *Patterson*, 2 Iredell 346.

38. Questions to a witness, tending to disparage or disgrace him, may be asked, and cannot be objected to by the opposite party; whether the witness is bound to answer them, is doubtful. *Ib.*

39. It is always competent for a party to show the relations existing between a witness of his adversary and the party against, as well as the person for whom he is called. *Starks* v. *the People*, 5 Denio 106.

40. So the party against whom a witness is called, has a right to prove

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his declarations indicative of hostile feelings towards himself. *Ib.*

41. Therefore it was held that a defendant, on the trial of an indictment, might prove that a witness for the prosecution had said of a particular locality, that it would be a good place in which to kill the defendant, though the remark was made before the time of the commission of the alleged offence, and the witness to whom the declaration was imputed, on his cross-examination had denied having made it. *Ib.*

42. A party has no right to give evidence of the general good character of his own witness, unless the character of the witness has been attacked by witnesses on the other side. *Ib.*

43. And it is not sufficient to justify evidence of good character, that the witness had been discredited by proof, contradicting portions of his testimony, and by evidence that he had made declarations hostile to the party against whom he was called, and in his testimony had denied the making such statements. *Ib.*

44. A party is entitled to impeach the general character of a witness for his adversary, though the testimony which such witness had given related solely to the general character of another witness. *Ib.*

45. Where A. conveyed an estate to a manufacturing company, which had been previously mortgaged to C., and a judgment was recovered by C. under the mortgage for the possession of the estate, and a petition for a venire was afterwards filed by the company, at the hearing of which A. swore that he notified the company, at the time of such conveyance, of the existence of the mortgage, and was subsequently indicted for perjury in giving such testimony; upon his trial, when the debt which was secured by the mortgage was still unpaid by the company, a stockholder of the company, who had been instrumental in procuring the indictment against A., was introduced as a witness; held that the interest of such witness was a matter going to his credibility, and not to his competency. *The Commonwealth* v. *Farley*, Thacher's Crim. Cas. 654.

46. The evidence of a child of seven years of age, corroborated by circumstances, is sufficient to warrant a conviction of a capital crime, although that evidence may be contradicted by the testimony of an adult; the credibility of the witnesses being left to the jury. *State* v. *Le Blanc*, 1 Const. Rep. 354.

47. Where the fact to which a witness deposes constitutes a part of the transaction under investigation, then the evidence of inconsistent statements by him in relation to this fact may be introduced to impeach his credit. *State* v. *Patterson*, 2 Iredell 346.

48. But in respect to collateral matters, drawn out by cross-examination, the answers of the witness are in general to be regarded as conclusive. The exception to this rule is, when the cross-examination is as to matters which, although collateral, tend to show the temper, disposition or conduct of the witness towards the cause or the parties. The answers of the witness as to these matters may be contradicted. *Ib.*

49. If a witness is asked whether he has made representations as to a particular fact, and denies it, then evidence of such representations would be proper, but not in relation to collateral matters. *Ib.*

50. Where a witness has made a different statement from the one made by him on trial, he is not thereby discredited, unless the discrepancy is wilful. *Yoes* v. *the State*, 4 Eng. 42.

51. It is incompetent to introduce a statement of a witness made at a hearing for a habeas corpus as taken down by the Vice-Chancellor, in order to contradict such witness at the trial, because the Vice-Chancellor is not required to take full notes of such statements. *Nelms* v. *State*, 13 S. & Marsh. 500.

52. Where a witness is discredited, his testimony should not be relied upon, unless it is corroborated in those points which are relied upon; and it is not enough that the corroboration goes generally to the main question at issue. *Troxdale* v. *State*, 9 Humph. 411.

53. The fact that a witness is of negro descent, though not so near as to

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render him incompetent to testify, is not competent as evidence to impeach his credibility. *Dean* v. *Commonwealth*, 4 Gratt. 541.

54. A witness may be questioned as to the state of his feelings towards a party, in order to show the bias under which he testifies ; it is not allowable, however, to inquire into the cause of his hostility. *Bishop* v. *State*, 9 Ga. 121.

55. For the purpose of discrediting a witness, a party is not confined to inquiries as to his character for truth, but may inquire as to his moral character generally. *State* v. *Shields*, 13 Mo. 236.

56. In order to discredit a witness, her general character for chastity may be examined into. *Ib.*

57. The evidence of general bad character of a witness should not be restricted to the single fact of want of veracity on oath. *Day* v. *State*, 13 Mo. 422.

58. Conviction of keeping a bawdy-house is a matter which goes to the credibility only, and not to the competency of a witness. *Deer* v. *State*, 14 Mo. 348.

59. The credibility of witnesses is wholly a question for the jury, and it is not erroneous in the Court to refuse to charge the jury how they ought to find, in a case depending on the credibility of witnesses. *Woodin* v. *People*, 1 Parker's Crim. R. 464.

60. That a witness for the prosecution in a criminal case has contributed funds to carry it on, goes only to his credibility. *People* v. *Cunningham*, 1 Denio 524.

61. When a witness of equal knowledge and credibility swears positively to a fact, and many swear negatively that they did not see or know the fact, the one witness who swears positively, and not contradicted, is to be believed in preference to the many. *Johnson* v. *the State*, 14 Ga. 55.

III. Examination of Witnesses.

62. It is discretionary with the Court to permit the re-examination of witnesses as to facts not in reply or rebuttal ; unless it is clear that injustice was done, Appellate Courts will not interfere. *Sartorius* v. *the State*, 24 Miss. 602.

63. On the trial of one charged with the offence of rape, the prosecutrix testified that the violence had been committed seven months before the indictment had been found, which, so far as the record showed, was the first disclosure by the witness of the injury done to her ; it appeared also that the accused had been the guardian of the witness from her early orphanage, and was her stepfather, and that she was about 16 years old at the time of the alleged crime. She was then asked did the prisoner then, or at any subsequent time, say anything to you in relation to this matter, to dissuade you from disclosing it ? State when, where, and what he said. Held that the question was leading and improper (Clayton, J., dissenting). *Turney* v. *State*, 8 S. & Marsh. 104.

64. The following question was also put : Did the prisoner at any time subsequent to the transaction, say anything to you about what judgment the laws of Mississippi would inflict on you or him, or both ? state it all ; it was also held that this question was leading and improper (Clayton, J., dissenting). *Ib.*

65. The following question was also put : If the prisoner in any of his antecedent conversations offered property or any other advancement to you, in order to attach you to him, say so ; held that this question also was improper (Clayton, J., dissenting). *Ib.*

66. The general rule of law which relates to leading questions, and the discretions allowed to the Court in permitting exceptions to the general rule, discussed and commented on. *Ib.*

67. When a witness is asked, on cross-examination, whether he has not been convicted and punished for an infamous crime, it seems that he is bound to answer the question. *State* v. *Garrett*, Busbee N. C. 357.

68. Where, however, such a question was put, and the judge left to the witness to choose whether he would answer, and he refused, it was held

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that such refusal might be insisted upon by counsel in addressing the jury as warranting the inference that he was unworthy of credit. *Ib.*

69. A witness is privileged from answering a question when the answer would tend to disgrace him, unless the evidence would bear directly upon the issue; and, therefore, where the answer could have no effect upon the case, except as it might impair the credibility of the witness, held that he was privileged. *Lohman* v. *the People*, 1 Comstock's R. 379.

70. A witness who has been examined in behalf of the State, on the trial of an indictment against three defendants for grand larceny, to show a common design and confederacy among them, may also testify to the same facts on a subsequent trial of two of the defendants, on an indictment for obtaining money under false pretences from the same person, at a different time and place. *The State* v. *Davis*, 19 Ala. 13.

71. An unmarried woman may be asked on cross-examination, although she has the privilege of refusing an answer, whether she has any children. *Campbell* v. *the State*, 23 Ala. 44.

72. It is for the Court to decide whether any direct answer to a question which may be proposed may furnish evidence to convict the witness of a crime. If it may, the witness himself must decide what his answer will be; and if he swears that he cannot answer the question without accusing himself, he cannot be compelled to answer. *Floyd* v. *the State*, 7 Texas 215.

73. Where a witness is exempt by statute from liability for any offence of which he is compelled to give evidence, or if the offence, as to him, is barred by the statute of limitations, he is not entitled to the privilege of not swearing, ordinarily incident to such a case. *Ib.*

74. It is the privilege of the witness, and not of the party, that the witness need not swear to facts which will subject him to a criminal prosecution; where he waives his privilege and testifies to part of a transaction in which he was criminally concerned, he is obliged to state the whole. *The State* v. *Foster*, 3 Foster (N. H.) 348.

75. The Court has discretion to allow witnesses to be examined at any time before the verdict, notwithstanding they were removed before their first examination, and have since been together. *The State* v. *Silver*, 3 Dev. 332.

76. A witness is under no obligation to answer, when his answer will subject him to a penalty, or will have a tendency to degrade his moral character; the practice of compelling an answer in the latter case seems, however, by the modern cases, to be gaining ground. *People* v. *Rector*, 19 Wend. 569.

77. Where a witness is tried to be impeached on a cross-examination, his answer, if favorable to himself, is conclusive against the party. *Ib.*

78. The refusal to recall a witness to re-state his testimony after a cause has been summed up and the jury charged, is a matter within the discretion of the Court before whom the trial is had; with the exercise of which a Court of Review will not interfere. *Ib.*

79. Where a witness is called to impeach the credibility of another witness, he cannot be questioned as to the character of the latter in any respect, except as to veracity. *Uhl* v. *Com.*, 6 Gratt. 706.

80. A witness is bound to testify, although he stands indicted for the same offence as the person on trial, and although he says his testimony will lead to his own conviction. *The State* v. *Douglass*, 1 Mo. 374.

81. It is the province of the Court to judge whether any direct answer to the question propounded will furnish evidence against the witness. *Ward* v. *the State*, 2 Mo. 98.

82. The witness is not bound to answer, when his answer may disclose a fact which forms a necessary and essential link in the chain of testimony, sufficient to convict him of crime—and of this he is to judge. *Ib.*

83. The questions, "state whether or not you examined the horse-tracks towards Crogan's?" and "state whether or not you had any difficulty in follow-

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ing the tracks?" were held to be leading and improper. *Hopper* v. *Commonwealth*, 6 Gratt. 684.

84. Where, upon the trial of an indictment, the witnesses not under examination were kept out from the Court room, and the question arose in the case whether a witness offered by the accused was or was not a mulatto; it was held proper to examine a person, as a witness upon this point, who had been present during the trial. *Ib.*

85. Whether, on a trial for felony, a witness for the Commonwealth having been examined and cross-examined, and told to stand aside, shall be again examined as to another matter by the attorney for the Commonwealth, must be addressed to the sound discretion of the Court. *Howell* v. *Commonwealth*, 5 Gratt. 664.

86. On the trial of an indictment, the defendant may ask a witness whether any person, on behalf of the government, has made the witness any offer of reward in relation to the testimony which he should give in a certain class of cases including the case on trial. *The Commonwealth* v. *Sackett*, 22 Pick. 394.

87. It is the province of the Court to determine whether a direct answer to a question has a tendency to criminate a witness. *The Commonwealth* v. *Braynard*, Thacher's Crim. Cas. 146.

88. In the trial of an indictment for larceny, a witness from whom the property is charged to have been stolen is not compelled to disclose the names of persons in his employment who gave the information which led him to take measures for the detection of the persons who were indicted. *The State* v. *Soper*, 4 Shep. 293.

89. A witness on a trial cannot be asked whether he has not in conversation stated the facts differently from what he now deposes. *The State* v. *Simpson*, 2 Hawks 580.

90. Where a witness is called to support a criminal prosecution, and objects to give his testimony, because it will criminate himself, but is, nevertheless, erroneously compelled to testify, and the defendant is convicted, it seems that the error does not operate against the rights of the witness alone, but that the defendant may object that the conviction was founded upon incompetent evidence. *The Commonwealth* v. *Kimball*, 23 Pick. 366.

91. Where, on the trial of an indictment for selling liquor, a witness for the defendant testified that before the alleged sale, he had purchased of the defendant all the spirits in the defendant's shop, and paid therefor, and taken a lease of the shop, and that the alleged sale was made by an agent on his account, and not on account of the defendant; it was held that the defendant had a right to interrogate the witness whether the transaction with him was an actual bona fide, or merely a colorable and pretended sale. *Ib.*

92. A question to a witness is leading when it puts into his mouth the words to be echoed back, or plainly suggests the answer which the party wishes to get from him. *The People* v. *Mather*, 4 Wend. 231.

93. Where it is evident that the witness is in the interest of the adverse party, it is proper to allow the direct examination to take the character of a cross-examination. *Ib.*

94. If the question has reference to introductory matter, and be intended only to lead the witness with the more expedition to what is material to the issue, it may be put, though it be leading. *Ib.*

95. Where a question is put in the alternative form, as whether or not a party did a certain act, specifying it, it does not remove the objection to its being leading. It is not allowable to put a question which assumes a fact proved which is not, even on cross-examination. *Ib.*

96. It is a matter within the discretion of the Court before whom a trial is had, whether or not to allow the re-examination of a witness after the lapse of a day, and after the examination of other witnesses. The Supreme Court will not interfere with the exercise of such discretion but in a very flagrant case. *Ib.*

97. In a trial for a conspiracy to kidnap a person, who was actually carried off, and whom it was believed was murdered, the prosecution asked a witness whether on a certain even-

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ing he was at the house of a certain person? and whether on that evening a hack, or covered carriage, arrived there, in which carriage it was alleged the person kidnapped was? The witness declined to answer, alleging that his answer might implicate him in the transaction representing the person kidnapped, and might expose him to infamy; it was held that he was not bound to answer. *Ib.*

98. Where the direct answer to a question has a tendency to disgrace a witness, and fix a stain of infamy upon his character, he is not bound to answer, and that whether the question be material or not to the merits of the cause in which he is examined. It is not enough, however, for the witness to allege that his answer will have a tendency to expose him to infamy or disgrace; the question must be such that the answer to it which he may be required by the obligation of his oath to give, will directly show his infamy, and the Court will see that such must be the case before they will allow the excuse to prevail. *Ib.*

99. Where the answer to a question will tend to implicate the witness in a crime, or misdemeanor, or will expose him to a fine or forfeiture, he is not bound to answer; and when he asks to be excused from answering, the Court are to determine whether the answer he may give to the question can criminate him directly, or indirectly, by furnishing evidence of his guilt, or by establishing one of many facts which together may constitute a chain of testimony sufficient to warrant his conviction, but which one fact of itself could not produce such result; and if they think the answer may in any way criminate him, they must allow his privilege without exacting from him to explain how he would be criminated by the answer which the truth may oblige him to give *Ib.*

100. The proper question to be asked a witness, called to impeach another, is whether he would believe him on oath; the opposite party may then go into a cross-examination to ascertain the grounds of the unfavorable opinion, the means of knowledge of the character of the witness impeached, and the source, extent, and duration of the unfavorable reports. *Ib.*

101. On a trial for felony, the counsel for the acccused will not be permitted, on the cross-examination of a female witness for the Commonwealth, to ask the witness "if she had not been found with stolen goods in her possession." *Howel* v. *Commonwealth*, 5 Gratt. 664.

102. On the cross-examination of a female witness for the Government, on a trial for felony, the witness was asked if, while she lived with A., she was not charged with stealing or taking things not her own; and whether, when she left there, she was not followed, and the things taken from her; held that it was proper for the Court to inform the witness that she was not compelled to answer the question unless she thought proper. *Ib.*

103. On a trial for felony, the counsel for the accused will not be permitted, on the cross-examination of a female witness for the State, to ask her "whether she is not generally reputed in the country to be a woman of unchaste habits, or whether she was not or had not been unchaste." *Ib.*

104. On a trial for felony, the counsel for the accused having, on the cross-examination of a female witness, asked her if she was married, to which she replied in the negative, will not be permitted to ask her "how old her youngest child was, or whether the said child was not a bastard." *Ib.*

105. A witness is not obliged to answer a question the answer to which may, of necessity, criminate himself. *Richmond* v. *State*, 2 Greene (Iowa) 532.

106. It is not for the witness but for the Court to decide whether the answer to a proposed question must necessarily tend to criminate the witness. *Ib.*

107. A witness cannot decline to answer the question whether he knows of any one other than himself being engaged in gaming within two years in M. county. *Ib.*

108. It is the witness' privilege, and not the right of the party against whom he is called, to object to his giving evidence to criminate himself; and it is not the province of the judge upon the

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interposition of such party, and independent of any objection of the witness, to inform the latter of the rule of law that he is not obliged to criminate himself. *Commonwealth* v. *Shaw*, 4 Cush. 594.

109. Where the transaction as to which a witness is questioned, constitutes any part of the issue to be tried, the witness will be bound to answer, however strongly it may reflect on his character. *Clementine* v. *State*, 14 Mo. 112.

110. A witness is under no obligation to answer whether he has been guilty of stealing, as his reply might subject him to criminal punishment. *Ward* v. *People*, 3 Hill 395.

111. The strict rule of practice is, that the witnesses on the part of the prisoner should not be in Court when those on the part of the State are examined. *State* v. *Zellers*, 2 Halst. 220.

112. It is not competent for one to discredit a witness called and examined by him, by asking him whether he had not made statements upon another occasion contradictory to the testimony which he had given. *People* v. *Safford*, 5 Denio 112.

113. Where the prosecution, on the trial of an indictment for selling liquor without license, called and examined a witness to show a sale of liquor by the accused to him, but witness failed to show an act of selling, and the counsel for the prosecution then asked him what he had sworn on the subject before the grand jury; held that the question was incompetent and inadmissible. *Ib.*

114. Where, in a prosecution for selling spirituous liquor to a common drunkard, the person to whom the liquor was charged to have been sold, was called, by the prosecutor, to establish the sale, and, having sworn to it, was asked on cross-examination by the defendant, if he was a common drunkard, and to this question he objected; it was held that he was not bound to answer it. *Barnes* v. *State*, 19 Conn. 398.

115. It is proper, in a capital offence, that each witness should be examined fully when first called upon the stand, upon all points of inquiry. *Com.* v. *Webster*, 5 Cush. 295.

116. A witness may, with the consent of the opposite party, state a legal conclusion; and the failure to object to an answer stating such a conclusion amounts to consent. *Sterne* v. *State*, 20 Ala. 43.

117. It is not the duty of the State, or of those who prosecute for it, to examine on a criminal trial all the witnesses who were present at the perpetration of a fact, or all the witnesses who had been sent to the grand jury. It is the province of the prosecuting officer, and not of the Court, to determine who shall be examined as witnesses on the part of the State. *State* v. *Martin*, 2 Iredell's Rep. 101.

118. Where the Court allowed the prosecuting attorney to recall a witness, and ask him a question, after the attorney had made his opening argument, and one of the counsel for the prisoner had spoken in his defence—it was held proper to do so. *Armstead's case*, 7 Gratt. 599.

119. A witness cannot be permitted to state positively that a party is not guilty of the offence charged against him. The witness must state facts which are known to him, and from these facts the jury, under the direction of the Court, are to find whether the accused is or is not guilty. *Garret* v. *State*, 6 Mo. 1.

120. A witness on a cross-examination, in order to discredit him, may be asked if he had not committed perjury in the State of Georgia. *State* v. *March*, 1 Jones' N. C. R. 526.

121. After a witness on a trial has been cross-examined, it is in the discretion of the presiding judge to permit or refuse a second cross-examination; counsel cannot demand it as a right. *State* v. *Hoppiss*, 5 Iredell 406.

122. Where the witnesses in a case have been ordered by the Court, at the request of a party, to withdraw, and one of them remains in violation of the order, and hears the testimony of the other witnesses, it rests in the discretion of the Court whether he shall afterwards be permitted to testify in the case. *Laughlin* v. *State*, 18 Ohio 99.

123. A witness cannot ordinarily be compelled to state anything that will tend to his own infamy, while on the

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stand; but if he voluntarily waives his privilege, in order to sustain a charge against another, he cannot claim it when asked other questions having a tendency to weaken or remove such charge. *The People* v. *Lohman*, 2 Barb. 216.

124. Where one intends to coerce an answer from a witness, which will tend to degrade him, such party is bound to show, affirmatively, that the question is relevant. *Ib.*

125. As a general rule, it is not permitted a party to put a leading question to his own witness; but if the other party does not raise the objection specifically at the time, it will not avail him on a writ of error. *Ib.*

126. The direction of the *manner* of cross-examining a witness, is in the discretion of the Court, and error cannot be assigned on matters resting in discretion. *West* v. *State*, 2 Zabris. 213.

127. A document, offered to contradict a witness who referred to such a one, must first be identified as the one referred to by him. *Ib.*

128. The State, as well as the defendant, may demand the exclusion of witnesses from the court-room during the trial, for the purpose of questioning each in the absence of the others. *Johnson* v. *the State*, 14 Ga. 55.

129. Where one is a witness for the State, who on cross-examination testifies that he has taken an active part in the prosecution, and that he cherishes unfriendly feelings towards the prisoner; held that he may be asked on re-examination, whether he feels so unfriendly towards the prisoner as to wish to see an innocent man convicted. *Campbell* v. *the State*, 23 Ala. 44.

130. The prisoner's witnesses may be asked on cross-examination as to their relations with the prisoner, whether they were on terms of friendly intimacy, their means of knowing the facts to which they swear, and as to any bias or prejudices that might influence them. *Ib.*

131. Upon cross-examination much greater latitude is granted than upon examination in chief, and leading questions are then admitted. *Boles* v. *the State*, 24 Miss. 445.

132. Where a witness has been ordered to retire from the court-room, but remains in Court, he will not ordinarily be examined; but this is a matter in the discretion of the Court. *Sartorius* v. *the State*, 24 Miss. 602.

133. It is not admissible, with a view to impeach a witness, to ask him as to what he had testified to on a former occasion, if his testimony on that occasion is of itself inadmissible in evidence. *Mitchum* v. *the State*, 11 Geo. 615.

134. In criminal, as well as in civil cases, it is within the discretion of the Court, on the application of either party, to require the witnesses to be examined out of the hearing of each other, and its ruling in that respect cannot be assigned as error. *McLean* v. *State*, 16 Ala. 672.

IV. Competency of Witnesses.

135. Where two persons were jointly indicted for an assault and battery, and pleaded separately, and one of them being first tried; held that the other defendant was not a competent witness for him. *People* v. *Bill*, 10 John. 95.

136. A party who is joined in the same suit or indictment cannot be a witness for his co-defendant, until he has been first acquitted or convicted; and whether the defendants plead jointly or separately, makes no difference. *Ib.*

137. An accomplice is a competent witness to testify; but unless his testimony is corroborated, a jury will rarely on that testimony alone convict. *U. States* v. *Troax*, 3 McLean 224.

138. The manner of his account, and the circumstances under which he acted, are to be weighed by the jury, and when other witnesses establish some material facts sworn to by him, the jury will give credit to his other statements. *Ib.*

139. An informer is competent to testify, although he may receive a part of the penalty; though this is not strictly the rule of the Common Law, the law is, however, now well established, and is founded upon neces-

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sity and policy. *U. States* v. *Patterson*, 3 McLean 53, 299.

140. Where two persons are jointly charged in the same complaint with the commission of the same offence, and neither of them has been either convicted or acquitted, the husband of one is not competent to testify for the other, who, by leave of the Court, has a separate trial. *Pullen* v. *the People*, 1 Doug. 48.

141. It is not necessary that a witness should believe in the existence of a God, in rewards and punishments; if, according to his faith, these rewards and punishments are inflicted in this life, he is held competent, and this fact may go to his credibility. *U. States* v. *Kennedy*, 3 McLean 175.

142. The testimony of an accomplice is admissible, but it should be received with caution. *U. States* v. *Lancaster*, 2 McLean 431.

143. An accessory who is joined in an indictment, may be called as a witness for the State, but not for the principal. *The State* v. *Calvin*, R. M. Charlt. 151.

144. In Virginia, no person is rendered incompetent as a witness on account of his religious belief. *Perry's case*, 3 Gratt. 632.

145. In Virginia, upon the trial of a convict from the penitentiary for a felony committed there, a convict confined there for felony is made by State competent to testify for the prosecution. *Johnson's case*, Gratt. 581.

146. In Georgia, where several are jointly indicted, if one of them chooses to be tried separately, he is to be regarded as if indicted separately, and a co-defendant is competent to testify in his behalf. *Jones* v. *State*, 1 Kelly 610.

147. Where in a case of murder a witness swore that he assisted in the arrest of the prisoner; that a reward was offered by the State and by other persons for the arrest and conviction of the murderer; that he had received the reward offered by the State, but received nothing from other persons, and had not expected to; held that he was competent to testify for the government. *Baxter* v. *People*, 3 Gilman 368.

148. A prosecutor in an indictment is competent to testify for the State upon the trial, notwithstanding his liability for costs, if the prosecution be found frivolous or malicious. *The State* v. *Blannerhassett*, Walker 7.

149. On the trial of an indictment for forgery, the party whose signature is charged to be forged is competent to prove the forgery, and also the destruction of the instrument charged to be forged, although civil actions are pending against him, to which his only defence may be the forgery of said instrument. *The Commonwealth* v. *Peck*, 1 Met. 428.

150. On the trial of an indictment for perjury, the Commonwealth introduced as a witness a person against whom a civil action was pending, wherein the defendant in the indictment, had been summoned as a witness for the opposite party; held that the witness so introduced by the Commonwealth had no such interest in the prosecution as to render him incompetent as a witness. *Hart's case*, 2 Robinson 819.

151. The wife is not a competent witness against her husband to prove a battery on her person by him, except in case where a lasting injury is inflicted, or threatened to be inflicted upon her. *State* v. *Hussey*, Busbee's N. Car. Rep. 123.

152. Where an officer would be liable as a trespasser for arresting a prisoner, if arrested wrongfully; the objection to the officer as a witness on the trial of the prisoner, is only a matter which goes to his credibility and to his competency. *The Commonwealth* v. *Merrill*, Thacher's Crim. Cas. 1.

153. In South Carolina, a free person of color, born of a free white woman ex parte materna, is a competent witness. *The State* v. *McDowell*, 2 Brevard 145.

154. A master is competent to testify for his slave in a criminal prosecution against him. *Isham* v. *the State*, 6 How. Miss. 35.

155. A master was held competent to testify for or against his slave, on his trial for an assault and battery with intent to commit murder in the first degree. *Elijah* v. *the State*, 1 Humph. 102.

156. In Tennessee, no person who is

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disqualified as a witness by reason of his being a free man of color, or a slave, under the act of 1794, c. 1 § 32, can be a witness in a prosecution on behalf of the State for a defendant who belongs to one of the disqualified classes. *Jones* v. *the State*, 1 Meigs 120.

157. On an indictment for perjury before a grand jury, members of such jury are competent to testify as to the facts deposed to by the defendant before them. *Crocker* v. *the State* 1 Meigs 127.

158. In the trial of an indictment for perjury, as to testimony given in Court, a witness, who heard all but a small portion of such testimony, was held to be competent to testify. *The Commonwealth* v. *Farley*, Thacher's Crim. Cas. 654.

159. Where two are jointly indicted for an assault and battery, and one of them upon motion is tried first, the wife of the other may be admitted to testify for him. *Moffett* v. *the State*, 2 Humph. 99.

160. A prosecutor for the penalties imposed by the Pennsylvania act of 22d April, 1794, entitled an Act for the prevention of vice and immorality, &c., is not competent to testify, and cannot become so by an assignment of the interest he may have in the penalties. *The Commonwealth* v. *Hargesheimer*, 1 Ash. 413.

161. The record of a conviction of petty larceny in another State, will not render the person convicted an incompetent witness in Virginia. *Uhl* v. *Com.*, 6 Gratt. 706.

162. One convicted of an infamous offence is a competent witness before sentence. *U. States* v. *Dickinson*, 2 McLean 325.

163. A person who has been convicted of the offence of receiving stolen goods, knowing them to have been stolen, is not allowed to testify. *The Commonwealth* v. *Rogers*, 7 Met. 500.

164. A conviction of larceny before a justice of the peace, in a case within his jurisdiction, and a performance of the sentence, render the convict incompetent to testify, notwithstanding the complaint on which the justice proceeded was defective; that judgment might have been arrested or reversed on error. *The Commonwealth* v. *Keith*, 8 Met. 531.

165. Where a witness has been convicted of forgery in another State, held that he is incompetent in the courts of North Carolina. *The State* v. *Candler*, 3 Hawks 393.

166. Where an indictment is found against several for a conspiracy to charge the wife of one of them with adultery; held that such wife is not a competent witness. *The State* v. *Burlingham*, 3 Shep. 104.

167. Where a person believes in the being of a God, and in His attributes as a righteous avenger of wickedness, and in the existence of a future state; held that he is competent to be sworn as a witness. *The Commonwealth* v. *Backelder*, Thacher's Crim. Cas. 191.

168. Where incompetency of a witness, on account of a defect of religious belief, has been made out by sufficient testimony, he cannot be sworn upon the voir dire to restore his competency by reason of his own declarations. *The Commonwealth* v. *Wyman*, Thacher's Crim. Cas. 432.

169. On an indictment where a witness is entitled to a part of the penalty, he is a competent witness if he release his interest. *City Council* v. *Haywood* 2 Nott & McCord 308.

170. Where a witness has gone through his testimony, and it is then discovered that he is interested, he will be competent if he release his interest, and he may then be re-examined. *Ib.*

171. Interest which goes to the competency of a witness, is a question to be determined by the Court; but influence which only affects the credibility, is a matter for the jury. *Ib.*

172. Where there is a conviction for libel in another State, it does not disqualify a witness in Alabama, nor is the record of conviction competent as evidence to discredit him. *Campbell* v. *the State*, 23 Ala. 44.

173. The clerk of the inferior Court is competent to testify that no license had been granted by that Court to the accused, who is on trial for retailing liquor. *Elkins* v. *the State*, 13 Ga. 435.

174. Where two persons are jointly indicted, neither is competent as a witness for the other, whether they are

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tried jointly or separately, being incompetent, not on the ground of interest, but of public policy; but if there is no evidence to criminate one, or if he is made a defendant by mistake, or for the purpose of doing away with his testimony, the practice of the Court is to direct his discharge, that he may testify for the other. *The State* v. *Roberts*, 15 Mo. 28.

175. Where one was jointly indicted with the defendant, but in whose behalf a nolle prosequi has been entered, he is a competent witness for the prosecution. *The State* v. *Champ*, 16 Mo. (1 Bennett) 385.

176. The party from whom goods have been stolen, is a competent witness on the trial of the offender as to any facts within his knowledge. *Commonwealth* v. *Moulton*, 9 Mass. 30.

177. One who has undertaken, before a prosecution is commenced, to indemnify the prosecutor, in case he has the costs to pay, is not a competent witness in the case. The rule that a party cannot be deprived of testimony to which he has a right, by any agreement between his adversary and the witness, does not apply; as to the Commonwealth's right to the testimony, it does not accrue till the indictment is found. *Com.* v. *Gore*, 3 Dana 475.

178. To render the witness incompetent from interest, because of his obligation to indemnify the prosecutor, his undertaking must be such as will, or as he thinks will be legally binding. A mere honorary or moral obligation, or a determination to save the prosecutor harmless, will not have the effect. It may go to the credit of the witness. *Ib.*

179. The confession of a witness in a criminal prosecution as to his incompetency, cannot be admitted to disqualify him. *Com.* v. *Waite*, 5 Mass. 56.

180. In an indictment against a white man for kidnapping, the negro kidnapped was allowed to give evidence, though there were white persons present participating in the crime. *The State* v. *Whittaker*, 3 Harrington 549.

181. On the trial of a slave for a capital offence the master is a competent witness for him. *Spence* v. *the State*, 17 Ala. 192.

182. Where there is an indictment against two for felony, and a separate trial of one of the defendants before the arraignment of the other, on the motion of the prosecutor, the defendant not arraigned is not a competent witness for the other, notwithstanding the statute securing in such cases a separate trial. *The People* v. *Williams*, 19 Wend. 377.

183. He is a competent witness who "believes in a God, and also in the Bible; but does not believe that the only punishment inflicted for wrongs in this life, is the pangs of a guilty conscience, or in a future state of rewards and punishments after death. *Bennett* v. *the State*, 1 Swan 411.

184. Semble, that proof of the good character of subscribing witnesses to a will, who are dead, and to whom fraud is imputed in the procuring or execution of the will, is admissible to repel the imputation; but it appears that this rule would not be extended in respect to other instruments. *People* v. *Rector*, 19 Wend. 569.

185. The examination of a witness taken on the arrest of a criminal, is competent in evidence to sustain his testimony, where the witness is sought to be impeached on the ground of inconsistent relations of the matter in question. *Ib.*

186. The opinions of witnesses as to the improbability of a blow having been given from which death ensued. Judging from the relative positions of the parties as narrated by witnesses, are not competent in evidence. *Ib.*

187. Where one had been charged. with a crime by the oath of the defendant, held that he was a competent witness against him, on his trial for perjury. *State* v. *McKennan*, Harper 302.

188. A horse-race is a game, and is therefore within the meaning of the statute enacting that any person legally called to give evidence against another for gaming shall be deemed competent to testify in order to prove such gaming, although such person may have been concerned as a party, and may be compelled to testify as in the case of other witnesses. *Cheesman* v. *State*, 8 Blackf. 332.

189. The owner of a slave is a com-

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petent witness for the State, upon a trial of the slave for a capital offence. *State* v. *Marshall*, 8 Ala. 302.

190. On an information for forgery, the person to whom the forged instrument was passed, is admissible as a witness. *State* v. *Nettleton*, 1 Root 308.

191. Where two were jointly indicted for uttering a forged note, and the trial of one was continued, it was held that he could not be called to testify for the other. *Com.* v. *Marsh*, 10 Pick. 57.

192. An accomplice is competent to testify on a criminal prosecution; and though the accomplice on a former examination denied, on oath, all knowledge of the facts to which he swears at the trial, yet this goes only to his credit; and if a jury find a verdict of conviction on his testimony, and the Court before which the trial is had, approves the verdict, the Appellate Court will not set it aside. *Brown's case*, 2 Leigh 769.

193. In Indiana, all persons believing in God and a future state, though they disbelieve in a punishment hereafter for crimes committed here, are competent to testify. *Noble* v. *the People*, Breese 29.

194. It is a general rule that in criminal prosecutions, the injured party may be a witness, and it is the constant practice in the Courts of South Carolina on an indictment for larceny to admit the owner of the goods to be a witness. *State* v. *Cassados*, 1 Nott & McCord 91.

195. In criminal prosecutions a principal is a competent witness against an accessory, so also are accomplices against their co-partners in crime. *People* v. *Lohman*, 2 Barb. 216.

196. A juror is an admissible witness to show the misconduct of his fellow-jurors, for the purpose of impeaching their verdict. *State* v. *Freeman*, 5 Conn. 348.

197. Where there is but little evidence against one who is jointly indicted with another, his case should be first submitted to the jury, and if found not guilty, he should be allowed to be a witness for his co-defendant. *Fitzgerald* v. *State*, 14 Mo. 413.

198. Where two defendants are jointly indicted for an assault, and a default is entered against one, on his recognizance, his wife is a competent witness for the other. *State* v. *Worthing*, 31 Maine (1 Red.) 62.

199. On the trial of an indictment against a free woman of color for leasing a house to be kept as a bawdy-house, it was held that a slave who cohabits with her as her husband, is a competent witness for her. *Coleman* v. *State*, 14 Mo. 157.

200. A father may be a witness on behalf of his son in a criminal case. *Cass* v. *State*, 2 Greene (Iowa) 353.

201. In a criminal prosecution for larceny, the party injured is not a competent witness for the prosecution where he is entitled to treble the value of the property stolen, upon the conviction of the prisoner. *The State* v. *Prey*, 14 N. H. 464.

202. Since, however, the payment of treble damages is a part of the sentence, and as there is no mode of carrying it into effect, where it is not included in the sentence, if the witness agrees to release all claim to it, and an entry in such case is made on the record to that effect, the Court would not be authorized to include it in the sentence, and the competency of the witness will be restored. *Ib.*

203. An accomplice may be a witness for others joined in the same indictment with himself, provided he be not put upon his trial along with the others; so if he has pleaded guilty, or been separately convicted, provided judgment has not been pronounced upon him for an offence which disqualifies him as a witness. *Garret* v. *State*, 6 Mo. 1.

204. Slaves, though living together as husband and wife, may be witnesses for or against each other, in a criminal case. *Smith* v. *State*, 9 Ala. 990.

205. Upon the trial of an indictment, an accomplice in the commission of the crime is a competent witness for the prosecution, and the testimony of a witness thus circumstanced, will, if the jury are fully convinced of its truth, justify the conviction of the defendant, though it be uncorroborated by other testimony. *People* v. *Costello*, 1 Denio 86.

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206. Competency of master of black, born under law for gradual abolition of slavery, as witness. *State* v. *Aaron*, 2 South 231.

207. The person whose instrument is forged is not a competent witness to prove the forgery, unless the instrument said to be forged is produced at the trial. *Com.* v. *Hutchinson*, 1 Mass. 7.

208. A witness is not rendered incompetent by the commission of, or by conviction for any crime, but only by a judgment upon such conviction. *State* v. *Valentine*, 7 Iredell 225.

209. The husband having been examined for the State, the wife was a competent witness on the other side, to show that her husband testified under a bias or prejudice against the defendant. Had she been offered to contradict her husband directly, there might have been doubts as to her competency. *Cornelius* v. *State*, 7 Eng. 782.

210. An infant under the age of seven years may be sworn as a witness in criminal prosecutions, if it has a sufficient knowledge of the nature and consequences of an oath. *State* v. *Morea*, 2 Ala. 275.

211. It is the Court, and not the judge as an individual, which is to determine the competency of an infant witness, and therefore the examination as to the competency of the witness must be made at the trial and in the presence of the prisoner and his counsel; to admit such a witness upon a private examination by the judge, is erroneous. *Ib.*

212. The word "respectable," used in the 31st section of the act of February 27, 1843, concerning "costs in criminal cases," is equivalent to the phrase "credible disinterested," as used in the 17th section of the 5th article of the act of March 21, 1835, concerning practice and proceeedings in criminal cases (where application is made for a change of venue in a criminal case), and they are each synonymous with the word "competent;" therefore a *respectable* or *credible disinterested* witness, means in both acts a *competent* witness. *Freleigh* v. *State*, 8 Mo. 606.

213. All persons who are disinterested and not infamous, are competent witnesses, and are presumed to be competent until the contrary appears. *Ib.*

214. On an indictment for bigamy, the second wife is admissible as a witness, either for or against the prisoner. *State* v. *Patterson*, 2 Iredell 346.

215. Marriage is in law complete when parties, able to contract, and willing to contract, have actually contracted to be man and wife, in the forms and with the solemnities required by law; consummation by carnal knowledge is not necessary to its validity. *Ib.*

216. Where a marriage is solemnized in another country, in the manner prescribed by the laws of this State, the Court must understand such a marriage to be good unless the contrary be shown. *Ib.*

217. The certificate of the Secretary of State in relation to the statutes of another State, given in pursuance of our statute (Rev. Stat. c 44, § 3), is evidence in criminal as well as in civil cases. *Ib.*

218. Where a person has been convicted of perjury, he is an incompetent witness, though he has been pardoned by the Governor, and the pardon purports to restore him to all his civil rights, the legislature having provided that such convict shall not be received as a witness till such judgment be reversed; such is the law, though the exclusive power to pardon be vested in the Governor. *Houghtaling* v. *Kelderhouse*, Park. Crim. Rep., vol. I, p. 241.

219. Such incapacity to give testimony, is the result of a rule of evidence, and not a punishment of the offence. *Ib.*

V. Miscellaneous.

220. In a criminal case, an oath which was administered by holding up the hand, although the Gospels were not presented to the witness, and he did not declare that he had conscientious scruples against being sworn on the Gospels, no objection being made

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by the accused at the time, was held obligatory and valid. *McKinney* v. *People*, 2 Gilman 540.

221. Where incompetent testimony has been received, and no objection is made at the time of its reception, counsel have the right to comment upon it before the jury. *Free* v. *State*, 1 McMullan 494.

222. In Massachusetts, the purchaser of spirituous liquor sold in violation of the statute of 1838, c. 157, § 1, does not, under ordinary circumstances, make himself liable to any penalty, either at Common Law, as inducing the seller to commit a misdemeanor, or under the statute, and may therefore be compelled by imprisonment to give testimony as to such sale. *Com.* v. *Willard*, 22 Pick. 476.

223. In criminal cases the Court has the power to compel a witness to enter into a recognizance to appear at a future day; but has no right to require any surety of him. *Berkley* v. *Com.*, 2 J. J. Marsh. 257.

224. Where a witness is sent to the grand jury room, having been sworn in open court, but not in the immediate presence of the judge, or during his temporary absence from the bench, it will be held regular in Tennessee. *Jetton* v. *State*, 1 Meigs 192.

WRIT OF ERROR.

Writ of Error—Grounds of.

1. In Virginia, a writ of error will not lie from the general court to a judgment of a county or corporation court that sits as a Court of Oyer and Terminer, in a criminal prosecution under the statute of 1831–'2, § 11. *Anderson's case*, 4 Leigh 693.

2. In Virginia, where a free negro was prosecuted, convicted, and sentenced for grand larceny, in a corporation court, under the statute of 1831–'2, ch. 22, § 11; held that a writ of error would not lie from the circuit superior court to the judgment of the corporation court, in such case. *Anderson's case*, 5 Leigh 740.

3. In a criminal prosecution, on motion for a new trial because the verdict is against the evidence, on the ground that the witnesses are not credible; the opinion of the Common Pleas, in refusing such motion, cannot be reversed on error. *Whitcomb* v. *State*, 14 Ohio 282.

4. In cases of error to the Supreme Court, no writ of error is required by the statute; if allowed in Bank, the official signatures of the judges to the allocatur, or a copy of the journal entry; if by two judges in vacation, their official signatures to the allocatur, furnished to the clerk of the county, is the proper way of officially informing him of the allowance of the writ. *White* v. *State*, 14 Ohio 468.

5. In Arkansas, the grand jury of Phillips Circuit Court communicated to the judge thereof certain questions which a witness summoned before them had refused to answer, on the ground that his answers would tend to criminate himself, and asked the opinion of the judge as to whether he was bound to answer them; the judge decided that he was not the attorney for the State, excepted to the decision, took a bill of exceptions setting out the facts, and brought error; held that the record presented no case for the decision of this Court, but simply an abstract point of law, and the writ of error was therefore dismissed. *State* v. *Biscoe*, 7 Eng. 683.

6. A writ of error will not lie in behalf of the people, after judgment for the defendant, in a criminal case. *People* v. *Canning*, 2 Comstock 1.

7. A writ of error will lie against the State, on the refusal of the Court to strike out improper items in the bill of costs in a State case, and the State is a proper party. *Weissinger* v. *State*, 11 Ala. 540.

8. But where no judgment is entered on the motion, there is nothing to sustain a writ of error, and if one is sued out it will be dismissed. *Ib.*

9. In New Jersey, a writ of error will not lie to review the decision of an inferior court refusing to allow a cer-

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tiorari, such allowance not being a matter of right, but resting in the discretion of the Court. *State* v. *Wood*, 3 Zabris. 560.

10. In Ohio, a writ of error in a criminal case, requires an allowance; and the better opinion seems to be that the jurisdiction is dependent upon its being allowed, and that therefore the allowance cannot be waived. *Farris* v. *State of Ohio*, 1 Ohio 188.

11. But if it could be waived, it is not waived where the record shows no express waiver, and no plea or joinder is filed by the State. *Ib.*

12. In such a case, the Court of Errors should quash the writ; and if, instead of so doing, it affirms the judgment of the inferior court, the judgment of affirmance will be reversed because the writ was not allowed; the parties will then stand as if no writ had ever issued. *Ib.*

13. It is irregular to return the original files, in a criminal case, instead of a transcript, with a writ of error; the statute authorizing the original papers to be sent up, relates to civil causes only. *Ib.*

14. The permission given by the Court to the solicitor, to enter a nolle prosequi, and to prefer a new indictment corresponding with the facts constituting the alleged offence, is not such a judgment as a writ of error will lie from. *Willingham* v. *State*, 14 Ala. 539.

15. A writ of error does not lie to revise the action of the Circuit Court, in cases of appeal from the order of a justice of the peace, or other officer, requiring a party to find sureties to keep the peace. *Tomlin* v. *State*, 19 Ala. 1.

16. No writ of error lies in Mississippi in the criminal court of Adams county. *State* v. *Holmes*, Walker's Rep. 415.

17. The discharge of a jury on a criminal prosecution, without agreeing on a verdict, is a matter resting in the sound discretion of the Court in which the trial is had. The exercise of the discretion of a Court in this respect, cannot be reviewed on writ of error; it was so held in this case, where the jury were discharged after only thirty minutes' consultation. *People* v. *Green*, 13 Wend. 55.

18. In New York, a writ of error, at the suit of a citizen, in criminal prosecutions, though not capital, cannot issue without the fiat of the attorney-general. *Lavett* v. *People*, 7 Cow. 339.

19. But should he refuse his fiat in a proper case for error, the Supreme Court will direct him to grant it; a writ of error will not of itself stay execution in a criminal cause—per Riker, Recorder; see note (a), but the Court below will on motion stay execution till judgment be given on the writ of error; Id. note (a). *Ib.*

20. The Court may refuse to quash a count in an indictment, and such refusal cannot be assigned as error. *State* v. *Jones*, 5 Ala. 666.

21. In Missouri, a writ of error lies in a capital case, but a bill of exceptions will not be allowed. *Mitchell* v. *State*, 3 Mo. 201.

22. A writ of error will lie on a judgment of the Supreme Court, on a habeas corpus. *John V. N. Yates* v. *State*, 6 John. 337.

23. Where the record uses the past tense, as that in the award of a venire facias, the sheriff was commanded or the indictment was found, &c., this though not strictly regular has been for so long a time the practice in this State, that the Court will not pronounce it a fatal error. *State* v. *Martin*, 2 Iredell 101.

24. Where two have been tried on an indictment, and the record sent to the Supreme Court, sets forth only the verdict in the case of the one who appealed, and does not state the verdict in the case of the other, this is not an error of which the appellant can take advantage. *Ib.*

25. Writs of error in cases which are not capital, issue of course; but they do not stay the sentence, except by an express order to that effect from a Circuit judge, or a judge of the Supreme Court. *Colt* v. *the People*, 1 Parker's Crim. R. 617.

26. In capital cases, no writ of error lies, unless allowed by the Chancellor, or one of the justices of the Supreme Court, or a Circuit judge, upon notice given to the attorney-general, or to

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the district attorney of the county where the conviction was had; and it is the duty of the officer to whom the application is made, to disallow the same, if he has no reason to doubt the legality of the conviction. *Ib.*

27. There is no precedent in the Commonwealth of Mass. in favor of a writ of error, on behalf of the Commonwealth in a criminal prosecution, to reverse a judgment, by which a party criminally prosecuted has been acquitted. *Commonwealth* v. *Cummings*, 3 Cush. 212.

28. Where an indictment contained two counts, to the first of which the defendant pleaded "not guilty," and the second was quashed, and the cause was submitted to the Court, and judgment rendered for the defendant; it was held that a writ of error for the State could be brought only on the judgment quashing the second court. *State* v. *Dark*, 8 Blackf. 526.

29. An objection to the admissibility of evidence, if not made at the trial, will not be ground of error, but will be considered as having been waived. *Clark* v. *State*, 12 Ohio 483.

30. As to what are proper considerations on an application for an allowance of a writ of error, and a stay of proceedings, in a capital case, by Edmonds, J. *Sullivan* v. *the People*, 1 Parker's Crim. R. 347.

31. In deciding whether a writ of error should be allowed, and a stay of proceedings granted, to enable a prisoner to have reviewed before the Supreme Court an exception taken at the Oyer and Terminer, on a trial for murder, it is not necessary that the justice to whom the application is made should come to the positive conclusion that the Court erred on the law; it is enough that the exception is not deemed frivolous, and that it involves a gravely important question in regard to which there is a conflict of authority, and which remains unsettled by the Courts of this State. *The People* v. *Hendrickson*, 1 Parker's Crim. R. 396.

32. Where a coroner's inquest was held on the day after the alleged murder, at which the prisoner was called by the coroner as a witness, and was sworn and examined by him, under oath, before the coroner's jury, having been subpœnaed to attend for that purpose, there being some circumstances tending to show that the prisoner was then suspected of the murder, though no charge had then been made against him, and the subsequent trial of the prisoner at the Oyer and Terminer, the Court allowed the counsel for the people to give in evidence the statements made by the prisoner on such examination; it was held there was sufficient doubt of the correctness of the decision to warrant the allowance of a writ of error, with a stay of proceedings. *Ib.*

33. A writ of error allowed for the purpose of obtaining a review of a final judgment of the Court of Oyer and Terminer, is a writ of right, and brings before the Supreme Court the bill of exceptions with the transcript of the record. *Safford* v. *the People*, 1 Parker's Crim. R. 474.

34. When a motion is made to set aside a stay of proceedings, and to quash a writ of error, in a capital case, it may be made by the district attorney; and the prisoner's counsel cannot avail himself of the objection that such motion should have been made by the attorney-general. *Carnal* v. *the People*, 1 Parker's Crim. R. 262.

35. A justice of the Supreme Court can allow a writ of error, and make an order staying proceedings, after conviction, in a capital case. *Ib.*

36. The mode of reviewing a decision of the Oyer and Terminer, as it existed previous to the adoption of the Revised Statutes, compared with the present practice. *Ib.*

37. No writ of error or appeal lies to an order punishing for a contempt. *Johnston* v. *Commonwealth*, 1 Bibb 598.

38. When the plaintiff in error makes the general assignment, and then assigns particular causes of error, he will not be permitted to insist upon other particular causes under the general assignment. *Crandall* v. *State*, 10 Conn. 339. But if the Court, on inspecting the record, discover a fatal defect not specially assigned, it will be their duty to reverse the judgment. *Ib.*

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39. The Court of Chancery cannot refuse a writ of error, or supersede it after it has issued in any civil case, or in a criminal case not capital. *Yates* v. *People*, 6 John. 335.

40. In error, a reason not filed, cannot be heard; but if defect is apparent on the record, time given to file reason. *States* v. *Kirby*, 2 South. 835.

41. In Virginia, no judgment of an inferior court, on a presentment for a misdemeanor, can be reviewed and reversed by a Superior Court, either upon appeal, or supersedeas; the Common Law writ of error being the only way in which such judgment can be reviewed and reversed, which writ of error may issue without any regard to the costs, or value of the judgment, and without the assent of the attorney for the Commonwealth. *Temple* agt. *Commonwealth*, 1 Virg. Cas. 163.

42. If a defendant confess judgment on a presentment, although the presentment might have been defective on a special demurrer, yet that judgment ought not to be reversed on a writ of error. *Commonwealth* v. *Offner*, 2 Virg. Cas. 17.

43. A writ of error in a criminal case does not of itself have the effect of a supersedeas. *Connor* v. *Commonwealth*, 2 Virg. Cas. 30.

44. The omission to charge that the offence was committed within the jurisdiction of the Court, the county itself being named, is cured by verdict. *Taylor* v. *Commonwealth*, 2 Virg. Cas. 94.

45. The Court has a right to correct any error made by the clerk in the orders of the preceding day. *Gibson* v. *Commonwealth*, 2 Virg. Cas. 111.

46. In Virginia, no writ of error lies for the State in a criminal case. *Commonwealth* v. *Harrison*, 2 Virg. Cas. 202.

47. After verdict and judgment in felony against a prisoner, he cannot have a writ of error to reverse the judgment on the ground that he was not examined for the felony, of which he was indicted and has been convicted. *Campbell* v. *Commonwealth*, 2 Virg. Cas. 314.

48. In Virginia, a judge, in vacation, cannot award a writ of error in a criminal case. *Baker* v. *Commonwealth*, 2 Virg. Cas. 353.

49. In Virginia, an indictment for grand larceny charged the goods to have been stolen on the 21st December, one thousand eight hundred and twenty-thee, leaving out the r in the last word. This is cured by the statute of Jeofails. *Aldrige* v. *Commonwealth*, 2 Virg. Cas. 447.

50. It cannot be objected to in error that two or more offences of the same nature, upon which the same or a similar judgment may be given, are embraced in different counts of the same indictment; nor can such objection be urged either on demurrer or in arrest. *Kane* v. *People*, 8 Wend. 203.

51. In Kentucky, there is no writ of error or appeal from Circuit Court on criminal prosecutions, when the punishment extends to imprisonment. *Commonwealth* v. *Browne*, 3 J. J. Marsh. 597.

52. In Kentucky, the appellate error the Court of Appeals has no jurisdiction to revise decision or judgments of the inferior courts, which are rendered, in a criminal case, not strictly penal, or in which the penalty may not be compensated in money. *Commonwealth* v. *Mitchell*, 3 J. J. Marsh. 630.

53. The statute of Massachusetts of 1784, c. 72, excludes from the benefit of this writ persons convict or in execution, by legal process, criminal or civil. *Riley's case*, 2 Pick. 172.

54. In Missouri, a writ of error lies to the Supreme Court, in all prosecutions for offences not capital. *Calloway and others* v. *State*, 1 Mo. 150.

55. It is error if it does not appear by the record that the defendant was tried by twelve jurors lawfully sworn. *Doebler* v. *Commonwealth*, 3 Serg. & Rawle 237.

56. In Alabama, the clerk of the Circuit Court has no right to issue a writ of error in any criminal case; such writs must originate from an application to the Supreme Court. *Bourne* v. *State*, 8 Porter 458.

57. And a writ thus issued will be dismissed. *Ib.*

58. Uniting errors of fact and errors of law in the same writ of error corani vobis, is a fatal defect. *Lightfoot* v. *Commonwealth* 4 Dana 492.

59. In Arkansas, on writ of error in criminal cases the statute requires

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the Supreme Court to render such judgment thereon as may appear to be authorized by law. *Dunn* v. *State*, 2 Ark. 229.

60. If the parties named in the record are not the same as those named in the writ of error, the proceedings are irregular, and the case will be dismissed. *Hudspeth* v. *State*, 1 Ark. 20.

61. In Arkansas, the State is by law entitled to a writ of error. *State* v. *Graham*, 1 Ark. 428.

62. On an indictment for grand larceny, a verdict that the prisoner is guilty of petit larceny, without ascertaining the value of the goods stolen, is not error. *Poindexter* v. *Com.*, 6 Rand. 667.

63. Such verdict will not be erroneous because it does not ascertain what goods are stolen, nor their value, nor whether they are forthcoming or not, nor what articles are not forthcoming (if any), nor the value of such as are not forthcoming. *Ib.*

64. Where a justice only gives it as his opinion that the defendant is guilty, and that he pay a fine, such judgment is bad. *Knowles* v. *State*, 2 Root 282.

65. That no presentment was found, is not such an error as will be ground for arresting judgment. *Horsey* v. *State*, 3 Harr. & J. 2.

66. Nor will it be ground that it does not appear by the record that the jurors were freeholders. *Ib.*

67. Variances between the names of the grand and petit jurors, who found the indictment and verdict, were held no good ground to arrest judgment. *Ib.*

68. A commitment of an accused, without his being first brought into Court by a capias, was held an insufficient ground to arrest a judgment. *Ib.*

69. Cases may sometimes occur in which the refusal of the Court below to grant a continuance, can be assigned for error. *Fuller* v. *the State*, 1 Blackf. 63.

70. A writ of error in criminal cases is ex gratia; but it will not be granted before a final judgment has been entered. *Mills* v. *Republicam*, 4 Yeates 319.

71. In criminal cases, error will lie to reverse the judgment of an inferior court against the defendant, notwithstanding he had a right in a case of appeal. *Cooke, petitioner*, 15 Pick. 234.

72. On the trial of an indictment for a crime punished by imprisonment, &c., not less than one, nor more than three years, the jury were charged that the term of imprisonment was to be not less than two, nor more than three years; the verdict found the prisoner guilty, and ascertained his punishment to be two years; the Commonwealth's attorney then remitted one year of the term, whereupon the Court sentenced the prisoner to one year's imprisonment; held that the judgment was erroneous, and not in accordance with the verdict, the attorney having no power to make such remission. *Allen's case*, 2 Leigh 727.

73. In such a case it was further held, that the verdict should be set aside on account of the erroneous charge as to the minimum of the punishment. *Ib.*

74. On a joint indictment for an assault, against several persons, where the jury assess a joint fine, it is erroneous, for which the judgment may be reversed. *Jones* v. *Com.*, 1 Call 525.

75. When judgment is that a fine shall go to the Commonwealth, when the statute gives it to the informer and Commissioners, it is erroneous. *Wenfell* v. *Com.*, 5 Binney 65.

76. In Iowa, a criminal case may be carried to the Supreme Court, by writ of error. *State* v. *Douglass*, 1 Green 550.

77. Where two writs of error are brought at the same time, one to reverse an original judgment, and the other to reverse sentence to additional punishment, if the original judgment is reversed the sentence on the information falls with it, and will also be reversed, if the error assigned be a matter of mere law, apparent on the record. *Hutchinson* v. *Com.*, 4 Met. 359.

78. The plea in nullo est erratum is in the nature of a demurrer, and puts in issue the validity of the judgment in all matters of law; new errors may be assigned viva voce at the hearing, taking care that the adverse party is not surprised, and that has been frequently done, and if the judgment be erroneous in the particulars thus indicated, though not in the particulars

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assigned for error, the judgment will be reversed; therefore the decision on such issue that the judgment be affirmed is an adjudication that there is no error in law apparent on the face of the record, and is a bar to another writ of error founded on any such supposed error then existing. *Booth* v. *Com.*, 7 Met. 285.

79. The application for a continuance is addressed to the discretion of the Court, and the decision thereof cannot be assigned for error. *Holmes* v. *People*, 5 Gilman's 478.

80. Where the record states that the jury retired to consider of their verdict in charge of a sworn officer of the Court, the presumption is that the Court performed its duty by requiring the proper oath to be administered. *Ib.*

81. In New York, the act of 22d March did not authorize a writ of error, in behalf of the people, where the judgment sought to be reviewed was rendered before the act was passed. *People* v. *Carnal*, 2 Selden 463.

82. In Georgia, a writ of error does not lie to the Supreme Court, in a criminal case on behalf of the State, 7 Geo. 422; admitting there is error in the particular exception, the judgment will not be reversed if it appear distinctly upon the whole record, that the prevailing party was entitled to award. *Houghton* v. *Slack*, 10 Vermont 520; *Stephen* v. *State*, 11 Ga. 225.

83. Held that to place the prisoners in the very front benches of the bar, by the side of their counsel, would have been an unnecessary indulgence, and that the Court did not err, under the circumstances of the case, in refusing it. *U. States* v. *Gibert*, 2 Sumner 19.

84. In Illinois, the State cannot prosecute a writ of error in a criminal case. *State* v. *Royal*, 1 Scam. 557.

85. A statute created an offence to be prosecuted by indictment in information, the penalty to go two-thirds to the State, and one-third to the informer; an information was filed, demanding the whole penalty for the State, upon which judgment was rendered for two-thirds of the penalty to the use of the State, and one-third to A. B., as informer. *Com.* v. *Howard, and others*, 13 Mass. 221.

86. On error by the original defendants, the Court reversed the part of the judgment which gave a portion of the penalty to the informer, and ordered judgment in favor of the State for the whole. *Ib.*

87. In Alabama, the legislature having omitted to prescribe the regulation by which the ordinary constitutional power of the Supreme Court over subordinate jurisdiction is to be exercised in criminal cases, the Court in bringing such cases before it for revision must resort to such writs as are known to the law. *Lynes* v. *Alabama*, 5 Porter 236.

88. This Court recognizes the writ of error as a Common Law writ. *Ib.* In Indiana, the Supreme Court has the unquestionable right, in the exercise of its constitutional power, to bring before it criminal cases, by ordering a writ of error. *Ib.*

89. In the State of New York, a writ of error does not lie to the Supreme Court, where an indictment and bill of exception taken on the trial of the prisoner are brought into that Court by certiorari, to take the advice of the Court, and the proceedings are remitted to the Court in which the trial was had, with advice to proceed to judgment. *People* v. *Stears*, 23 Wend. 634.

90. Whether after removing the proceedings by certiorari, and after the Supreme Court has passed upon the case, the prisoner can subsequently bring error; and if he can, to what court the writ must issue.—*Quere. Ib.*

91. In Mississippi, a recognizance must be taken for the appearance of the accused in criminal cases removed into the Supreme Court from the Circuit Court, or the writ of error will not operate as a supersedeas. *State* v. *Craft*, Watkins 537.

92. Where the venue is changed, a writ of error to the county in which the trial was had, will not reach an error in the proceeding of the Court from which the venue was changed. *Byrd* v. *State*, 1 Howard 247.

93. It is not a ground of error that a defendant who has pleaded in chief was indicted and convicted by a wrong name. *Turns* v. *Com.* 6 Met. 224.

94. The refusal to admit a nolle

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prosequi, is no ground for a writ of error, after a verdict for the accused. *State* v. *Davis*, 4 Blackf. 345.

95. Where a general verdict of guilty is returned, and one count in the indictment is good, it is not a cause for reversing the judgment on error, that there is another count which is bad. *Jennings* v. *Com.*, 17 Pick. 80.

96. Where a witness examined in chief and discharged, came back before the prosecution had concluded its testimony, and brought into court fire-arms, stating that they were the arms the prisoner had when he arrested him, and stating that he had forgot to mention the fact when first examined; held that the propriety of permitting the statement to go to the jury at that time, was a matter belonging to the discretion of the Circuit judge, and will not be revised by the Supreme Court. *Carroll* v. *State*, 3 Humph. 315.

97. In Mississippi, no appeal lies to the court of errors from the Circuit Court, in criminal cases. *Loftin* v. *Miss.*, 11 S. & Marsh. R. 358. In Mississippi, clerks of the Circuit Court cannot grant writs of error in criminal cases. *Rockhold* v. *State*, 5 Howard 291.

98. In Illinois, a writ of error does not lie in behalf of the people to reverse the decision of a Circuit Court, in a criminal case. *State* v. *Dill*, 1 Scam. 257.

99. Where the indictment was for a joint offence, both were convicted of the offence charged, and both complain that the judgment was erroneous, both may join in a writ of error to revise it. *Sumner and others* v. *Com.*, 3 Cush. 521.

100. The object of a proceeding in error, is to reach the judgment and to avoid it when it does not possess the elements upon which alone all judgment should stand; but a Count will never set aside a judgment because error may have been committed upon some particular point, where an examination of the whole record conclusively shows that the judgment was correctly rendered. *Ib.*

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